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SECOND SERIES

215 Cal. 461

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al.

S. F. 14251.

Supreme Court of California.

April 29, 1932.

Rehearing Denied May 26, 1932.

1. Constitutional law ⇐48.

Presumption is that statutes are constitutional, and contravention of Constitution must be unquestionable before it can be so declared.

2. Constitutional law ⇐20.

In determining constitutionality of statute, court cannot construe Constitution provision as if it were statute and adopt its own interpretation, disregarding legislative constructions.

3. Constitutional law ⇐20.

In determining constitutionality of statute, court should accept meaning of Constitution provision chosen by Legislature, where more than one reasonable meaning exists.

4. Master and servant ⇐347.

Statute authorizing workmen's compensation for injuries to artificial member *held* within Constitution provision authorizing legislation to compensate workman for injury or disability (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911; Const. art. 20, § 21, amended in 1918).

St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911, is within the provision of Const. art. 20, § 21, amended in 1918, authorizing legislation to compensate workman for injury or disability, since a man who has lost the use of an artificial limb, is "disabled."

[Ed. Note.—For other definitions of "Disable," see Words and Phrases.]

5. Master and servant ⇐385(15).

Workmen's compensation recoverable for loss of artificial limb *held* cost of another plus compensation for period employee was, through no fault of his own, without limb (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911; Const. art. 20, § 21, amended in 1918).

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by John Driscoll, claimant, opposed by the Pacific Indemnity Company. From an order of Industrial Accident Commission awarding compensation for injuries to an artificial limb, the Indemnity Company petitions for certiorari.

Annulled and remanded.

Superseding 5 P.(2d) 1.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

LANGDON, J.

This is a review of an award of the Industrial Accident Commission. Respondent Driscoll was employed by petitioner's assured as a teamster. He had an artificial leg. On May 9, 1930, while driving his team, the horses shied, causing him to lose his balance. His artificial leg was caught and broken beyond repair. He had no money to purchase a new leg and was unable to continue his work without it. The commission made its award for temporary total disability from May 9, 1930, to October 1, 1930, in the sum of $383.44, and the further sum of $19.45 per week to continue until further order. The order also included an award for "medical treatment," which obviously, in this case, was the replacement of the artificial leg.

The order of the commission is based upon section 3, subdivision 4, of the Workmen's Compensation Act, as amended in 1919 (St. 1919, c. 471, p. 911), which provides: "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment *including injuries to artificial members.* * * *" Petitioner contends that this section goes beyond the scope of article 20, § 21, of the California Constitution, under which provision the Workmen's Compensation Law was enacted, and is therefore unconstitutional. In brief, the argument is that

the Constitution permits awards to be made for injuries to *workmen* and not their personal property, and that injury to an artificial member is not an injury to a workman.

The constitutional provision reads, in part, as follows: "The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for *injury or disability*, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment * * * full provision for such medical, surgical, hospital *and other remedial treatment as is requisite to cure and relieve from the effects of such injury* * * * all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government." (Italics ours.)

The important words are "workmen," "injury," and "disability." It is necessary for us to determine whether, under any reasonable interpretation of these terms, the injury sustained in the instant case can be compensable. Petitioner has argued strenuously that there was no injury to a *workman*, citing as authority London Guarantee & Accident Co. v. Industrial Accident Commission, 80 Colo. 162, 249 P. 642, and City and County of San Francisco v. Industrial Accident Commission, 183 Cal. 273, 191 P. 26. Neither case is controlling. City and County of San Francisco v. Industrial Accident Commission was concerned with the question whether industrial disease came within the scope of the term "injury" in the original constitutional provision, and after briefly remarking that "injury" referred to "bodily injury" the court proceeded to adopt the broadest possible construction of the term in order to bring industrial disease within its meaning and thus to uphold the legislative definition. The subsequent amendment of the Constitution in 1918, adding the words "or disability," makes the decision pertinent only as an indication of how liberal the rule of construction should be. London Guarantee & Accident Co. v. Industrial Accident Commission is a memorandum opinion which disposes of the case without any discussion of the issues. The court said: "Compensation can be awarded for personal injuries only * * * which means injury to the person. * * * A wooden leg is a man's property, not part of his person, and no compensation can be awarded for its injury." This language, however, was directed toward a *statute* which referred only to "personal injuries." It may well be that in the absence of statutory authority, the commission might not have the power to compensate for injuries to an artificial member. Direct statutory authority does exist, however, in this state, and the only question before us is whether the Legislature had the constitutional power to vest such authority in the commission.

[1-3] In construing special constitutional provisions of this nature we are in danger of overlooking the cardinal rule which limits the power of the courts to declare statutes unconstitutional. The presumption is in favor of constitutionality, and the contravention of the Constitution must be clear and unquestionable before it can be so declared. For the purpose of determining constitutionality, we cannot construe a section of the Constitution as if it were a statute, and adopt our own interpretation without regard to the legislative construction. Where more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature. Many decisions have made this clear, and of them one of the most important is City and County of San Francisco v. Industrial Accident Commission, supra, where the court said (page 279 of 183 Cal., 191 P. 26, 28): "* * * Where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution."

[4] Bearing these matters in mind, we are satisfied that this statute comes within the scope of the legislative power. It should be noted that section 21 permits compensation for injury *or disability*. There can be no question but that a man who has lost the use of an artificial limb is disabled. Indeed, where is the fundamental difference between injury to a real and an artificial member? A man is injured and his leg is amputated; he

has lost the use of the stump and is given an artificial limb. This, we say, is justifiable, for it tends to relieve him from the consequences of the injury. Here is a man who is placed by an industrial accident in the identical position; that is, he has lost the use of the remainder of the limb and requires an artificial leg to relieve him from the consequences of the accident. But this man, it is contended, is not entitled to that relief because the amputated leg was wood and not flesh. Nothing in the constitutional provision can be made to sanction this absurd result. In plain words, it permits compensation for "injury or disability" to "workmen." If a man with a wooden leg is fully able to perform his duties, and thereafter, upon the loss of the said leg, is unable to perform his duties, how can it be said, in defiance of the legislative declaration, that he is uninjured? And even if we take this extreme and arbitrary view of the term "injury," to say that this man is not disabled is directly to contradict the physical facts. We cannot annul this award without wiping out of the Constitution the words "or disability" which were added by the people in 1918.

Fear is expressed by petitioner that the award is the forerunner of others for injuries to clothes, tools, automobiles, or other personal property. We anticipate no such result. The Constitution, in our opinion, authorizes compensation for injury to the body of the workman, including every part thereof, natural or artificial, which is essential to its proper functioning. Other things, such as clothes and tools, may be necessary if he is to perform his duties, but their destruction does not cause him a physical injury or disability. His body may function without them. The distinction is, we think, quite clear, and should not be difficult to apply. But these matters are really irrelevant because purely speculative. The Legislature has only gone so far as to provide for compensation for injury to *artificial members*. Whether it may in the future seek to go beyond this point is not a proper question for our consideration at this time. The constitutionality of the statute before us being established, it follows that the commission was justified in granting compensation to respondent.

[5] The commission made its award in the sum of $383.44, payable forthwith, and the further sum of $19.45 a week, beginning October 2, 1930, until termination of disability or further order of the commission; and also awarded medical treatment. We think the record will support such award only in so far as it requires the furnishing of another artificial limb to take the place of the one destroyed, and compensates the employee during the period in which he was without such artificial limb through no fault of his own. No other basis of disability indemnity is presented. Since it does not appear in the record whether an artificial limb has been furnished, we cannot at this time direct that the commission continue or terminate its award. The award is therefore annulled and the cause remanded to the commission for proceedings in consonance with the views herein expressed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.; NOURSE, Justice pro tem.

123 Cal.App. 215

MACKIE v. AMBASSADOR HOTEL & INVESTMENT CORPORATION et al.

Civ. 533.

District Court of Appeal, Fourth District, California.

April 29, 1932.

Rehearing Denied May 26, 1932. Hearing Denied by Supreme Court June 28, 1932.

1. Appeal and error ⇐1001(1).

As regards sufficiency of evidence to support verdict, where there is any substantial evidence in favor of verdict, it is controlling.

In other words, the reviewing court must accept the evidence favorable to the successful party at its face value, and disregard conflicting evidence.

2. Appeal and error ⇐842(1).

On appeal from verdict for plaintiff in unlawful arrest action, whether there were reasonable grounds for arrest is question of law for reviewing court (Pen. Code, §§ 836, 837).

Reviewing court must determine as a matter of law whether the facts and circumstances as they appear from the evidence adduced in support of plaintiff's case constitute reasonable grounds for the arrest, and is not bound by the verdict of the jury, but must consider all the facts and circumstances favorable to plaintiff as found by the jury to be true.

3. False imprisonment ⇐7(1).

"False imprisonment" is unlawful detention of person without warrant, or by illegal warrant, or warrant illegally executed (Pen. Code, § 236).

[Ed. Note.—For other definitions of "False Imprisonment," see Words and Phrases.]

4. False imprisonment ⇐22.

In unlawful arrest action, arrest being shown, burden is on person making arrest to show justification therefor.

5. False imprisonment ⇐7(1).

In unlawful arrest action, arrest made without warrant by policeman and hotel detective *held* justified under circumstances, including fact that, when arrested plaintiff was carrying suitcase containing goods stolen from hotel (Pen. Code, §§ 836, 837).

6. False imprisonment ⇐7(3).

Where police regulations left incarceration of arrested person to officer in charge of appropriate detail, arresting officer and aids could not be held liable for false imprisonment.

7. False imprisonment ⇐7(3), 15(3).

Hotel auditor, assisting in arrest at policeman's request, was not liable to arrested person, nor was hotel (Pen. Code, §§ 150, 839).

Hotel was not liable because auditor was not liable, and also because auditor was not acting within the scope of his authority.

8. Master and servant ⇐333.

Where hotel detective was not liable for unlawful arrest, hotel could not be held liable.

9. False imprisonment ⇐15(3).

Where plaintiff in false imprisonment action was arrested and detained after crime was committed, hotel corporation could not be held liable for hotel detective's activities looking toward plaintiff's detention.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Malcolm Mackie against Ambassador Hotel & Investment Corporation (formerly Ambassador Hotel Corporation) and others. From the judgment, named defendant and certain other defendants appeal.

Reversed as to all defendants.

O'Melveny, Tuller & Myers, Pierce Works, and J. R. Girling, all of Los Angeles, for appellants.

Kirtland I. Perky, of Los Angeles, and Ralph W. Eckhardt, of San Bernardino, for respondents.

LAMBERT, Justice pro tem.

This is an appeal by the defendants, Ambassador Hotel & Investment Corporation, a corporation, Frank Shannessy, and P. L. Leslie from the judgment entered on the verdict of the jury, against the said defendants and E. M. Hull, jointly, and other defendants not appealing (the defendant E. M. Hull has taken a separate appeal), in the sum of $25,000, in an action for unlawful arrest and false imprisonment. Motions for new trial were made and denied as to these defendants appealing.

The arrest of the respondent Malcolm Mackie occurred on September 8, 1926. The evidence of the plaintiff and his witnesses disclosed that prior to this time he was conducting a small furniture store at 960 North Vernon avenue, Los Angeles, Cal., which he claimed was profitable, and that due to his arrest and detention he lost his business, his stock of goods, his reputation, and a Ford truck. He was at the time married to the defendant Florence Eleanor Palmer, also known as Florence Mackie, but was not living with her. She was living at 2248 Meadowvale. On the evening of August 18, 1926, the respondent called the Alexandria Hotel, which was owned by the appellant Ambassador Hotel & Investment Corporation, by telephone, and asked to speak to the manager of the hotel; was referred to and finally talked to appellant Frank Shannessy, the house officer or house detective, whose duty, among other things, was to look out for any property that might be taken wrongfully from the hotel, and advised him that he, the respondent, had information about some articles stolen from the Alexandria Hotel, but preferred to talk to him personally about the matter, and made an appointment to see him at his place of business later. About nine o'clock that night, appellant Frank Shannessy and two other men, one of whom was the defendant E. M. Hull, detective lieutenant of the Los Angeles police force, called to see him. Respondent gave them the address where the wife of the respondent was living, but did not disclose that she was his wife. The evidence also disclosed that appellant Shannessy and Lieutenant Hull went to this address and recovered about $200 worth of Alexandria Hotel property, which apparently had been stolen. Mrs. Mackie told these men that the goods had been given her by one Max Seibert. The respondent, afterwards, and prior to his arrest, went to the home of Mrs. Mackie to get some personal belongings. These were loaded on his truck. When the truck was unloaded, he discovered some linens bearing the marks of the Angelus Hotel and the Alexandria Hotel. He immediately called up his lawyer and also the manager of the Angelus Hotel, and also had the goods photographed. In the meantime Max Seibert had been arrested for stealing the goods recovered from Mrs. Mackie's home, and his preliminary examination set for the afternoon of September 8, 1926, on the seventh floor in the Hall of Justice in the city of Los Angeles, and Seibert was at the time of the hearing in the custody of Lieutenant Hull. At this point, Mackie, moved by motives not so altruistic as he would have us to believe, decided he might help Seibert, though just how does not appear, proceeded to get in touch with S. D. Pandit, the attorney for Max Seibert; he was requested by him to

attend the preliminary hearing and to bring with him the articles which he had in his possession bearing the hotel marks heretofore mentioned. Respondent put the goods in a suitcase and carried them into the courtroom where the hearing was had. He deposited the suitcase at the seat where he seated himself, and afterwards gave it to Mr. Pandit. The respondent was not called as a witness. This proceeding having ended, Mackie left the courtroom carrying the suitcase. On the way to the elevator appellant, Shannessy said, "Here he comes with the grip; get him now." Upon reaching the ground floor and after having left the elevator, Lieutenant Hull walked beside respondent; he made various remarks to respondent, among others, "I suspect you have got stolen goods in that grip." Lieutenant Hull testified that prior to the arrest he said to Mackie, "I believe you have got stolen goods in that suit case belonging to the Hotel Alexandria." Respondent testified, regarding the arrest, that, as he came out of the elevator, "Officer Hull come up to my right. I was walking with Mr. Pandit who was on my left, and he was carrying the suit case. Officer Hull asked me where I was living now and what I was doing and what I had in my suit case and I told him I did not think it mattered very much to him, and then he told me he would arrest me anyway. At the same time Mr. Leslie come up on my left and he grabbed me by the left arm and knocked Mr. Pandit out of the way. Somebody struck me about that time, I could not say which it was"; that Officer Hull and Mr. Leslie, against his will and by force, walked him down to the police station. Appellant Shannessy followed behind. There respondent was turned over to the officer in charge of the robbery and burglary detail, which in this case was one Captain Cahill; was examined by the said Cahill, and refused to answer any questions or give any information. The suitcase was opened and contained some articles bearing marks of the Alexandria Hotel. The respondent was booked on suspicion of receiving stolen property.

It also appears from the evidence that appellant Shannessy thought at the time he was a policeman by reason of a courtesy badge, but the time limit on it had expired, and he was not. However, his name appeared along with that of Lieutenant Hull as one of the arresting officers. Respondent was kept nine days before any complaint was filed, which was September 17, 1926; he was held to answer to the charge September 24, 1926; was thereafter tried by a jury, and eventually acquitted.

The appellants offered to show that he was convicted by a jury on his first trial, and this conviction was set aside, and that on his second trial he was acquitted. The trial court, however, excluded the evidence of conviction on his first trial. This brief summary presents the salient points of respondent's side of the case.

Appellants herein contend that the judgment should be reversed: First, because the evidence is insufficient to support the implied finding of the jury to the effect that the defendant Ambassador Hotel & Investment Corporation or its employees, Leslie and Shannessy, unlawfully arrested or imprisoned plaintiff or deprived him of his liberty; second, that the damages awarded were excessive and given under the influence of passion and prejudice; third, error by the court in its instructions to the jury; fourth, error in the admission and rejection of evidence.

[1] As to the first assignment, we start with the premise that as to the facts if there is any substantial evidence in favor of the verdict, it is controlling. In other words, we must accept the evidence favorable to the plaintiff at its face value, and disregard conflicting evidence. Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, page 111; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Treadwell v. Nickel, 194 Cal. 243, 260, 228 P. 25.

[2, 3] Also we must determine as a matter of law whether the facts and circumstances as they appear from the evidence adduced in support of plaintiff's case constitute reasonable grounds for the arrest, and are not bound by the verdict of the jury (Michel v. Smith, 188 Cal. 199 at 206, 205 P. 113). In other words, we must consider all the facts and circumstances favorable to the plaintiff as found by the jury to be true, and then determine whether there was reasonable cause for the arrest. False imprisonment is the unlawful violation of the personal liberty of another. Pen. Code, § 236. It is the unlawful detention of a person without warrant, or by an illegal warrant, or a warrant illegally executed. Donati v. Righetti, 9 Cal. App. 45, at page 48, 97 P. 1128. In this case the arrest was made without a warrant. Section 836, Penal Code, provides:

"Arrests by peace-officers. A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

Section 837 of the Penal Code provides:

"Arrests by private persons. A private person may arrest another:

"1. For a public offense committed or attempted in his presence.

"2. When the person arrested has committed a felony, although not in his presence.

"3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

[4, 5] The arrest being shown, the burden was on the person or persons making the arrest to show justification therefor. Sebring v. Harris, 20 Cal. App. 56 at 58, 128 P. 7. Under the first assignment, the appellants contend that the arrest was justified as distinguished from the detention, and rely on the case of Gisske v. Sanders, 9 Cal. App. 13, at page 15, 98 P. 43, 44. With this contention we agree.

In the course of the opinion, in Gisske v. Sanders, supra, as to the law, the court says: "* * * Were a formal arrest established, yet its unlawful character is not disclosed. If it be the law that a police officer acting upon reasonable grounds in making an arrest, even without a warrant, is liable should the arrest be subsequently shown to be improper, it were idle to maintain a police force in the large cities. The duty of every good citizen is, when called upon, to give all information in his power to the proper officers of the law as to persons connected with crime (Miller v. Fano, 134 Cal. 106, 66 P. 183); and this should be held to require that all proper information be given upon request of a personal nature, as affecting the one of whom inquiry is made, when the circumstances are such as to warrant an officer in making inquiry. A police officer has a right to make inquiry in a proper manner of any one upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification. The fact that crimes had recently been committed in that neighborhood, that plaintiff at a late hour was found in the locality, that he refused to answer proper questions establishing his identity, were circumstances which should lead a reasonable officer to require his presence at the station, where the sergeant in charge might make more minute and careful inquiry."

In the instant case, it appears from all the facts and circumstances in the case that the arrest of respondent was justified by Lieutenant Hull. It also appears that appellant Shannessy participated in the arrest, but was likewise justified in so doing.

[6] The evidence in this case shows that the police regulations for the internal management of the police department provide that an arresting officer cannot incarcerate a person, and that the matter of detaining a person in jail is left to the officer in charge of the particular detail under whose supervision the particular crime may come. The doctrine is announced in Gisske v. Sanders, supra, at page 17 of 9 Cal. App., 98 P. 43, 45, as follows: "Under the regulations, when an officer presents a prisoner at the station his authority and control of such prisoner there ends. The officer can neither incarcerate him nor discharge him, and the mere fact of his bringing a person to the station is not of itself sufficient excuse for incarceration. The regulation requires the sergeant then to assume the responsibility and to make an independent investigation, and to determine whether or not the person so presented should be confined or released. The rule as to the responsibility of the arresting officer is otherwise where he has authority to and does direct the confinement of the prisoner, or where confinement is the direct result of the arrest."

From this it would seem the appellants are not in any event liable for the incarceration or the detention of the respondent.

[7] As to the appellant Leslie, who was the auditor of the Ambassador Hotel & Investment Corporation, we may say that the evidence shows that whatever he did, and he did very little, was done at the request of Lieutenant Hull, the police officer, and he is therefore not liable to respondent. Pen. Code, §§ 839 and 150; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266; Presley v. Fort Worth & D. C. Ry. Co. (Tex. Civ. App.) 145 S. W. 669. For this reason, as well as the fact that Leslie was not acting within the scope of his authority, the appellant Ambassador Hotel & Investment Corporation cannot be liable by reason of the conduct of Leslie.

[8] Appellant Shannessy not being liable for the arrest, of course the Ambassador Hotel & Investment Corporation cannot be.

[9] This now brings us to the question of whether or not the Ambassador Hotel & Investment Corporation is liable for the detention under the doctrine of respondeat superior; that is, whether the appellant Shannessy, in his activities looking toward the detention of respondent, was acting within the scope of his employment, and as a part of the transaction of the business of the principal. Johnson v. Monson, 183 Cal. 149, 190 P. 635. The evidence shows no express authority. Respondent seeks to uphold the judgment on the theory of implied authority and the ratification of the act by the Ambassador Hotel & Investment Corporation, and has very thoroughly briefed this part of the case. However, whatever may be the law in other jurisdictions, the instant case is

controlled by the case of Korkman v. Hanlon Drydock, etc., Co., 53 Cal. App. 147, 199 P. 880. This was a case of false imprisonment. The court upheld the verdict of the jury for $1,500, on the theory that the president of the corporation was acting in the furtherance of the transactions of the corporation before a crime was committed. In this case, at page 151 of 53 Cal. App., 199 P. 880, 882, the rule is stated thus: "Appellant cites numerous cases holding that an agent can have no implied authority to institute criminal proceedings for a corporation, as the institution and prosecution of criminal proceedings are not in aid of the transaction of the corporate business. We have carefully read all of the cases cited, but find that there is a clear difference between such cases and the present one. That difference is the one emphasized in the case of Allen v. London, etc., L. R., 6 Q. B. 65, which is the leading case on the subject, and which is cited in practically all of the cases relied upon by appellant here. The distinction is that where one, to prevent or terminate a present interference with the business or property of his principal, takes a certain step, such as ordering the arrest of a person, that is in furtherance of his duty as manager of the business, or custodian of the property; but where one causes the arrest of another for an offense that has already been committed, such arrest cannot aid in the business of the principal nor serve to protect the principal's property. When the offense has been already committed, punishment therefor is entirely disassociated from the conduct of the principal's business. In the case of Allen v. London, etc., supra, it is said: 'There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done.'"

Many cases are cited and discussed in the case just quoted from, and nothing would be gained by further quotations therefrom. In the instant case, the arrest and detention was after the crime was committed by someone, if committed, and comes squarely within the rule laid down in Korkman v. Hanlon Drydock, etc., Co., supra.

We are therefore compelled to hold that the Ambassador Hotel & Investment Corporation is not liable to respondent. It is true that the evidence in this case shows that, when the attorney for respondent called up the hotel, he was referred to appellant Shannessy, and when Shannessy was accused by him of holding the respondent in jail at the instance of the corporation, without any complaint being filed against him, he stated that "we will get around to that," or words to that effect. However, not being liable for the arrest, it would appear that the corporation would not be liable for the detention, and especially is this true because of the fact that the officer in charge of the department detail, to which the respondent was delivered, is the person responsible for the incarceration of respondent and for his detention. Gisske v. Sanders, supra. We are thus presented with a situation where the detention of respondent for the length of time which he was detained without any charge having been filed against him was wholly unwarranted, illegal, and unjust, and for which he would be entitled to a substantial award, although nothing like the amount of this verdict. However, the person responsible for the detention is not before the court.

This renders it unnecessary to discuss or express any opinion on the other assignments of error.

It follows from what has been said that the judgment must be and it is reversed as to all the defendants on this appeal.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 770

Malcolm MACKIE, Plaintiff and Respondent, v. AMBASSADOR HOTEL & INVESTMENT CORPORATION (formerly Ambassador Hotel Corporation) (a Corporation), H. E. Lathrop, Walter Ratliffe, Frank Shannessy, P. H. Leslie, James E. Davis, as Chief of Police of the City of Los Angeles, California; E. M. Hull, as Detective Lieutenant of the City of Los Angeles, California; James E. Davis, E. M. Hull and Florence Eleanor Palmer, sometimes known as Florence Eleanor Mackie, Defendants; E. M. Hull, as Detective Lieutenant of the City of Los Angeles, and E. M. Hull, Appellant.

Civ. 534.

District Court of Appeal, Fourth District, California.

April 29, 1932.

Rehearing Denied May 26, 1932. Hearing Denied by Supreme Court June 28, 1932.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Jess E. Stephens, City Atty., and Jerrell Babb, Dep. City Atty., both of Los Angeles, for appellant.

Kirtland I. Perky, of Los Angeles, and Ralph W. Eckhardt, of San Bernardino, for respondent.

LAMBERT, Justice pro tem.

This is a separate appeal by E. M. Hull, detective lieutenant of the city of Los Angeles, and E. M. Hull, as an individual, from a judg-

ment entered on the verdict of the jury against the appellant and Ambassador Hotel & Investment Corporation, a corporation, Frank Shannessy, P. H. Leslie, and others, in the sum of $25,000.

The judgment of the trial court has this day been reversed on the appeal of the defendants Shannessy and Leslie and Ambassador Hotel & Investment Corporation, a corporation (11 P.(2d) 3); reference is made to that opinion for the facts and the law applicable thereto.

We stated in the opinion just referred to that Lieutenant Hull was not liable for the arrest or for the detention of respondent, and, for the reasons stated in that opinion, we so decide on this appeal.

It is therefore ordered that the judgment against appellant E. M. Hull, as detective lieutenant of the city of Los Angeles, and E. M. Hull, be, and the same is hereby, reversed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 288

PEOPLE v. WELLS.

Cr. 1205.

District Court of Appeal, Third District, California.

May 2, 1932.

Criminal law ⇐1182.

In absence of brief and appearance for oral argument on behalf of appellant, judgment of conviction of manslaughter was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Wesley Wells was convicted of manslaughter, and he appeals.

Affirmed.

Wesley Wells, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Sacramento county of a felony, to wit, manslaughter.

The transcript on appeal was filed in this court March 10, 1932. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 2, 1932. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

123 Cal.App. 165

JACKSON v. RATERREE LAND CO., Inc., et al.

Civ. 8253.

District Court of Appeal, First District, Division 2, California.

April 29, 1932.

1. Vendor and purchaser ⇐334(1).

Vendor's failure to perform contract entitles purchaser, if not in default, to disaffirm and recover money paid thereon.

2. Vendor and purchaser ⇐334(1).

Vendor's failure to install improvements called for by contract of purchase *held* "failure of consideration," entitling purchaser to rescind and recover money paid thereon (Civ. Code, § 1689).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Emily Jackson against the Raterree Land Company, Inc., and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

Harley E. Riggins and Sherman & Sherman, all of Los Angeles, for appellant.

Winterer & Ritchie, of Los Angeles, for respondents.

JAMISON, Justice pro tem.

This action is for rescission of a contract and return of money paid thereon.

The complaint sets forth three causes of action. The first cause of action is for failure of consideration, in that defendant refused and neglected to perform its agreements contained in said contract; the second cause of action alleges fraudulent representations by reason whereof plaintiff was induced to enter into said contract; and the third cause of action is for money had and received.

Judgment was rendered in favor of plaintiff canceling the said contract, and for the sum of $3,310.22 paid by her thereon. From this judgment, defendant has appealed.

On February 18, 1926, respondent and appellant entered into a contract for the purchase by appellant of a certain lot in tract

No. 7181, in the county of Los Angeles, for the sum of $4,500 upon the following terms: $1,125 cash, and the remainder in installments of $40 per month. Said contract provided that appellant, with reasonable diligence subject to delays beyond its control, would grade and install granite or oil and gravel roadways, and install curbs and sidewalks along all streets or portions of streets within said tract, install in the streets within said tract or along the rear end of the lots of said tract, water pipes, gas mains, and electricity.

The court found, and this finding is supported by the evidence, that appellant did not, with reasonable diligence or at all, grade all the streets or portions thereof within the said tract 7181, nor install curbs or sidewalks upon all of said streets or portions thereof within said tract, nor install gas mains containing gas, nor any electricity or appliances for same within said district, and that said failures were not caused by any conditions beyond its control.

[1] Respondent produced evidence to the effect that, on nearly every occasion when she paid the said monthly installments to appellant, she called the attention of its agents to the fact that the improvements as called for by said contract had not been installed, and that she was invariably assured by them that these improvements would be shortly thereafter installed. Also that she continued to pay her monthly installments up to April 18, 1929. That on or about that time she learned from George A. Coan, who was the secretary of appellant company, that appellant did not intend to carry out its agreement to install granite or oil and gravel that portion of Sepulveda boulevard within said tract, but that the same would be done by the county of Los Angeles under an improvement act. And also became aware, at said last-named date, that the improvements consisting of gas mains, electricity, sidewalks, and curbing within said tract had not been completed. It is well settled that the failure or refusal of a vendor to perform his part of the contract entitles the purchaser, if not in default, to treat the contract as at an end and to recover any money which he has paid thereon. Burdick v. Kerkovecz, 81 Cal. App. 786, 254 P. 684; 25 Cal. Jur. 716; 6 Cal. Jur. 392. Section 1689 of the Civil Code provides that a party to a contract may rescind it, "If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part;" and also, "if such consideration, before it is rendered to him, fails in a material respect, from any cause."

[2] The failure and refusal of appellant to perform the said street work, in said tract, constructing curbs and sidewalks, and installing electricity therein, constituted a failure of consideration, within the meaning of said section. Andreoli v. Hodge, 71 Cal. App. 762, 236 P. 333; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356; Mills v. Richmond Co., Inc., 56 Cal. App. 774, 206 P. 486.

The answer does not set up the plea of limitation against the first cause of action, nor does the evidence indicate that respondent waived her right to maintain this action.

As the judgment must be affirmed on the first cause of action, we deem it unnecessary to discuss the matters involved in the second and third causes of action.

Appellant contends that the trial court committed error in admitting and rejecting evidence; but we find nothing in this action of the court that justifies a reversal.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

123 Cal.App. 264

RODRIGUEZ v. BULOTTI et al.

Civ. 7300.

District Court of Appeal, First District, Division 2, California.

May 2, 1932.

Rehearing Denied June 1, 1932. Hearing Denied by Supreme Court July 1, 1932.

1. Joint adventures ⇨4(1).

Where one joint adventurer abuses fiduciary relation to coadventurer by entering secret agreement with defendant, coadventurer is entitled to relief whether injured or not.

2. Joint adventures ⇨7.

Where plaintiff's husband, being her joint adventurer in restaurant purchase entered secret agreement with sellers to defraud her, plaintiff need not prove damage to rescind.

Facts disclosed that plaintiff and her husband purchased restaurant represented by sellers to cost $2,000, and that plaintiff believed husband paid $500, and that she paid balance of $1,500; but that purchase price was in fact only $1,500, and that husband had entered into secret agreement with sellers whereby his purported check for $500 was void and was only to deceive plaintiff.

3. Contracts ⇨124.

Plaintiff, rescinding restaurant purchase, restored sellers to statu quo by returning restaurant and fixtures on discovering fraud.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Action by Hortensia Rodriguez against Henry F. Bulotti and wife and another. From a judgment for plaintiff, named defendant and wife appeal.

Affirmed.

Raymond Perry, of San Francisco, for appellants.

Hubbard & Hubbard, of San Francisco, for respondent.

SPENCE, J.

Plaintiff had judgment for the rescission of an agreement to purchase a restaurant and for the return of the sum of $1,000 paid by plaintiff upon the purchase price. From this judgment, defendants appeal.

On July 2, 1928, plaintiff and her husband, Manuel Rodriguez, who was joined as a defendant in the action, entered into a written agreement to purchase the restaurant from the Bulottis for the sum of $2,000. The terms of the agreement provided for a cash payment of $1,500, and for monthly payments of $50 per month for ten months. At the time the agreement was entered into, plaintiff could not read English. She had some insurance money left her by her former husband, and just prior to the date of the agreement plaintiff and defendant Manuel Rodriguez had married. The defendants Henry Bulotti, Rosie Bulotti, and Manuel Rodriguez, the husband of plaintiff, had entered into a secret agreement to deceive and defraud plaintiff by representing to her that the purchase price was $2,000 and that defendant Manuel Rodriguez was investing in the enterprise by putting up $500 of his own money, together with $1,000 of plaintiff's, to make the cash payment. In truth and in fact, under the terms of the secret agreement between defendants, the total purchase price was to be only $1,500, and defendant Manuel Rodriguez was to pay nothing on the cash payment. When the agreement was signed, plaintiff paid $1,000 to the Bulottis, and defendant Manuel Rodriguez gave them what plaintiff was led to believe was a check for $500. Pursuant to defendants' secret agreement, this purported check was delivered to the Bulottis solely for the purpose of deceiving plaintiff and of inducing her to part with her agreed share of the cash payment. Plaintiff and defendant Manuel Rodriguez went into possession of the restaurant, but within a month thereafter plaintiff learned of the fraudulent agreement and promptly gave notice of rescission. Possession of the restaurant was turned back to the Bulottis on August 1, 1928, and they conducted the same for more than a year thereafter and until shortly before the trial of the action.

[1, 2] Appellants state that two issues are presented: "First. Fraud without damage fails to constitute or establish a cause of action. Second. Respondent failed to place appellants in statu quo."

In support of the first contention appellants rely upon the general rule that a party is not entitled to rescind merely upon a showing of fraud, but must also show that damage has resulted. We are not prepared to say that no damage was shown by respondent (Dozier v. Northrop, 89 Okl. 67, 213 P. 304), but, even assuming that respondent failed to plead or prove any damage, we are of the opinion that the facts of this case bring it within an exception to the general rule. As was said in Menefee v. Oxnam, 42 Cal. App. 81, at page 87, 183 P. 379, 382: "Though it is the general rule that fraud without at least some slight injury is not ground for relief, this general rule is not an obstacle to recovery in cases of the kind here under consideration, even though there be a total absence of injury to the complaining party. That is, where one occupies a fiduciary relation to the plaintiff, and, acting in co-operation with the defendant, he abuses the confidence of the plaintiff, his associate in a common enterprise, by entering into a secret agreement with the defendant, the general rule that fraud without injury is not ground for relief is not applicable, and the plaintiff will be entitled to relief whether he has been injured or not." Here the husband of plaintiff, who was a joint adventurer with her, entered into a secret agreement with appellants to deceive and defraud her, and respondent was not compelled to plead or prove damage in order to be entitled to rescind.

[3] We find no merit in appellants' second contention that "respondent failed to place appellants in statu quo." The evidence showed without conflict that respondent returned to appellants the restaurant and equipment which was the subject of the sale. It is not claimed that the physical property was not returned to appellants in the same condition that it was delivered to respondent. In this connection, however, appellants call our attention to the testimony of appellant Henry Bulotti to the effect that the volume of business done before appellants sold the restaurant to respondent was greater than the volume done after appellants retook possession. Much of said appellant's testimony was so thoroughly discredited that the trial court would have been justified in rejecting his entire statement. In any event, we fail to see the materiality of the testimony referred to, particularly in the light of the fact that, so far as the evidence shows, the decline in patronage may have been due to a seasonal change or due to the manner in which appellants conducted the restaurant after retaking possession.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

ADAM v. OBARR.

Civ. 8340.

District Court of Appeal, First District, Division 1, California.

April 25, 1932.

Rehearing Denied May 25, 1932.

1. Partnership ⇐95.

Agreement to purchase half interest in business *held* modified by conduct of parties and incoming partner's subsequent contributions equaling original capital investment.

2. Partnership ⇐95.

Incoming partner's subsequent contributions equaling original capital investment *held* sufficient consideration for modification of agreement for purchase and sale of half interest in business.

3. Partnership ⇐95.

Whether personal property should be considered as partner's capital contribution or as sold to partnership *held* immaterial to such partner's right to credit therefor and accounting for excessive withdrawals by other partners.

4. Partnership ⇐342.

Partner's allegation that other partner had overdrawn about $5,000 *held* not to preclude finding for larger sum.

5. Partnership ⇐179, 305.

Upon liquidation of partnership, partnership debts should first be paid, withdrawals by partners equalized, and residue distributed between partners.

Appeal from Superior Court, Santa Barbara County; Wm. D. Dehy, Judge.

Action by Thomas B. Adam against S. R. Obarr. From a judgment for plaintiff, defendant appeals.

Affirmed.

Major McGregor, of Santa Barbara, and Fred A. Shaeffer, of Santa Maria, for appellant.

Henry G. Bodkin and Gordon J. Hatert, both of Los Angeles, for respondent.

OGDEN, Justice pro tem.

This is an appeal from a judgment dissolving a partnership, ordering an accounting, and directing the payment of debts, sale of assets, and distribution thereof among the copartners.

The action was brought by the respondent Adam, who alleged in his complaint, in so far as it concerns this appeal, that on March 1, 1922, by oral agreement, he and the appellant Obarr entered into a partnership for the purpose of carrying on a grocery and meat business known as the California Market & Grocery Company at Santa Maria, Cal.; that it was agreed that each partner would share equally in the profits or losses; that neither partner would receive a salary; that both partners would devote all of their time and services to the partnership; and that upon the liquidation thereof each partner should receive one-half of the money of the partnership and in addition a return of the money and property invested by him therein. It was further alleged that pursuant to said agreement both parties contributed certain moneys and property to the partnership; that during the years 1924, 1925, and 1926 respondent contributed to the partnership cattle and calves of the approximate value of $17,000, as well as other property, for which he was not given credit; that appellant had withdrawn from the partnership approximately $5,000 more than respondent and in addition thereto withdrew without authorization a salary of $65 per week for a long period of time, and that appellant refused to reimburse the partnership for the amounts so wrongfully withdrawn or to credit respondent for the cattle so delivered. The complaint prayed for an accounting, and for the dissolution of the copartnership.

In his answer appellant denied that the agreement was as alleged by respondent, and alleged that it provided for the purchase by respondent from appellant of a one-half interest in the business, for which respondent was to pay the appellant the sum of $9,000, representing one-half of the amount then invested in the business by the latter; that respondent had breached this agreement by his failure to pay any part of the purchase price and by his failure to devote his entire time to the business. The answer then alleges the contribution by respondent to the partnership of various items of money, cattle, and other property, and the contribution by appellant, in addition to the $18,000 originally invested, the sum of $3,000; that taking into consideration the contribution of each partner as alleged and the profits and withdrawals of each partner, the net result was that at the close of the year 1929 the investment of each partner in the business was approximately equal. He further alleged that respondent had been given credit for all cattle delivered by him or, if not, such credit should be made. The salary withdrawals are admitted, but alleged to have been authorized by agreement of the partners; but it is denied that appellant withdrew any sum in excess of the withdrawals of respondent. The answer further alleges the necessity for an accounting and joins with the complaint in a prayer therefor, and for the dissolution of the partnership.

An expert accountant was appointed by the court prior to the trial to audit the books

of the partners, and was examined in detail at the trial as to the various contributions and withdrawals by each partner. The trial court, in detailed findings and conclusions of law, determined that, although the original agreement of the parties was one for the purchase by respondent of a one-half interest in the business from appellant, this was changed by a subsequent oral agreement to the effect that respondent should contribute to the partnership capital an amount equivalent to the original investment of appellant and that he did in fact so contribute to the capital of the business the sum of $3,000 in cash, real property of the agreed valuation of $1,050, and during the years 1924, 1925, and 1926, cattle and other personal property of the agreed value of $14,126.27, with the net result that, with certain hereinafter mentioned exceptions, the investment of each partner at the close of the year 1929 was approximately equal. The exceptions referred to were the amounts withdrawn from the business by appellant in excess of the amounts withdrawn by respondent during 1928 and 1929, which excesses the court found to be the sum of $5,349.18 in 1928 and $1,572.76 in 1929, together with unauthorized salary withdrawals by appellant in the sum of $3,333.32. Judgment was entered directing an accounting for the year 1930, which was not included in the report of the auditor appointed by the court, directing the sale of the partnership assets, payment of debts, and payment from the proceeds to respondent of the sum of $10,255.26; this sum being the total of the wrongful withdrawals above referred to, and directing the remaining assets to be distributed equally among the parties.

Appellant contends that the trial court erred in finding that there was a modification of the original agreement of purchase by respondent from appellant of a one-half interest for $9,000 and in finding that the contributions by respondent of moneys, real property, cattle, etc., were capital investments offsetting the original capital investment of appellant.

[1, 2] The evidence discloses that, although the partners, after entering into their original agreement of purchase, never expressly by spoken or written word changed that agreement, their subsequent conduct and transactions conclusively show a modification thereof as found by the trial court. The only payments made by respondent toward the purchase price were the sums of $1,000 made three weeks after the original agreement, and of $2,000 some four months later. The first payment was made directly to appellant and the second was deposited to the credit of the partnership, appellant receiving a credit on its books therefor. Respondent testified that, when he offered to give a note for the balance, appellant advised him that he could deliver cattle to apply on his indebtedness to the firm instead. There appears to have been no further conversation between the partners with reference to any balance due appellant. As from time to time contributions of cattle, hay, and real property were made by respondent, an agreed valuation thereof was set up on the books as a credit to his account. At no time did appellant make demand for the balance of the purchase price, nor did he suggest that they were not equal partners. Appellant testified that he presumed that they were such. In fact, the affirmative allegations contained in appellant's answer that "after consideration [of] such withdrawals, the profits of the business, and the contributions by each partner to the business above set forth, the net result is that at the close of the year 1929 the investment of each partner in the business was approximately equal," admits of no interpretation other than that the contributions of one partner were intended to and did offset the contributions of the other. There was ample consideration for such a modification. The capital of the partnership and the required amount of respondent's contribution were both thereby doubled.

[3] Appellant argues that the contributions by respondent were in fact merely sales to the partnership for which he received credit. If, for the purpose of argument, we should assume his contention to be correct, we do not understand nor has he pointed out how he has been prejudiced by the conclusion reached by the trial court. If the cattle and the other property were sold to the partnership, respondent is entitled to payment therefor. If respondent purchased a one-half interest in the business, the capital contribution by each partner would be his respective one-half interest and appellant would be entitled to a credit as capital contribution of only $9,000 and not $18,000 as credited by the trial court. The unpaid balance of the purchase price would be an obligation owing to appellant individually, not to the partnership. In any event, respondent would be entitled to an equalization of the excess amounts withdrawn by appellant under the guise of profits and salary.

[4, 5] The allegation of the complaint that the difference between the withdrawals of respondent and appellant was approximately $5,000 did not preclude the trial court from finding that difference to be the sum of $6,921.94. "* * * It is apparent that the amount stated in the complaint is intended to be only an approximation of the indebtedness of defendant, and the allegations should not be held to preclude the court from finding the exact condition of the account. Indeed, it is too late for appellant to make the point, since the evidence as to the whole amount appropriated by defendant was received without objection. * * *" Brandt v. Salomonson, 17

Cal. App. 395, 119 P. 946, 947. The trial court has, upon competent and sufficient evidence, including the examination in detail of all of the transactions of the partnership from its inception in 1922 until the close of the year 1929, found that the contribution of the partners to the partnership capital was equal, that the appellant has, without authority and while the business was carried on at a loss, withdrawn from the partnership under the guise of profits the sum of $6,921.94 in excess of the amounts withdrawn by respondent, and that he has in violation of the partnership agreement withdrawn the sum of $3,333.32 as salary. It has correctly ordered that after payment of the partnership debts and before distribution of the remaining assets among the partners, the withdrawals of the partners be equalized by the payment to respondent of an amount equivalent to the excess withdrawn by appellant.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

FIREMEN'S FUND INDEMNITY CO. v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 8435.

District Court of Appeal, First District. Division 2, California.

April 28, 1932.

Rehearing Denied May 28, 1932. Hearing Denied by Supreme Court June 27, 1932.

1. Master and servant ⇐371.

That injury arose out of and also occurred in course of employment is essential to power to grant award.

2. Master and servant ⇐403.

Compensation claimant has burden of showing that injury arose out of and also occurred within course of employment.

3. Master and servant ⇐375(2).

Railroad laborer, who, having quit work when fifteen miles from town wherein paymaster's office was located, was injured while accompanying engineer thereto in truck, *held* not entitled to compensation.

It appeared that railroad construction laborer, having gone to timekeeper to obtain statement of his time and amount due him, and hearing that a locomotive had broken down and that it was necessary for engineer to go to certain town, at which there was a railroad that would take laborer on his way to destination toward which he was proceeding before he procured temporary employment in railroad construction work, obtained permission from engineer to accompany him to a town 15 miles away at which paymaster's office was located. There was no evidence whether, on request, pay checks would be forwarded from such town to construction camp, nor that employers, if requested, would not have furnished transportation.

Proceeding under the Workmen's Compensation Act by Pete Novak, claimant, opposed by Worden & Forsythe, employers, and the Firemen's Fund Indemnity Company, insurance carrier. The Industrial Accident Commission dismissed the proceeding as against the employers, but granted an award against the insurance carrier, and the insurance carrier applies for a writ of review.

Award annulled.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Matthew A. McCullough, of San Francisco, for respondent Pete Novak.

STURTEVANT, J.

Pete Novak applied to the respondent commission to fix the amount of his compensation growing out of an injury received. A hearing was had, and the commission made an award in favor of the claimant in the sum of $131.39 against the Firemen's Fund Indemnity Company, but dismissed the application as against the employer. The indemnity company has applied to this court for a writ of review.

In the early part of August, 1931, Pete Novak started to Boulder dam to seek employment. He stopped at Lassco, and temporarily took employment under Worden & Forsythe as a laborer in constructing a railroad in the vicinity of Westwood. At the time he was employed, nothing was said regarding transportation to or from Westwood. At the time he took employment, the construction work was about one mile distant from Lassco. As the work progressed, the camp was moved north from Lassco. Novak continued as an employee until the evening of August 27, 1931. On the evening of that day he quit. He went to the timekeeper and obtained a statement of his time and the amount due him. While in the timekeeper's office waiting to obtain that document, he heard the engineer of the locomotive stating that one locomotive had broken down and that it was necessary for the engineer to go to Westwood to obtain some parts to repair the locomotive. Novak asked the engineer if he could ride with him, and the engineer consented. The engineer was using a Chevrolet automobile that had been converted in-

to a small truck. The automobile was the property of another laborer, but was loaned to the engineer. The engineer sat at the wheel and did the driving. The fireman sat on the front seat by the side of the engineer. Novak took a seat on the bed of the truck. There was evidence that prior to August 28th the laborers on the construction job were in the habit of riding on the locomotives as far as they ran and were then transferred to the dumping trucks and in that manner rode to their work and returned in a similar manner. Worden & Forsythe paid off at stated times, but at other times they did not maintain a paymaster at the camp. Time slips were issued by the timekeeper and were directed to the paymaster, who was at Lassco. At the time of the accident, the camp was fifteen miles distant from Lassco. Lassco was on the road to Westwood, and at the latter point there was a railroad on which the claimant could be taken on his way to Boulder dam. There is no evidence whether upon application pay checks would be forwarded from Lassco to the camp in the event that one of the employees quit work. There was evidence that, when the claimant left the camp, he intended to go to Boulder dam. As the automobile truck proceeded on its way, it overtook another vehicle. The driver turned to one side and accelerated his speed to pass the vehicle in front. As he did so, the wheels of the truck hit a chuck hole, and the jar was such that the claimant was thrown off of the truck and broke his left collar bone. After the accident, he was put on the truck and the truck continued on its way to Lassco. At that point the claimant received a check for his pay and a card authorizing admission into the hospital at Westwood. He was admitted to that hospital and later was sent to Greenville in Plumas county and was there placed in another hospital.

In making its award the respondent commission made findings which, among others, found that the accident occurred to the claimant "while employed as a laborer, * * *" and while so employed he "sustained injuries occurring in the course of and arising out of his employment. * * *" This petitioner claims that said findings are not sustained by the evidence. Before proceeding, it should be stated there is no evidence that any person had the authority to do so or that he attempted to direct Novak to ride on the automobile truck, or that the automobile truck was an instrumentality of the employer in any respect whatsoever except as hereinabove set forth.

The respondent commission, in support of the award, cites and relies on 27 California Jurisprudence, p. 383, § 85, where it is said: "When transportation is furnished to convey a workman to and from the place of work, as an incident of the employment, an injury sustained by him while going or coming, in the vehicle so furnished by the employer and under his control, arises out of and in the course of the employment. But when transportation is not furnished as a necessary incident of the employment or as a requirement imposed by the nature or the location of the work, and the use of transportation on the part of the employee is entirely voluntary and optional and bears no relation to the contract of employment, the dangers involved are not risks of the employment, and therefore an injury incurred while using means of transportation is not compensable." Continuing, the respondent commission argues "that the nature and location of the work in the case at bar necessarily implies that the furnishing of transportation by the employer was incidental to the employment. Surely, the workman could not be expected on hiring out or quitting to walk a matter of fifteen miles to the company camp or nearest town." In reply, the insurance carrier asserts that in the instant case the employer did not furnish any transportation, but that the engineer did, and that the transportation so furnished was not incidental to the employment or in any way connected therewith.

[1-3] The respondent commission makes the claim frequently that the claimant's acts were "necessary"; but it does not quote any evidence to support those claims. There is no evidence that, if requested, the employers would not have furnished within a reasonable time and in a reasonable manner transportation to Lassco or perhaps to Westwood. But they were not requested to do so. There is no evidence that the pay check would not on request have been forwarded from Lassco or that the request was made. There is evidence that the claimant took the transportation which he did entirely of his own volition, and not on the request of his employers or with their knowledge or consent. It is essential to the power to make an award, and the burden is upon an applicant for compensation to show not only that the injury arose out of but also that it occurred within the course of the employee's employment. 27 Cal. Jur. p. 341. As early as the evening of August 27, 1931, by mutual consent, and acting on the request of the claimant, the contract of employment was terminated. After that moment, the employers did not have, and did not attempt to exercise, any power of direction or control over the activities or movements of the claimant. There is no claim that after that moment the claimant directly did anything in furtherance of the master's business; but the sole claim is that some of his acts were incidental thereto. If so, the claimant should have shown the facts; the burden rested on him to bring himself within any exception to the general rule. He failed to do so, and he was not entitled to compensation. Awards in favor of the claimant were annulled in: Parker v. Pont, 105 L. T. 493;

Enterprise Foundry Co. v. Ind. Acc. Comm., 206 Cal. 562, 275 P. 432; London G. & A. Co. v. Ind. Acc. Comm., 190 Cal. 587, 213 P. 977; New York Indem. Co. v. Ind. Acc. Comm., 87 Cal. App. 105, 261 P. 1106, and California Highway Comm. v. Ind. Acc. Comm., 61 Cal. App. 284, 214 P. 658. Yet in each of those cases the facts were more favorable to the claimant than in the instant case.

The award is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 80

PEOPLE v. WHITE.

Cr. 2158.

District Court of Appeal, Second District, Division 1, California.

April 26, 1932.

Criminal law ⇐1159(2).

Where record contains evidence of substantial nature to support verdict, District Court of Appeal will not disturb verdict.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Ernest White was convicted of burglary, and he appeals.

Affirmed.

Joseph Mayer, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Dep. Atty. Gen., for the People.

TAPPAN, Justice pro tem.

Defendant was found guilty of the crime of burglary, and appeals from the judgment entered on the verdict and from the order of the court denying his motion for a new trial.

The record discloses that the evidence introduced at the trial of defendant was largely circumstantial, and consisted, on the part of the prosecution, of the testimony of a finger print expert and of certain alleged admissions of the defendant made to police officers. The defendant denied that he committed the alleged crime, and offered testimony tending to support an alleged alibi. The only contention made by defendant upon this appeal is that the evidence is insufficient to support the verdict of the jury finding him guilty. The questions presented at the trial, as to this phase of the case, were questions of fact. There is to be found in the record evidence of a substantial nature to support the verdict, and under those circumstances this court will not disturb the verdict of the jury. At best there is but a conflict in the evidence.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

123 Cal.App. 115

In re GILHAM'S ESTATE.

GILHAM v. CHITTENDEN et al.

Civ. 8446.

District Court of Appeal, First District, Division 2, California.

April 27, 1932.

1. Wills ⇐302(2).

Verdict that signature at end of purported will was not that of testatrix *held* supported.

2. Appeal and error ⇐1001(1).

Verdict supported by substantial evidence may not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Will contest by Kelsey M. Gilham against Jessie Chittenden and others, proponents of the purported will of Nellie F. Gilham, deceased. From an adverse judgment, proponents appeal.

Affirmed.

Fred A. Watkins, of San Francisco, and Gilbert D. Ferrell, of Redwood City, for appellants.

Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, and H. B. Churchill, of Santa Rosa, for respondent.

STURTEVANT, J.

This is a contest over the application of the defendant Jessie Chittenden to have admitted to probate the purported will of Nellie F. Gilham, deceased. The contest was filed by Kelsey M. Gilham, the son of the deceased. The defendant Jessie Chittenden answered the contest, and a trial was had before the court sitting with a jury. At the end of the hearing, the trial court submitted to the jury forms of several special verdicts, among others: "Question 1. Did Nellie F. Gilham subscribe her name at the end of the instrument (contestant's exhibit 1) dated October 28, 1929? Answer. ———. (Note. If

question 1 above is answered 'No' then the jury need not find as to any other question.)" The jury answered "No," and a judgment in favor of the contestant was entered on the verdict. Later the defendants moved for a new trial, basing their motion on all of the statutory grounds. The motion was denied, and the defendants have appealed and have brought up a bill of exceptions.

[1] The defendants contend that the verdict is not supported by the evidence. They assert that the contestant introduced no evidence excepting the testimony of Mr. Chauncey McGovern, an expert witness, whereas the defendants introduced the testimony of the petitioner, Mrs. Jessie Chittenden, Mr. E. L. Geiger and his wife. Continuing, they assert that their witnesses were not in any way contradicted, and therefore the verdict should be set aside.

The uncontradicted evidence is that on October 28, 1929, Mrs. Chittenden wrote the purported will. All disputes involve what happened thereafter. Mrs. Chittenden testified that about ten days later the decedent and Mr. and Mrs. Geiger were at the home of Mrs. Chittenden at Burlingame in San Mateo county. As to what happened there on the morning of that date, she testified as follows: "Mr. Geiger remained a few minutes and then said he would have to go on to work; this was around 10 o'clock in the morning; Nellie F. Gilham then said, 'Wait a moment I want you to do something for me before you go.' She then asked me to get the papers, 'that it was as good a time as any to sign them.' I did so, and she said to Mr. and Mrs. E. L. Geiger, 'I have made a little will and I want you to sign as witnesses.' Mr. Geiger then said, 'I would like to read this Aunt Nell before signing my life away.' She said 'All right.' I then said, 'Read it aloud, Mr. Geiger.' Mr. Geiger then read contestant's exhibit 1 aloud in full. When he had completed the reading he said, 'It does look like a will all right,' and Nellie F. Gilham said, 'Yes, it is my will,' and she signed her name to it. I then signed my name to the will and Mrs. Geiger signed and then Mr. Geiger signed his name to the will, contestant's exhibit 1. Mr. Geiger then bade us goodbye and left the house." Regarding the same incident Mr. Geiger testified: "I stayed a few minutes and was about to go when Nellie F. Gilham said, 'Wait a minute, Erb, I want you to do something for me,' then she turned to Jessie Chittenden and said, 'Jessie, get me those papers.' I said, 'What do you want me to do, Aunt Nell?' She said, 'I have made a little will and I want you and Mrs. Geiger to sign as witnesses.' Jessie Chittenden got the papers out of a drawer and placed them upon the table. I said, 'Before I sign my life away I would like to read it.' I picked it up and read it aloud. When I had finished I said, 'It does sound like a will,' and Nellie F. Gilham replied, 'It is my will.' I said, 'I think that you should see an attorney' and she said, 'Maybe, but it will be all right.' She then took the will and signed it. Jessie Chittenden then signed and my wife signed; I signed last. When this was done I left to go on to my work." Regarding the same incident Mrs. Geiger testified: "We talked a bit and my husband, soon after he arrived, took leave to go to work. As he was doing so Nellie F. Gilham asked him to wait a moment, that she wanted him to do something. He asked what it was, and she replied, 'I want you and Mrs. Geiger to sign a will I have made.' She asked Jessie Chittenden to get the papers and Jessie Chittenden brought the papers, contestant's exhibit 1, from out of a drawer and placed them on the table. My husband said, 'I would like to know what it is before I sign my life away,' and he picked up the papers to read them. Then he read them aloud. When he had finished he said, 'It does sound like a will Aunt Nell,' and she replied that it was her will. Nellie F. Gilham then signed it and I signed it and Jessie Chittenden and my husband signed. I used the pen that had been used by Nellie F. Gilham. My husband used a fountain pen. When we had all signed, Jessie Chittenden held the will before a fire to dry the ink. My husband then left the house and I remained the rest of the day."

Comparing the testimony of each of those witnesses with that of each of the others, it will be seen that there is an astonishing similarity in detail that might impress any jury as indicating fabricated testimony. Furthermore, Mr. Geiger and Mrs. Chittenden testified that Mr. Geiger used a fountain pen but that Mrs. Gilham, Mrs. Geiger, and Mrs. Chittenden used the same pen and the same ink. Mr. McGovern testified that the name "Nellie F. Gilham" was not entirely written with the same ink. By stipulation of counsel, the will was produced at the oral argument. An inspection of the signature with the naked eye discloses at least two different inks. The extreme terminal of the name "Nellie" is decidedly reddish in color, whereas all of the rest of the signature is black in color. Therefore it may not be said that the witnesses for the defendant were not discredited.

Mr. McGovern, one of the witnesses for the contestant, was examined and cross-examined at length. He testified that the signature, Nellie F. Gilham, was a "clumsy forgery." In explanation of that statement he gave many different reasons, all of which tend to impress one favorably who reads the testimony. There were introduced in evidence many checks written by the decedent either shortly before the date of the alleged execution of the purported will or shortly thereafter. These exemplars show that Mrs. Gil-

ham wrote a firm, well-formed hand that was altogether masculine in appearance. Although she was admitted to be of the age of seventy-seven years or thereabouts, her signature has the appearance of one in middle life. The signature attached to the will distinctly varies from each and all of the exemplars in this, "Nellie F. G" is the trembling hand of one in her dotage, but the terminal "ilham" is firm and flowing in appearance. After the signature on the will appears a period. At no other time did it appear that the decedent ever used a period when writing her signature. The exemplars, in themselves, were some evidence to the effect that the signature at the end of the will was not genuine.

The contestant was called as a witness in his own behalf. Among other things, he testified: "I am and have been for many years last past familiar with my mother's signature—Mrs. Nellie F. Gilham. I do not believe the signature Nellie F. Gilham to said purported will is my mother's signature or was written by her."

[2] In view of what appears above, it will suffice to state that, in our opinion, it may not be said there was not substantial evidence in support of the verdict. Under these circumstances, the verdict may not be disturbed on appeal. 2 Cal. Jur. pp. 918–935.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 168

RUFF v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8453.

District Court of Appeal, First District, Division 2, California.

April 29, 1932.

Rehearing Denied May 28, 1932. Hearing Denied by Supreme Court June 28, 1932.

1. Master and servant ⇐375(1).

Dairy employee *held* not in employer's service when killed by milk truck toppling from hoist at service station while helping employee thereof.

2. Master and servant ⇐375(1).

Employee voluntarily doing something outside scope of employment is temporarily beyond control of employer, who is not liable for his resulting death.

Proceeding under the Workmen's Compensation Act by Vito Moscato and others to recover compensation for the death of Michael Moscato, employee, opposed by George Ruff, doing business as College Park Dairy, employer, and the Ocean Accident & Guarantee Corporation, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation, the employer and insurance carrier bring certiorari.

Award annulled.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

NOURSE, P. J.

Petitioner Ruff is an individual doing business as College Park Dairy. Bert Kessler was employed by Ruff to drive one of his dairy trucks in the delivery of milk. Michael Moscato, a boy of fifteen years, was employed to help Kessler, his only duty being to ride on the truck and to deposit the milk at the doors and to return empty bottles to the truck. While on a regular delivery route, Kessler stopped at a service station to have the truck serviced. He drove the truck upon the hydraulic hoist, and then he and Moscato walked away leaving the truck in the hands of an employee of the service station. Another truck belonging to Ruff drove into the station at this time, and Kessler climbed into the seat of the second truck. While he was there engaged in conversation with the driver of second truck, the employee of the service station called to Moscato to come over and help him. The boy went to the hydraulic hoist where he was lifted up to the seat of the truck by this employee to help him in turning the steering gear. Kessler did not see the boy and did not know what he was doing, but, a short time after he had been called by the employee of the service station, Kessler heard a cry and turned around in time to see the truck topple from the hoist and strike the boy, killing him.

[1, 2] The petitioners contend that the boy was not in the service of Ruff at the time he was killed, but that he was voluntarily doing a service outside of his employment. This contention must be sustained. The rule is stated in 27 Cal. Jur. page 351 et seq., where many cases are cited. In the recent case of San Francisco & S. R. R. Co. v. Ind. Acc. Com. et al., 201 Cal. 597, 600, 258 P. 86, the authorities on this subject are considered at length. It is true that in the latter case the employee was killed while voluntarily performing a service outside of his employment and in disregard of his employer's instruction, but that is just one element of the case which emphasized the absence of the relation of master and servant. The essential element of this character of cases is that,

when the employee is engaged in voluntarily doing something outside the scope of his employment, he is temporarily beyond the directions and control of the employer, and the liability of the latter attaches only when that relation exists.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

123 Cal.App. 79

McFARLAND v. MOTT.

Civ. 8398.

District Court of Appeal, First District, Division 2, California.

April 26, 1932.

Rehearing Denied May 26, 1932. Hearing Denied by Supreme Court June 24, 1932.

Appeal and error ⇐80(4).

Judgment requiring defendant to account to plaintiff for rents, issues, and profits of certain realty *held* not appealable "final judgment" (Code Civ. Proc. § 963, subd. 1).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; J. A. Smith, Judge.

Action by Elta F. McFarland against Maude R. Mott. From an adverse judgment, defendant appeals.

Appeal dismissed.

Carey & Gorfinkel and Maurice R. Carey, all of San Francisco, for appellant.

Knight, Boland & Christin and Charles A. Christin, all of San Francisco, for respondent.

SPENCE, J.

In this action for an accounting of the rents, issues, and profits of certain real property, the trial court entered its judgment as follows: "That plaintiff is entitled to an accounting from the defendant, and to recover from the defendant, with interest, all the rents, issues and profits of said property and from the sales thereof in excess of the sums disbursed by defendant for plaintiff's account * * * and that a reference be had to determine such rents, issues, profits and amounts, and that James V. Farley be and he is hereby appointed as referee to ascertain and report the same to this court, for confirmation." Defendant appeals from said judgment.

As indicated in Middleton v. Finney (Cal. Sup.) 6 P.(2d) 938, uncertainty may have previously existed as to whether such judgment was appealable as a "final judgment" within the meaning of subdivision 1 of section 963 of the Code of Civil Procedure. The Supreme Court, however, considered the question in Middleton v. Finney, supra, and Gunder v. Gunder, 208 Cal. 559, 282 P. 794, and the question is no longer an open one. Such judgment is not appealable, as it is not a "final judgment" within the meaning of that section.

The appeal is dismissed.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 112

IRWIN v. WEINSTEIN.

Civ. 8401.

District Court of Appeal, First District, Division 2, California.

April 27, 1932.

Rehearing Denied May 27, 1932. Hearing Denied by Supreme Court June 24, 1932.

1. Appeal and error ⇐757(1).

Where appeal is taken under alternative method, and appellant fails to print in brief or appended supplement portions of record relied on, court will not examine typewritten record to determine alleged insufficiency of evidence to support verdict (Code Civ. Proc. § 953c).

2. Appeal and error ⇐758(2).

General assertion that court erred in giving or refusing to give 41 instructions will not be noticed, particularly where based on evidence not printed on brief.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Grace Monroe Irwin against Samuel Weinstein. From judgment for plaintiff, defendant appeals.

Affirmed.

Leon Samuels, of San Francisco, for appellant.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

TUTTLE, Justice pro tem.

This is an action to recover damages alleged to have been sustained by plaintiff through the fraud of defendant in the exchange of real property. The trial was had before a jury, and a verdict of $55,000 returned in favor of plaintiff. The appeal is from the judgment entered upon the verdict.

Plaintiff was the owner of an interest in

certain real property in Seattle, Wash., which she alleged was worth $75,000, and which was subject to a mortgage of $20,000. Herman Kronfield was the owner of what is known as the "First Avenue" property in said city. After negotiations between the parties and their agents, an exchange of these properties was effected. It was alleged in the complaint that defendant, as the agent of Kronfield and acting in connivance with the latter, made false representations in respect to the value of the "First Avenue" property; the income therefrom; its condition and state of repair; and many other matters.

[1] While appellant does not definitely so state, we would gather from his "argument" that he relies upon the insufficiency of the evidence to support the verdict. Assuming that he had this idea in view, he is precluded from urging the point for the reason that he has failed to comply with the provisions of section 953c of the Code of Civil Procedure, the appeal being taken under the "alternative method." The record in the case covers some 1,500 pages of typewritten transcript, and appellant has failed "to print in his brief or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." In all, about half a dozen questions and answers are quoted from the record. We do not feel called upon, under such circumstances, to assume the vexatious burdens of an examination of the typewritten record. Eddy v. Stowe, 43 Cal. App. 789, 185 P. 1024. The insufficiency of the evidence to support a particular point raised will not be considered unless printed in the briefs. Town of St. Helena v. Merriam, 171 Cal. 135, 152 P. 299. We presume that the judgment is regular, and that there is ample evidence in the record to support the verdict.

[2] The instructions are next questioned by appellant in a manner which is vague and uncertain. Forty-one instructions are printed in appellant's brief, some given and some refused. His attack upon these is made in the following language:

"The appellant contends that the court erred in refusing to give the instructions hereinafter specified and in giving the instructions requested by plaintiff.

"In plaintiff's instructions the court instructed the jury on conspiracy, whereas the testimony produced was destitute of any vestige of conspiracy on the part of appellant.

"Likewise, there was no evidence that Kolmitz or Kronfield was the agent of appellant in this transaction and it was error to instruct the jury on the subject of agency."

No portion of the evidence questioned is printed in the brief, and no instruction is specifically attacked. In keeping with his attitude throughout here again we find appellant proceeding upon the mistaken theory that error is presumed, and that we are going to search through these forty-one instructions in order to find reversible error. The quotation given from appellant's brief is all that he has to say upon the matter of instructions. We deem such a presentation as indicative of an utter lack of confidence in the merit of the point urged for our consideration, and we presume that the court did not err in the giving or refusing of the instructions.

The foregoing disposes of all the contentions made by appellant. The appeal has all the "earmarks" of dilatoriness and borders upon the frivolous.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 148

HALL v. WILLIAMS et al. (two cases).

Civ. 7853, 7854.

District Court of Appeal, Second District, Division 1, California.

April 28, 1932.

Rehearing Denied May 26, 1932.

1. Automobiles ⇐244(11).

Where driver of west-bound truck made left turn without signal, striking east-bound automobile, evidence supported verdict for injured occupants of automobile.

2. Evidence ⇐597.

Evidence sufficient to support verdict is not rendered less sufficient in law merely because other testimony, if believed, would have warranted contrary result.

Appeals from Superior Court, Los Angeles County; Elliot Craig, Judge.

Two separate actions, one by Alice Hall, by Frank Hall, her guardian ad litem, and the other by Frank Hall, against Bill Williams and another, were consolidated for trial. Judgment for plaintiff in each case, and defendants appeal.

Affirmed.

Lon A. Brooks, of Los Angeles, for appellants.

John J. Dillon, of Culver City, for respondents.

CONREY, P. J.

The plaintiff Alice Hall is the mother of plaintiff Frank Hall. Each of them received personal injuries resulting from a collision which occurred between an automobile driven by Frank Hall, and a truck driven by de-

fendant Bill Williams, who at the time was driving said truck as the employee of defendant Leo Honek. The two actions were consolidated for trial. In accordance with the verdict of the jury, damages were awarded in favor of Alice Hall in the sum of $11,000, and in favor of Frank Hall in the sum of $2,500; besides costs.

The sole grounds of appeal are that the verdict of the jury in each case was contrary to the evidence, because (a) in the case of respondent Alice Hall, the injuries were, according to the evidence, caused solely by the negligence of Frank Hall, with whom she was riding; and (b), in the case of Frank Hall, that the appellants' allegation of contributory negligence was established; and in each case that the amounts awarded as damages were excessive.

At the time of the accident in which the plaintiffs' injuries were received, the plaintiffs in their automobile were traveling in an easterly direction on West Adams street in the city of Los Angeles, approaching a cross street named Moynier lane. At the same time the defendant Williams, in a truck belonging to defendant Honek, was approaching the same cross street from the east. The truck made a left turn for the purpose of going south along Moynier lane, at the same time when the automobile of plaintiffs was crossing or about to cross the intersection. According to the testimony of Frank Hall and other witnesses, the truck was traveling at the rate of thirty to thirty-five miles per hour, and continued that speed up to the time of the collision; and defendant Williams made the turn without first giving any signal that he was about to make such turn. By the testimony of those witnesses, or some of them, it further appears that the automobile of plaintiffs was proceeding through the intersection at a speed of not more than fifteen miles per hour, and that the truck, without any signal given, made a sharp turn, which was the proximate cause of the collision.

[1, 2] The argument for appellants is based upon the claimed weakness and improbability of the testimony of the witnesses produced by the plaintiffs, as compared with the stronger and more probable testimony of the witnesses produced by defendants. Taking by itself the testimony which is favorable to the plaintiffs, we find it is sufficient to support the verdict. This being so, such evidence is not rendered any less sufficient in law by the fact that there is other testimony which, if believed by the jury, would have exonerated the defendants from liability in the case.

An examination of the testimony concerning the injuries received by the respective plaintiffs reveals injuries of such serious character, and in the case of Alice Hall reveals injuries of such serious and permanent character, that we are unable to say that the amount of damages awarded is excessive; or that the awards were the result of passion or prejudice on the part of the jury, and were not the result of a fair and unbiased consideration of the evidence.

The judgments are, and each of them is, affirmed.

We concur: YORK, J.; HOUSER, J.

BONNEY et al. v. PETTY et al.*

Civ. 8222.

District Court of Appeal, First District, Division 2, California.

April 26, 1932.

Rehearing Granted May 26, 1932.

1. Appeal and error ⇐843(4).

Objection to sufficiency of original complaint need not be considered where superseded by amended complaint, notwithstanding amended complaint was made to conform to proof.

2. Appeal and error ⇐843(4).

Appellate court reviews only sufficiency of amended complaint to state cause of action, absent demurrer to either original or amended complaint.

3. Pleading ⇐408.

Sufficiency of pleading to state cause of action may be raised at any stage of case.

4. Pleading ⇐8(4).

In action for specific performance of contract to convey realty, complaint must allege facts showing fairness to vendor and adequacy of consideration; allegation in statutory terms being conclusion (Civ. Code, § 3391).

5. Pleading ⇐433(3).

After judgment, amended complaint, defective because alleging conclusion, not facts, sustained action for specific performance of contract to convey realty (Civ. Code § 3391; Const. art. 6, § 4½).

6. Pleading ⇐406(5).

In action for specific performance of contract to convey, amended complaint alleging value of property on making contract and damages on breach inferentially stated value of realty at breach, absent demurrer (Civ. Code, § 3391).

7. Pleading ⇐433(6).

After judgment, amended complaint, if defective because not stating value of realty, sustained action for specific performance (Civ. Code, § 3391; Const. art. 6, § 4½).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 969.

8. Specific performance ⇨114(1).

In action for specific performance of contract to convey, amended complaint stated facts implying vendor's bad faith (Civ. Code, § 3391).

The amended complaint alleged full compliance on the purchaser's part, that vendor canceled the escrow, evidencing the terms of the contract for conveyance, and that he immediately sold the realty to a third person, thus putting performance beyond his power.

9. Specific performance ⇨121(3).

In action for specific performance of land contract, findings for plaintiffs *held* sustained by evidence.

10. Appeal and error ⇨1011(1).

Appellate court cannot disturb finding on conflicting evidence.

11. Specific performance ⇨128(3).

In action for specific performance of land contract, purchaser's damages properly included difference between agreed price and value at breach; vendor having acted in bad faith (Civ. Code, § 3306).

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by L. F. Bonney and another against George M. Petty and others. The action was dismissed as to defendants other than George M. Petty, and, from an adverse judgment, he appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Evans, Pearce & Campbell, and Wm. H. Campbell, all of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

This action was brought for the specific performance of a contract to convey real property. The court found that the defendant George M. Petty, the vendor named in said contract, could not specifically perform, and in lieu thereof awarded the plaintiffs damages in the sum of $7,500, and the additional sum of $500, paid to said defendant in pursuance of the terms of the contract. The action was upon motion for a nonsuit dismissed as to the other defendants. The defendant Petty has appealed. He brought the record to this court under the alternative method.

[1-3] The first error upon which the appeal is predicated is the claim that neither the original nor the amended complaint states facts sufficient to constitute a cause of action. As the original complaint has been superseded by the amended one, it is unnecessary to give further consideration to the former. 21 Cal. Jur. p. 213, § 146. This rule applies even where, as in the instant case, the amended complaint is made to conform to the proof. Dieckmann v. Merkh, 20 Cal. App. 655, 658, 130 P. 27. There has been no demurrer filed to either complaint, and our consideration is therefore confined to the sole question as to the sufficiency of the amended pleading to state a cause of action, which question may be raised at any stage of the case.

[4, 5] It is claimed by the appellant that the complaint is fatally defective because in an action for the specific performance of a contract the plaintiff should allege that the contract is fair, just, and reasonable as to him. There can be no doubt but that such contention is true. The amended complaint does allege, however, "that the said sum of five thousand and no/100ths ($5,000) was an adequate, just, fair and reasonable consideration for said property." Section 3391 of the Civil Code provides that the specific performance of a contract cannot be enforced against a party thereto, "1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable." In Andersen v. Charles, 52 Cal. App. 290, 198 P. 641, it is held that it is necessary in this character of action that the complaint allege facts showing that the contract is just and reasonable as to the defendant and that the consideration received for the contract is adequate, and an allegation in terms to such effect is but the statement of a conclusion. See, also, 23 Cal. Jur. p. 495, § 53; Salisbury v. Yawger, 184 Cal. 783, 195 P. 682; Miller v. Gusta, 103 Cal. App. 32, 283 P. 946. If at this point we were foreclosed of further inquiry into this question, under the last-mentioned decisions, we would be compelled to order a reversal of this case upon that ground, but in the case of Baker v. Miller, 190 Cal. 263, 266, 212 P. 11, 12, it is said concerning a state of pleadings similar to the one here under consideration: "The only averment in that connection is that 'at or about the date of the contract the estate of said deceased was of the appraised value of $22,753, and said contract was in all respects just and fair and liberal in its provisions in favor of said defendant.' Aside from the statement of the value of the estate, there is not here any attempt to state facts at all—nothing more than the general language of the statute, which amounts to a mere conclusion of law without facts to support it. Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67; Stiles v. Cain, 134 Cal. 170, 172, 66 P. 231. If it be contended that the statement of facts in the complaint, including the contract, set out in exact words, together with an allegation of the appraised valuation of the estate, constitute an inferential averment not amounting to an absolute want of

facts, the cases relied upon to support the contention merely hold that if, 'no demurrer is interposed, the pleading will be held good after judgment.' Estate of Behrens, 130 Cal. 416, 418, 62 P. 603, 604. Viewed as a whole we feel there is no escape from the conclusion that the complaint is insufficient, and the general demurrer interposed by the defendant should have been sustained." However, after reciting the facts of that case, the court concluded that "the case presented is one which falls squarely within the constitutional inhibition that no judgment shall be set aside for any error as to any matter of pleading, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[6-8] Although in the case at bar, under the above authorities, the amended complaint is defective, the evidence hereinafter set forth shows that the contract is, as to the defendant, just and reasonable and sustained by an adequate consideration, and the court has so found. After judgment, the amended complaint is sufficient to sustain the action. Objection is also made that the amended complaint is insufficient because it does not allege the value of the property either at the time the contract was made or at the time of its alleged breach. The said complaint does allege the value of the property at the time of the making of the contract as $5,000 and the damage suffered by the plaintiff at the time the contract was breached, as $15,000; this statement we believe, in the absence of a demurrer, inferentially states its value. But we believe that the cause, having gone to judgment, falls within the rule laid down in Baker v. Miller, supra. It is also claimed that there is a failure to allege bad faith; but, taking the entire amended complaint as a whole, it sets forth facts from which bad faith may be inferred. Facts are alleged which show full compliance on the part of plaintiffs, defendant's cancellation of the escrow, and his immediate sale of the property to a third person, thus putting it beyond his power to perform. We think these allegations are sufficient to state a cause of action in that behalf, especially as the evidence is sufficient and there are proper findings of fact.

[9, 10] Objection is also made that material findings and conclusions of law fail to support the judgment. These we will consider after the examination of the evidence.

There is substantial evidence to support the following facts, many of them being uncontradicted: On December 14, 1928, the plaintiffs, as buyers, and defendant Petty, as seller, entered into an agreement whereby the plaintiffs agreed to buy, and the defendant agreed to sell, a certain lot in the county of Los Angeles for the sum of $5,000. The terms of the contract were evidenced by an escrow agreement deposited with the First State Bank of Lawnsdale as the escrow holder. Plaintiffs had paid by check outside of escrow $500 of the purchase price, which was acknowledged in the agreement; $3,000 by check at the time of the execution of the agreement, and under its terms $1,500 was to be paid into escrow on or before January 2, 1929; the balance of the $5,000 was to be used for commissions and other expenses, and was not to be paid into the escrow. The defendant Petty was to deposit in the escrow a deed of the property to be delivered to plaintiffs after recordation upon their payment into the escrow the sum of $4,250; such sum being the total due after deducting the $500 paid out of escrow and a commission of $250. This deed was deposited in escrow within the time limit required. It is provided in the escrow agreement that the holder is the agent of both parties. Under the buyers' agreement, it is provided that the buyers give authority to the escrow holder to use all funds deposited by them to carry out the instructions provided that "on or before January 14, 1929, instruments have been filed for record entitling you to procure assurance of title in the form of a guarantee of title issued by California Title Insurance Company. * * *" The foregoing instructions were accepted and approved in their entirety by the seller. The evidence further shows that on Saturday, December 29, 1928, J. C. Wright, one of the parties to the agreement and a respondent herein, deposited with the escrow a check for $1,511, to pay the balance due, the $11 to pay the escrow charges. This last-named check was drawn on the Huntington Park Bank, a branch bank of the Security First National Trust & Savings Bank at Seventh and Spring streets in Los Angeles. On Monday, December 31, 1928, the Lawnsdale Bank, the escrow holder, sent this check, with others, in a cash letter to the above-mentioned First National Bank above referred to, where it was credited to the account of the Lawnsdale Bank and forwarded to the Huntington Park Bank. The account of J. C. Wright, the maker of the check, amounted to between seven and eight hundred dollars in the last-named bank, and, when the check reached it, the officials telephoned the home of J. C. Wright, and, Wright being away from home, his wife directed the insertion at the head of the check—Seventh and Spring—the head office of the Huntington Park Bank, where Wright had a checking account of about $10,000. This was done, and the check was returned to the Seventh and Spring street bank and received on January 4, 1929.

The escrow bank never knew of this error, which occurred through Mr. Wright having checks of both banks in his pocket and inadvertently using the wrong one, nor was the escrow at any time after December 29, 1928, without credit for the full amount due Petty. On January 4, 1929, the appellant, Petty,

called at the Lawnsdale Bank and inquired if the money was there for him, but was told that there had been no report on the check, and it was suggested that he call next day. He was also advised by the said bank that they had not recorded the deed nor received the certificate of title. Petty left the bank and returned later with a written notice signed by him canceling the escrow.

After demand on Petty to fulfill the terms of the escrow, the plaintiffs commenced this action on January 8, 1929, for the specific performance of the contract or damages in case the first-named relief could not be granted. The case came on regularly for trial March 12, 1929, and on the following day it developed that defendant Petty had sold the property involved an hour before this action was filed, to his attorney, W. E. Lady, for the sum of $7,500, with the understanding between them that, after Lady had received from oil profits from said land the amount of the purchase price, Petty and Lady would then divide any further profits between them. The complaint was thereupon amended, and Lady, together with another party, was brought into the case. The evidence further discloses that for some time prior to the date of the execution of the escrow agreement the property in controversy and the land in that vicinity was being prospected for oil; that considerable excitement had prevailed; that the Standard and other large oil concerns were interested; that at 3 o'clock on the morning of the day the escrow herein was entered into a well not far distant from this land had actually developed oil, although, according to the evidence, neither party knew at the time of such development. There was testimony that, at the time of the making of the contract, the fair market value of the land was from $4,500 to $5,000, which was a fair price, irrespective of the oil strike near by. From the date of the escrow until January 4, 1929, when the defendant Petty gave notice of cancellation, the price continued to increase until on the last-named date the market value was fixed by witnesses as being between $12,500 and $17,500. The court found that at the date of the agreement the market value was $5,000, and, when breached, it had a market value of $12,500. The court also found that defendant Petty acted in bad faith. We think the court's finding is justified by the evidence that, without waiting for a report or return on the check, without waiting until January 14, 1929, for the recordation of the deed, and without waiting for the receipt of the certificate of title, as he had agreed to do, he attempted to cancel the escrow, and had then sold the property in such a manner as to prevent the enforcement of the agreement and to still retain, for all practical purposes, one-half of the income of the property. In any event, this was a question of fact to be determined by the court. It is true that some of this evidence is disputed, but it was for the trial court to determine the conflict, and, having done so, its findings thereon may not be disturbed by us.

[11] It appears from the foregoing that the consideration for the contract was adequate; that as to the defendant it was just and reasonable; and that the defendant acted in bad faith. In such cases the proper measure of damage is fixed by section 3306 of the Civil Code as follows: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach. * * *" Hansen v. Hevener, 69 Cal. App. 337, 231 P. 361. This rule was followed in the present case. The plaintiff was allowed such detriment plus the $500 paid to defendant Petty out of escrow and which he still retains.

A review of the entire record, including all of the evidence, satisfies us that there has not been a miscarriage of justice. Article 6, § 4½, Const. of Cal. The judgment should be affirmed, and it is so ordered.

We concur: SPENCE, Acting P. J., STURTEVANT, J.

123 Cal.App. 173

BOLSON v. BOLSON.

Civ. 4555.

District Court of Appeal, Third District, California.

April 29, 1932.

1. Husband and wife ⇐297.

Evidence in wife's action for separate maintenance *held* sufficient to support court's findings for plaintiff on ground of desertion.

2. Husband and wife ⇐283(2).

Husband's abandonment of wife, while she was mentally incompetent, constituted desertion entitling her to separate maintenance.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Lena Bolson against Harry Bolson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Marcus C. Clark, of Los Angeles, for appellant.

Shapiro & Shapiro and H. Y. Romayne, all of Los Angeles, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action for separate maintenance upon the grounds of desertion and willful neglect. The court found in favor of plaintiff upon all issues, and this appeal is taken from the judgment entered in accordance with the findings.

[1, 2] The sole ground for appeal is that the evidence is insufficient to support the findings.

On October 15, 1919, respondent became mentally ill, and was sent by the authorities of Los Angeles county to Rest Haven, a home for incompetents. Within the year following, she was committed to the State Hospital for Insane at Patton. At the expiration of a month she was paroled from Patton and placed in custody of her mother and sister, where she remained until 1920. During that year she was again sent to Patton, where she remained until October 1, 1924, on which date she was again paroled in the custody of her mother and sister, where she remained and was living when this action was commenced in June, 1928. On May 28, 1928, she was granted a certificate of full recovery from her illness.

Attacking the findings upon the ground of desertion, appellant contends "that the separation was not caused by any action of appellant, but was caused by the mental illness of respondent." What was the conduct of appellant during this trying period? During the time respondent was at Patton, some four years, he visited her but once. During the four and one-half years she was on parole in Los Angeles, he did not call upon her at all. Once, during the latter period, she visited her home and saw her three children. Appellant then told her to "Go home," and said, "Don't stay any more." We are satisfied that there is ample evidence from which the trial court could find that appellant intended to and did desert respondent. His attitude is clearly indicated by his remark made to the sister of respondent, when the latter appealed to him to assist his wife: "I will do nothing because I am not a hypocrite, I don't love her any more and I am not going to do anything." At the trial respondent pleaded with the court to be returned to her family, but this did not strike a responsive chord in the heart of appellant, who maintained an ominous silence. Appellant took respondent for his wife "in sickness or in health," and his abandonment of her during her period of disability is desertion of the most flagrant character. In the case of Murdough v. Murdough, 23 Cal. App. 179, 137 P. 267, the wife contracted consumption. When the husband learned this fact he resolved to live with her no more, and refused to do so. Such proof justified a finding of willful desertion upon the part of the husband.

In view of the foregoing, it is unnecessary for us to discuss the sufficiency of the evidence upon the finding of willful neglect.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

123 Cal.App. 296

KEELING COLLECTION AGENCY v. PENZINER et al.

DE LUCA et al. v. SAME.

Civ. 8394.

District Court of Appeal, First District, Division 2, California.

May 4, 1932.

Rehearing Denied June 3, 1932. Hearing Denied by Supreme Court July 2, 1932.

1. Mortgages ⇨151(3).

Where there was no general contract, liens based on separate, independent contracts with owner subsequent to recording of trust deed *held* subordinate thereto (Code Civ. Proc. § 1186).

2. Mortgages ⇨186(5).

Evidence showed that lien claimants, even if commencing improvement before recording of trust deed, had notice thereof, making lien subordinate thereto (Code Civ. Proc. § 1186).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Keeling Collection Agency, a corporation, and others, against William L. Penziner, the West American Finance Company, C. A. Gibson, R. T. Harper, and others, wherein defendants named, except defendant first named, filed a cross-complaint against R. De Luca and another doing business as De Luca & Son. Judgment for plaintiffs, and the cross-complainants appeal.

Reversed.

Courtney L. Moore, John A. Sinclair, and A. Don Duncan, all of San Francisco, for appellants.

Louis E. Goodman and Louis H. Brownstone, both of San Francisco, for respondent.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

SPENCE, J.

Plaintiff, as assignee of certain lien claimants, brought this action to foreclose four mechanics' liens. The trial court entered its judgment decreeing foreclosure of the liens and further decreeing that said liens were "prior to the deed of trust of defendant West American Finance Company." The defendant West American Finance Company, the beneficiary, and defendants C. A. Gibson and R. T. Harper, the trustees under said deed of trust, appeal from the judgment.

The sole question on this appeal is that of priority as between the liens and the deed of trust. The deed of trust was recorded on September 1, 1927. The parties stipulated that it was executed on August 16, 1927, and was delivered between August 16 and August 19, 1927.

[1] Appellants' first contention is that three of the liens, to wit, those of J. M. Piconi, Gunn, Carle & Co., and the Atlas Heating & Ventilating Company, were subsequent and subordinate to the deed of trust as they are based upon separate and independent contracts made with the owner subsequent to the date of the recording of the deed of trust. In our opinion this contention must be sustained. There was admittedly no general contract for the construction of the building and each of the lien claimants dealt directly with William L. Penziner, the owner of the property. It is conceded that the contracts of these three claimants were all made subsequent to September 1, 1927, and that said lien claimants thereafter performed the work and furnished the materials under said contracts. The deed of trust therefore had priority over the liens of the three claimants above mentioned. Powers v. Soule-Martin Lumber Company, 209 Cal. 557, 289 P. 809; McClain v. Hutton, 131 Cal. 132, 61 P. 273, 63 P. 182, 622; E. K. Wood Lumber Company v. Mulholland (Cal. App.) 5 P.(2d) 669; Consolidated Lumber Company v. Bastien (Cal. App.) 5 P.(2d) 80; K. & K. Brick Company v. Brooke (Cal. App.) 5 P.(2d) 49; American Building Service Company v. Wallin (Cal. App.) 2 P.(2d) 1007.

[2] With respect to the remaining lien, the contract with the owner was executed August 24, 1927. The lien claimants were De Luca & Son, a partnership consisting of R. De Luca and his son John De Luca. No actual work was done by De Luca & Son on the premises until after the recording of the deed of trust on September 1, 1927, but on August 26, 1927, they piled some used form lumber on the sidewalk in front of the adjoining property. Respondent strenuously insists that August 26th was the time when the improvement was commenced within the meaning of section 1186 of the Code of Civil Procedure and that the lien of De Luca & Son attached at that time. We are not called upon to decide this question, for in our opinion, even assuming that the improvement was commenced on said date, said lien does not have priority over the then unrecorded deed of trust because said lien claimants had notice thereof. Under said section 1186 it is only where the lien claimant has no notice of an unrecorded deed of trust or mortgage that the lien has priority. Root, Neilson & Co. v. Bryant, 57 Cal. 48.

In the present case a representative of the finance company went to see Mr. R. De Luca during the month of August, 1927, and informed him that appellant West American Finance Company was contemplating financing the building on the premises involved. The owner, Mr. Penziner, had given Mr. De Luca's name to the finance company as a reference in connection with his application for a loan of $150,000. Mr. De Luca informed the representative that Mr. Penziner had always paid him and further said that: "He (De Luca) thought he would get the contract, that he was the lowest bidder." On August 24th, when the contract was executed, both Mr. R. De Luca and Mr. John De Luca were present as well as Mr. Penziner, and the building loan was freely discussed. According to the testimony of Mr. John De Luca, Mr. Penziner told them that "he had his loan" of $150,000 from the West American Finance Company. Mr. R. De Luca testified that Mr. Penziner told them at that time that "he had a building loan," but the witness did not remember whether Mr. Penziner mentioned the name of the lender. Before signing, the following clause was written into the contract with De Luca & Son: "This, a copy not to be recorded or used till building loan is recorded." Both the father and son admitted further discussion at that time regarding the insertion of this clause, and pursuant thereto, the contract was not in fact recorded until some time after September 1, 1927. We need not discuss whether this clause constituted an express waiver of priority or created an estoppel to claim priority as contended by appellants. The testimony without conflict shows that both Mr. R. De Luca and Mr. John De Luca had actual notice that the loan had been consummated and expressly agreed that the "building loan" was to be recorded before their contract was to be "recorded or used." We are therefore of the opinion that because of such notice on the part of the lien claimants the deed of trust of appellants had priority over the lien of De Luca & Son.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 281

GRAY v. HECKE et al.

Civ. 4645.

District Court of Appeal, Third District, California.

May 2, 1932.

Rehearing Denied June 1, 1932. Hearing Denied by Supreme Court July 1, 1932.

Appeal and error ⇐627(2).

Where no transcript has been filed on appeal and its filing has become a physical impossibility, motion to dismiss appeal will be granted.

The filing of the transcript became a physical impossibility because the court reporter who made the phonographic record died before he had transcribed his record, and the trial court certified that he did not have sufficient memory to recall the proof made, and the attorneys could not agree to stipulate the record on appeal.

Appeals from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by John Gray against G. H. Hecke and others. Judgment for defendants, and plaintiff appeals.

On motion to dismiss the appeal.

Motion granted.

John Gray, in pro. per.

U. S. Webb, Atty. Gen., Jess Hession, Dep. Atty. Gen., Charles A. Bliss, of Sacramento, Earl Warren, Dist. Atty., and James H. Oakley, Dep. Dist. Atty., both of Oakland, and Guard C. Darrah, Dist. Atty., and Daniel V. Marceau, Dep. Dist. Atty., both of Stockton, for respondents.

Mr. Justice pro tem. ANDERSON delivered the opinion of the court.

This is an application on the part of respondents by motion to dismiss the appeal from the judgment therein, and also dismiss the appeal from the order granting a new trial, on the following grounds:

The notice of appeal from the judgment was filed February 6, 1931, and the bill of exceptions therein December 6, 1931. The notice of appeal from the order granting new trial was filed April 10, 1931, and the bill of exceptions thereon filed December 28, 1931; more than thirty days have elapsed since filing of said appeal, and no transcript has been filed in the appellate court.

The authorities submitted in support of said motion are: 2 California Jurisprudence, page 757, and it is further contended that the appellant, in his appeal record, has violated rule VIII of the appellate court, and this is supported by the case of Thomas J. Haverty Co. v. Pacific Indemnity Co. et al. (Cal. App.) 4 P.(2d) 214.

In response to the motion to dismiss, appellant cites authorities in which the Supreme Court and appellate courts have excused the delay in some instances, to wit, Gould v. Stafford, 77 Cal. 66, 18 P. 879; Robinson v. Robinson, 158 Cal. 117, 110 P. 112; Grant v. De Lamori, 71 Cal. 329, 12 P. 228; Chapman v. Bank, 88 Cal. 419, 26 P. 608.

We have examined these authorities, but fail to see where they meet the situation here, and fail to see where further delay can help the situation here. The trial court has granted the motion for a new trial and has refused to certify the record on appeal in order to complete the record, and the court has given the very sufficient reason for refusing to do so, that the court reporter who made the phonographic record is deceased and he did not transcribe his record, but the attorney refused to stipulate as to the record, and the judge who tried the case has certified that he has not sufficient memory to recall the proof made.

It thus appears to be a physical impossibility to proceed.

We feel that any further continuance could avail nothing and that there is nothing to do but to grant the motion.

The motion is granted; appeal dismissed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 233

PEOPLE v. DE VOE.

Cr. 2148.

District Court of Appeal, Second District, Division 1, California.

April 30, 1932.

Rehearing Denied May 13, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. Criminal law ⇐982.

Trial court *held* not to have abused discretion in denying request of accused, found guilty of grand theft, to withdraw application for probation.

2. Criminal law ⇐982.

Where leave to withdraw accused's application for probation was denied, probation subsequently granted must be considered to have been granted on accused's application.

3. Criminal law ⇐982.

Application for probation *held* waiver of accused's right to have judgment pronounced

prior to order granting probation (Pen. Code, § 1191).

4. Criminal law ⇨371(2).

Evidence as to accused's misappropriation of employer's property other than that included in indictment *held* proper to prove criminal intention.

5. Criminal law ⇨1036(2).

Where accused made no objection to cross-examination as to refusal to answer certain questions before grand jury on ground that answers might tend to incriminate her, objection on appeal cannot be considered.

6. Criminal law ⇨814(17).

Where direct evidence is relied on for conviction and circumstantial evidence is merely incidental and corroborative, instruction on law of circumstantial evidence need not be given.

7. Criminal law ⇨1134(2).

Assignment of error as to failure to instruct on law of circumstantial evidence must be tested by single count on which accused was convicted.

8. Criminal law ⇨784(1).

Where principal evidence in relation to count on which accused was convicted consisted of that of complaining witness and accused, refusal to instruct on law of circumstantial evidence was proper.

9. Criminal law ⇨957(1).

Where examination of jurors was permitted to determine whether verdict was result of lot or chance, questions relating to proceedings other than single permissible inquiry whether conviction was not possibly result of lot or chance *held* properly excluded.

HOUSER, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Daisy I. De Voe was convicted of grand theft, and she appeals.

Affirmed.

See, also (Cal. App.) 300 P. 874.

William B. Beirne, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J.

In this action the defendant presents three appeals: (1) An appeal from an order made and entered on the 2d day of February, 1931, denying appellant's motion for a new trial; (2) an appeal from an order make and entered on the 10th day of February, 1931, placing appellant upon probation for a period of five years, suspending imposition of judgment and sentence, and ordering appellant confined in the county jail of Los Angeles county for a period of eighteen months; (3) an appeal from an order made and entered on the 24th day of February, 1931, denying appellant's motion for a new trial made upon the ground that judgment had not been pronounced within the statutory period prescribed by section 1191 of the Penal Code.

By indictment the defendant was charged in thirty-seven counts with the crime of grand theft. To each count the defendant pleaded not guilty. Two counts were dismissed at the trial, and on thirty-four counts the defendant was found not guilty. On count seven, wherein defendant was charged with the theft of $825, the defendant was found guilty. The verdict was returned and duly entered in the minutes of the court on the 23d day of January, 1931, and the pronouncing of judgment as to count seven was set for January 26th. At this time the defendant presented a motion for a new trial, and hearing on said motion and the pronouncing of judgment were continued to February 2d. On February 2d the motion for new trial was denied, and the defendant applied for probation. The passing on said application for probation and the pronouncing of judgment were thereupon set for February 10th. On February 10th defendant made application for permission to withdraw her application for probation. Permission to withdraw application for probation was denied, a probation report was filed, and the court ordered "that proceedings as to count 7 of the indictment be suspended and said defendant granted probation for a period of five years under the following conditions: the first eighteen months of said probation period, defendant shall remain in the county jail. Defendant shall report to probation officer and follow his instructions."

On February 11th the defendant filed a notice of appeal "from the order and judgment of the court made and entered in the above-entitled cause on the 10th day of February, 1931, placing said defendant on probation for a period of five years and ordering that she be confined in the county jail of Los Angeles county for a period of eighteen months."

On February 4, 1931, the defendant filed a written notice of appeal "from the order of the above-entitled court made and entered on the 2nd day of February, 1931, denying her motion for a new trial of the above-entitled cause, which motion was made by defendant in open court on the 26th day of January, 1931."

[1-3] Some phases of the case in relation to said probation order were brought to the at-

tention of this court in June, 1931, upon an application of appellant for a writ of habeas corpus, at which time the petitioner was remanded to custody. Matter of De Voe (Cal. App.) 300 P. 874. In that case the record of the proceedings of the court upon the application of defendant to be admitted to probation and her subsequent attempted withdrawal of that application, was the same as the record of the same transactions as shown in this appeal. As was indicated in the decision in said habeas corpus case, we are satisfied that the trial court, in the exercise of its discretion, was justified in making its order by which the request of the defendant to withdraw her application for probation was denied; that the subsequent action of the trial court in granting probation to the defendant must be considered solely as the result of her own application directed to that end; and that the said application for probation constituted a waiver of the defendant's right to have judgment pronounced prior to the making of an order granting to her the probation which she sought. It follows that the appeal of defendant from the order placing her on probation for a period of five years and ordering that she be confined in the county jail of Los Angeles county for a period of eighteen months is without merit. This leads to the further consequence that the appeal of the defendant from the order entered on the 24th day of February, 1931, denying her motion for a new trial upon the ground that judgment had not been pronounced within the statutory period prescribed in section 1191 of the Penal Code, is without merit.

There remains for consideration the appeal of defendant from the order made on February 2, 1931, denying her motion for a new trial. Appellant admits that the evidence is sufficient to support the verdict. She contends, however, that there was other evidence amply sufficient to have justified a verdict of acquittal if the jury had so found. And she contends that the errors in the trial, of which she complains, were more prejudicial to her than such errors might be in a case where the evidence unquestionably establishes the guilt of a defendant. The questions before us, therefore, cover the errors assigned and also the probable effect of such errors as may have been committed.

[4] First we have a series of rulings whereby the court permitted the introduction of evidence to prove misappropriation by defendant of funds and other property of the complaining witness, other than those included in the charges of the indictment. (App. Opening Brief, pp. 21 to 75.) We are of the opinion that the court did not err in allowing the introduction of this evidence. Appellant had been the employee, in a confidential position, of the complaining witness. On leaving this employment appellant had taken away sundry items of her employer's property. This included checks, check books, letters, jewelry, etc. When the check books were taken from defendant, some of the checks which had been issued, as shown by the check stubs, and which had been paid, were missing, and in connection with some of the accusations in this case it became necessary to trace the missing checks. In some instances (as in the one upon which conviction was obtained) there was evidence that the employer had signed the check in blank and left it with the defendant to be filled out in accordance with given instructions. It was necessary, therefore, to ascertain, first, whether defendant violated the employer's instructions and appropriated the money to use different from the instructions, and, second, whether the misapplication was accomplished with criminal intent. It was for the purpose of proving the existence of a criminal intention and plan of defendant in relation to her employer's affairs that the evidence now in question was admitted.

Appellant contends that the court erred in refusing to permit her to give testimony by way of explanation of some of the facts relating to the above-mentioned transactions. Apparently these rulings related to improper forms of questions, and irrelevancies in answers given. The defendant was not prevented from producing such evidence as was appropriate to the matters under investigation.

[5] Another assignment of error: That the trial court erred in permitting the prosecution to cross-examine appellant with reference to certain testimony given by her before the grand jury, and with reference to appellant's refusal to answer certain questions before that body upon the ground that they might tend to incriminate her. It does not appear that in the trial court any objection was made to this cross-examination. It is suggested by respondent that the questions were appropriate under the provisions of section 926 of the Penal Code. At any rate, on this record, the matter should not be considered. Present counsel for defendant, it may be noted, was not her attorney at the trial of the action.

Misconduct of the court, in making certain comments about the progress of the trial, is now charged by appellant, although no such complaint was made in the trial court. We think that the point is without merit.

[6-8] The defendant asked the trial court to instruct the jury as follows: "If the evidence relating to any circumstance in this case is, in view of the evidence, susceptible of two interpretations, one of which would point to defendant's guilt, and the other would admit of her innocence, then, it is your duty in considering such evidence, to adopt that interpretation which will admit of the defendant's innocence and reject that which

would point to her guilt." It is contended by appellant that the court erred in refusing this instruction.

The proposed instruction correctly states the law, and should be given whenever proof of some essential fact is necessary to sustain a verdict against the defendant, and the proof of such fact depends upon circumstantial evidence. People v. McClain (Cal. App.) 1 P.(2d) 1085. But where the prosecution relies for conviction upon direct evidence, the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given. 8 Cal. Jur. p. 369; People v. Lapara, 181 Cal. 66, 183 P. 545. In the present case, since appellant was convicted on only one count, the assignment of error must be tested by that count only, and the evidence in relation thereto. The principal evidence in relation to that count consists of the testimony of the complaining witness, and that of the defendant. In harmony with the decisions above cited, it appears to be a reasonable conclusion that the court did not err in refusing the requested instruction.

[9] Defendant moved for a new trial basing her motion upon all of the statutory grounds for such motions. One of these is that the verdict of guilty rendered by the jury was decided by lot. Appellant, claiming that the jurors had refused to make affidavits as to whether or not the verdict had been arrived at by lot and chance, asked leave to examine the jurors in open court. This was permitted. Nevertheless, appellant now contends that the court erred in refusing to allow the witnesses to answer some of the questions put by appellant's counsel. The court's rulings were made in accord with its effort to confine the inquiry to the single subject of the inquiry, viz.: Was the verdict decided by lot or chance? The questions which the court ruled out were part of a line of inquiry well calculated to exceed the permitted limit of investigation into the deliberations and proceedings by which a jury arrives at a verdict. These questions called upon the witness to give information concerning matters connected with the proceedings of the jury, *other than* the single permissible inquiry related to the conviction on count seven as (possibly) the result of a determination of the issue by chance or lot. This may not be done. Whiting v. Squeglia, 70 Cal. App. 108, 118, 232 P. 986; People v. Reid, 195 Cal. 249, 261, 232 P. 457, 36 A. L. R. 1435.

We have reached the conclusion that the order denying defendant's motion for a new trial is without error.

The orders from which defendant appeals are, and each of said orders is, affirmed.

I concur: YORK, J.

HOUSER, J., (concurring).

I concur in the judgment herein, with the exception only of that part thereof by which it is held that no error was committed by the trial court in its hearing of the motion for a new trial wherein defendant was denied the right of adducing evidence relative to the question of whether in arriving at its verdict the jury reached its conclusion "by lot, or by any means other than a fair expression of opinion on the part of all the jurors." Subdivision 4, § 1181, Pen. Code.

In ordinary circumstances and as applied to facts which usually are present where the integrity of a verdict is challenged, I should have no hesitancy in subscribing to the doctrine so generally announced in the prevailing opinion herein. But in the instant case, as portrayed by the record of the proceedings which occurred at the time when the hearing was had, the situation is of such an extraordinary character that, in my opinion, the rule which forbids a juror to impeach his verdict has no application. Indeed, as later may be made to appear herein, by the terms of the statutes, as well as by judicial construction of the law, where on a motion for a new trial the contention of the defendant in a criminal action is to the effect that the verdict was reached "by chance," the affidavit of a juror to that effect is admissible.

In order that a better understanding may be had of the situation which prevailed at the time when the defendant was denied the right to inquire from the members of the jury into the manner adopted and pursued by the jury in arriving at its verdict of guilt of the defendant as to a particular count set forth in the indictment, it is deemed advisable that a more complete statement of the pertinent facts be made herein. As is indicated in the opinion of my associate, because of the fact that "the jurors had refused to make affidavits as to whether or not the verdict had been arrived at by lot and chance," leave was granted "to examine the jurors in open court." At the time when on such examination the defendant attempted to elicit from the members of the jury the facts which related to the alleged irregularity or misconduct of the jury in the matter, the following verbatim questions and answers, together with remarks made by the trial judge in connection therewith, as appears from the reporter's transcript of the proceedings, will serve to exemplify the attitude of and the ruling by the trial court with reference to a consideration of the ultimate question of whether the verdict of the jury was "decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors" (subdivision 4, § 1181, Pen. Code):

"Q. Will you state to the court the manner in which the vote on that verdict was arrived at?

"Mr. Clark (Deputy District Attorney): Object to that on the ground it is too general.

"The Court: Sustained. * * *

"Now, the only inquiry you can make— * * * You will have to confine your inquiry to the question, in effect, was this verdict arrived at by lot or chance. Now, the witness ought to know what that means and I am explaining my position to you to save us trouble in connection with the inquiry you are about to make.

"Mr. Beirne (Attorney for Defendant): I intentionally refrained from that question as I figured it was calling for a conclusion of the witness.

"The Court: No, I think those are simple questions in the English language that we all know, and it is not objectionable because it calls for a conclusion of the witness. * * *

"Q. (By the Court) You know what deciding a question by lot or chance means, do you not, Mr. Smith? * * * A. I do.

"Mr. Beirne: Q. Was the verdict of the jury in this case on count seven, as returned, arrived at by the jury by lot or chance?

"The Court: Answer the question. A. *Well, I don't know just exactly how to answer it.*

"The Court: You don't know how to answer it? A. I can tell it was voted on by one vote, arrived at by one vote.

"The Court: You mean they took a ballot on it? A. Took one ballot on it, yes. * * *

"The Court: Did you put anything in a box, or draw anything out, do any speculating? A. No, we did not.

"Mr. Beirne: With respect to that question, your Honor, if you Honor will proceed and ask further questions as to other methods of chance, I think that would be very proper, but that is not the only method of chance or lot.

"The Court: I think the witness has answered the question. * * *

"Mr. Beirne: I think the court should have before it the evidence of how that last verdict was arrived at.

"The Court: I am not interested in it at all.

"Mr. Beirne: So that the court can determine whether it was a verdict by lot or chance.

"The Court: I am not interested in that speculation. * * *

"Mr. Beirne: For the purpose of the record may it be considered I have asked this juror the following question, asked him whether or not the verdict was arrived at in the manner as described—

"The Court: No, that would not be giving the juror and the jurors the protection to which they are entitled, * * * Ask the question in the form that you want it and you understand, don't answer it until the court rules.

"Mr. Beirne: Q. Mr. Smith, was the verdict of guilty on count seven arrived at in the following manner by the jurors in this case: It was agreed among all the members of said jury that the vote of not guilty upon the three counts aforesaid should be set aside, and the same was set aside, and it was then decided and agreed upon, which decision and agreement was immediately acted upon and executed by said jury, that the eight members of said jury who were contending for a verdict of not guilty on all counts, should vote guilty on one count of said indictment, and for a verdict of not guilty upon all other counts of said indictment, and the members of said jury who contended for a verdict of guilty on various of the counts of said indictment other than the three counts on which they had formerly voted not guilty, should vote for a verdict of not guilty on thirty-four counts of said indictment and for a verdict of guilty upon one count thereof; that this method was planned and adopted as a means of relieving the members of said jury from further physical restraint—

"The Court: Don't answer the question.

"Mr. Beirne: That this plan and proposal was accepted by all members of said jury, and it was further agreed as a part and parcel of said plan that the count upon which all members had agreed to vote guilty should be selected at random; that thereupon count seven of the indictment was so selected at random, a verdict of guilty was returned thereon without due, or any deliberation as to, or consideration of, the evidence that had been adduced upon said count and without due, or any consideration of the law applicable thereto.

"Mr. Clark: I object to that on the ground it is immaterial.

"The Court: Objection sustained."

In effect, it was then stipulated that had the remaining jurors been asked questions identical with those asked of the one juror they would have "made the same answers and the court made the same rulings. * * *" In connection with an inquiry made by counsel for defendant of the deputy district attorney in charge of the prosecution as to whether he would stipulate that "they (the jurors) would answer that question," the judge of the trial court remarked, "I wouldn't let them answer it, if he did stipulate to it."

From a consideration of the quoted portion of the reporter's transcript of the proceedings which occurred at the time when the matter was before the court, it thus becomes plain that the only pertinent questions which defendant was permitted to ask of the juror and to have answered by him were the bald interrogatories as to whether the verdict was "arrived at by the jury by lot or chance"; and as to whether the jurors "put anything in a

box, or draw anything out, do any speculating." As to the first question, it is clear that the juror expressed himself as not knowing "exactly how to answer it." As to the second question, although the juror indicated that nothing was either placed within "a box," or withdrawn therefrom, or that "any speculating" was resorted to by the jury in arriving at its verdict, it is not without the bounds of probabilities that some unidentified practice or form of other modes of selection by lot or by chance was adopted and carried out by the jury in reaching its decision. At least as much may be readily surmised from the reply made by the juror that he did not know "just exactly how to answer" the question as to whether the verdict was "arrived at * * * by lot or chance." That such speculation is not far from the truth may also be indicated by the fact that as to the particular count of the indictment of which defendant was found guilty, judged from the record herein, the evidence introduced by defendant not only was sufficient to have caused the existence of a reasonable doubt in the "mind" of the jury as to the guilt of defendant, but, going beyond such a situation, the evidence very largely preponderated in favor of the innocence of defendant; whereas, as to each of several other counts in the indictment of which defendant was found "not guilty," the evidence taken as a whole, would appear to have been much more satisfactory in quality and quantity and more nearly freed from any question of reasonable doubt regarding the guilt of defendant.

As hereinbefore has been indicated, the rule by which jurors "are legally disabled to impeach their verdict by any means" does not extend to a situation wherein the verdict is challenged on the ground that it "had been decided by lot." People v. Reid, 195 Cal. 249, 261, 232 P. 457, 462, 36 A. L. R. 1435.

In the cited authority (195 Cal. 249, 261, 232 P. 457, 462, 36 A. L. R. 1435), it is said: "Upon well-grounded considerations of public policy jurors are legally disabled to impeach their verdict by any means, whether it be by affidavits or by testimony or by extra judicial statements. People v. Azoff, 105 Cal. 632, 635, 39 P. 59; People v. Findley, 132 Cal. 301, 308, 64 P. 472; Saltzman v. Sunset T. & T. Co., 125 Cal. 501, 504, 58 P. 169; Fredericks v. Judah, 73 Cal. 604, 607, 15 P. 305; Siemsen v. Oakland, S. L. & H. Elec. Ry., 134 Cal. 494, 498, 66 P. 672. This is the general rule throughout the United States, and it is almost universally held that the only exceptions to it are those in which the legislatures of the several states have by express enactment authorized such attack upon the verdict. See notes to 5 L. R. A. 523; 11 L. R. A. 706; 12 Am. Dec. 143, 29 Cyc. 982. The only exception so made in this state is in the case of so-called 'chance verdicts.' Code Civ. Proc., § 657, subd. 2." See, also, People v. Kromphold, 172 Cal. 512, 524, 157 P. 599, and authorities there cited.

Subdivision 4 of section 1181 of the Penal Code is to the effect that when a verdict has been rendered against a defendant the court may grant a new trial "when the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors." By subdivision 2 of section 657 of the Code of Civil Procedure it is provided that a verdict may be vacated and a new trial granted "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance," and that "*such misconduct may be proved by the affidavit of any one of the jurors.*"

That the usual practice in this state has been to set up in affidavits the *facts* which constitute the alleged misconduct of the jury, rather than the bare statutory conclusion which may be inferred from the facts, is readily established by a consideration of any of the numerous cases which have been ruled upon by the appellate tribunals of this state wherein a question like that here under consideration has been a subject of appeal. Nowhere has it been even intimated that an affidavit containing the mere conclusion of a juror, or any other person, that the decision rendered by the jury was a "chance verdict," or that it was "arrived at by lot," would be sufficient either in form or in substance. Necessarily the question of whether the alleged action or conduct of the jury in the premises constituted a decision by that body "by chance," or "by lot," is one of law to be determined by the trial court on the consideration by it of the relevant facts.

Although by the language contained in subdivision 2 of section 657 of the Code of Civil Procedure it is provided that the misconduct of the jury "may be proved by the affidavit," not only in reason, but as well in view of certain decisions by the Supreme Court of this state in analogous situations relative to alleged misconduct of juries, it may not be doubted that on the hearing of a charge of misconduct of the character of that here under consideration evidence of such misconduct is not limited to "the affidavit of any one of the jurors," but that such misconduct may be established by any competent evidence thereof, including the oral testimony of jurors or other persons. People v. Tucker, 117 Cal. 229, 230, 49 P. 134; People v. Sullivan, 129 Cal. 557, 562, 62 P. 101. Particularly should such rule obtain where, as in the instant case, the jurors have refused to make an affidavit and no other means of establishing their misconduct is available to the aggrieved party.

To my mind it is quite clear that, in the absence of any express statute by the terms of which the method of establishing the ultimate

fact as to whether a challenged verdict was "arrived at" by lot or by chance is indicated, the aggrieved party should not be restricted either in the detail of pertinent facts which may be set forth in an affidavit of a juror or other person, or in the introduction in evidence of competent and relevant facts either by oral examination of jurors or other persons, or by the introduction of writings or other documents. In other words, on a hearing of a charge of misconduct of a jury to the effect that its verdict was reached either "by a resort to the determination of chance," or that the verdict was decided "by lot," the same rules should apply in the determination of such an issue as ordinarily obtain in the trial of an action or other proceeding before the court. The proper object of a trial or any proceeding is to arrive at the relevant and pertinent truth. Our laws pretend to vouchsafe to a defendant that on a criminal charge preferred against him he will receive a fair trial. Although it is of great importance that the guilty be punished, such a termination of the trial of a guilty violator of a criminal statute fades into insignificance when are considered the possible, or even probable, results which may flow from a continual denial of justice. In my humble opinion the precedent which will or may be eventually established by the judicial affirmance of what amounts to a refusal to hear competent evidence relating to a charge of misconduct of the jury in a particular such as is herein specified is far-reaching in its effect and completely overshadows the possible failure to bring to justice a probably guilty defendant.

123 Cal.App. 153

TROMANHAUSER v. GRISEMER.

Civ. 395.

District Court of Appeal, Fourth District, California.

April 28, 1932.

Rehearing Denied May 19, 1932. Hearing Denied by Supreme Court June 27, 1932.

1. Appeal and error ⇐78(4).

Order of nonsuit when entered in minutes of court constitutes "final judgment" of nonsuit, and is dismissal of action (Code Civ. Proc. § 581, subd. 5).

Code Civ. Proc. § 581, subd. 5, provides that the dismissals mentioned in subdivisions 3, 4, and 5 of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered; but the clerk of the court must note such orders in his register of actions in the case.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

2. Appeal and error ⇐347(1).

Time within which appeal may be taken from judgment of nonsuit begins to run from date of entry of order of nonsuit in minutes of court (Code Civ. Proc. § 939, and § 581, subd. 5).

3. Appeal and error ⇐347(1).

Where notice of appeal from judgment of nonsuit was filed more than 60 days after entry of order of nonsuit in minutes of court, appeal was dismissed (Code Civ. Proc. § 939, and § 581, subd. 5).

4. Appeal and error ⇐356.

Where appeal from judgment of nonsuit was filed too late, appeal presented moot questions, and was dismissed.

Appeal from Superior Court, Tulare County; K. Van Zante, Judge.

Action by Leslie Tromanhauser against N. B. Grisemer. From a judgment of nonsuit as to four causes of action, and a judgment for defendant on a fifth cause of action, plaintiff appeals.

Appeal dismissed in so far as it relates to nonsuit, and judgment on fifth cause of action affirmed.

Harry A. Wishard, of Fresno, for appellant.

Guy Knupp, of Porterville, for respondent.

THOMSON, Justice pro tem.

This is an action for damages. The first four causes of action are for damages for slander, and the fifth cause of action is for damages for false imprisonment. The case came on for trial before a jury December 18, 1930. After plaintiff had rested on the first four causes of action, defendant made a motion for a nonsuit as to each of the causes of action in said complaint, and the motion was granted as to the first, second, third, and fourth causes of action, and denied as to the fifth cause. By stipulation of the parties, the jury was then discharged, and the trial proceeded before the court without a jury on the fifth cause of action, and, after the matter had been submitted on briefs filed by the respective parties, judgment was rendered for defendant on said fifth cause. Findings of fact and conclusions of law were filed on February 21, 1931, and the judgment was entered on February 24, 1931. The order of the court granting the nonsuit on the first four causes of action was entered by the clerk in the minutes of the court on December 18, 1930, and on the same day the clerk noted such order in the register of ac-

tions. The notice of appeal was filed March 31, 1931, the material portion of which is as follows: "Notice is hereby given that the plaintiff, Leslie Tromanhauser, does hereby appeal * * * from the judgment heretofore rendered in the above entitled action and from the whole thereof. Said judgment was entered on the 24th day of February, 1931." No appeal was taken from the order granting the nonsuit.

Appellant seeks a review by this court of the trial court's action in granting respondent's motion for a nonsuit, but offers no objection to the judgment so far as it relates to the fifth cause of action, and, in fact, has not included in the record on appeal any transcript of evidence relating to said fifth cause of action. Respondent, however, contends that no valid appeal has been taken from the judgment of nonsuit on the first four causes of action, basing his contention on section 581 of the Code of Civil Procedure, the material portions of which are as follows: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered; but the clerk of the court must note such orders in his register of actions in the case."

[1] We are of the opinion that respondent's contention is meritorious, and that the trial court's action in granting such nonsuit cannot be reviewed on this appeal. Since the amendment of 1897 to the foregoing section, which added the last sentence of said section above quoted, none of the orders or judgments provided to be made by the court under said section need be entered in the judgment book or appear in any record, except that containing the minutes of the court. It should be mentioned in passing that, in addition to the entry of the order in the minutes, the statute also specifies a clerical duty of noting it in the register of actions, but, in case the clerk should neglect this ministerial duty, it would not affect the validity of such order of nonsuit as a final judgment. Marks v. Keenan, 140 Cal. 33, 34, 73 P. 751. The statute now provides that the entry of the order of nonsuit is "effective for all purposes." The entry of the order, therefore, is equivalent to a final judgment, and it finally disposes of the matter to which it relates. It is not necessary that a formal judgment of dismissal follow the order granting the motion for a nonsuit. The order of nonsuit, when entered in the minutes of the court, constitutes the judgment of nonsuit and is a dismissal of the action, or those causes of action to which it relates, since the statute declares that such an order so entered in the minutes is "effective for all purposes." Otherwise the words last quoted would be meaningless. 9 Cal. Jur., p. 565; Bengel v. Traeger, 100 Cal. App. 526, 528, 280 P. 538; Burks v. Bronson, 58 Cal. App. 143, 144, 207 P. 1018; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 140, 141, 154 P. 882. It is apparent that the statute contemplated that the order granting a nonsuit should be final, for it provides that "a judgment of nonsuit" may be entered. The language of the statute nowhere indicates that the "judgment of nonsuit" is only an intermediate step which must be followed by a more formal decree to become final. Brown v. Sterling Furniture Co., supra; Henry v. Lingsweiler, 81 Cal. App. 142, 144, 253 P. 357.

This proceeding under said section 581 must be distinguished from judgments entered and docketed pursuant to sections 664, 671, and 672 of the Code of Civil Procedure, which refer to decisions of the court in favor of either of the parties; whereas, if a nonsuit is granted, there is really no decision in favor of either party. Bengel v. Traeger, supra.

In the case at bar, the formal findings of fact and conclusions of law filed February 21, 1931, recite the fact that, when the plaintiff rested his case, the defendant moved for a nonsuit, which motion was argued, submitted to the court, and granted by the court; and the formal judgment filed February 24, 1931, recites the fact that such motion was granted and the nonsuit as to said first four causes of action entered herein. The formal judgment did not purport to grant the nonsuit. There is nothing in the findings or conclusions of law or the judgment entered thereon to indicate that the order granting the nonsuit as entered in the minutes was in any way not final. In fact, the language used in the findings and conclusions of law and in the judgment thereon shows that the entry of the order of nonsuit in the minutes was a final disposition of said first four causes of action.

[2, 3] The entry of the order of nonsuit in the minutes being in its nature a final judgment and being "effective for all purposes," it must be so treated for the purpose of appeal. It therefore follows quite logically that the time within which an appeal may be taken from said judgment of nonsuit begins to run from the date of such entry in the minutes. Matthai v. Kennedy, 148 Cal. 699, 700, 84 P. 37; Lewis v. Hammond Lumber Co. (Cal. App.) 300 P. 49. The judgment of nonsuit in the case at bar was entered in the minutes of the trial court on December 18, 1930. Notice of appeal herein was filed on March 31, 1931, more than 60 days after such entry of said nonsuit in the minutes,

and therefore the purported appeal from the judgment of nonsuit was taken after said judgment of nonsuit had become final. Consequently such purported appeal is ineffectual. Code Civ. Proc., § 939.

[4] In view of our decision on the question of the purported appeal from the order of nonsuit, a review of the trial court's action in determining the motion for a nonsuit and of the other matters presented in the briefs on appeal would present merely moot questions, for the reason that, regardless of the conclusion to which such a review might lead, the judgment of nonsuit, having become final could not be disturbed. Finch v. Ekstrom (Cal. App.) 1 P.(2d) 516.

The purported appeal, in so far as it relates to the nonsuit entered on the first, second, third, and fourth causes of action, is dismissed, and the judgment on the fifth cause of action is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 283

BROWN v. BROWN.

Civ. 4543.

District Court of Appeal, Third District, California.

May 2, 1932.

1. Divorce ⇐133(3).

In husband's California divorce action for wife's desertion, wife's statements made subsequent to period embraced in prior Nevada divorce suit sufficiently proved desertion thereafter.

Husband commenced suit for divorce in Nevada, because of his wife's alleged desertion, and, after commencement of that suit, the wife stated that she had never cared for, and did not wish to live with, her husband. The Nevada court denied relief to either party, and the husband, having changed his residence to California, subsequently started another action for divorce because of his wife's desertion.

2. Divorce ⇐171.

Prior Nevada decree denying divorce for wife's desertion *held* not res judicata in California action, where wife's statements justifying divorce for desertion were made after period properly embraced in Nevada suit.

3. Divorce ⇐37(22).

Wife's desertion long after husband's alleged cruelty was unjustified, even if prior foreign decree denying divorce had found husband guilty of cruelty (Civ. Code, § 98).

4. Divorce ⇐171.

In California divorce action, court properly disregarded findings of Nevada court respecting plaintiff's continued residence, where Nevada decree exceeded jurisdiction by so finding.

5. Divorce ⇐171.

In California divorce action, court properly disregarded findings of Nevada court that wife did not desert husband preceding decree, where Nevada decree exceeded jurisdiction respecting matters subsequent to commencing action.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action for divorce by Morris Brown against Esther Brown. From an adverse judgment, defendant appeals.

Affirmed.

Thomas F. Hinds, of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for respondent.

Mr. Justice pro tem. ANDERSON delivered the opinion of the court.

This is an action for divorce. It will be necessary to recite certain facts in order to make plain the points to be considered.

The plaintiff filed the first complaint in Washoe county, state of Nevada, on the 18th day of November, 1927, charging willful desertion. The complaint alleged a residence of plaintiff of three months in Washoe county immediately next before the filing of the complaint, which is one of the jurisdictional facts necessary to be alleged. Defendant filed her pleadings. The case came on for trial, and the Nevada court made finding, which findings were filed on the 19th day of April, 1928. A decree denying the divorce and relief of both parties was signed and recorded on May 2, 1928.

Thereafter, to wit, on the 28th day of November, 1928, the same plaintiff filed an action for divorce against the said defendant on the ground of desertion, in the county of Los Angeles, state of California, and thereafter, to wit, on the 21st day of January, 1930, the superior court of the county of Los Angeles signed and entered an interlocutory decree of divorce against defendant and appellant, herein, in favor of the plaintiff.

The allegations of the complaint as set forth are that the defendant willfully deserted the plaintiff for more than one year next preceding the 28th day of November, 1928; that plaintiff is now, and for more than one year last past has been a resident of the state of California, and for more than three months immediately next preceding the com-

mencement of the action, a resident of the county of Los Angeles. Evidence was offered and received proving the allegations; thereupon evidence was offered to prove the charge of willful desertion, which the court received and acted upon by granting an interlocutory decree of divorce to the plaintiff.

We do not understand that appellant objects to the sufficiency of the evidence, except on the ground of estoppel and res judicata by reason of the prior Nevada decree. This was offered and received in evidence. No other evidence was offered by the defense. Defendant did not appear at the trial except by counsel.

It will be observed that the complaint in the Nevada case was filed on the 18th day of November, 1927. This complaint embraced all charges of desertion prior to the 18th day of November, 1927. The plaintiff testified that on or about the 22d day of November, 1927, he changed his residence to Los Angeles county, Cal., and on the 28th day of November, 1928, as hereinbefore stated, he filed a complaint for divorce against his wife, the same defendant named in the divorce action in the state of Nevada, charging his wife with willfully deserting him on the 17th day of June, 1923, and that she "has at all times since said date continued to so desert and abandon plaintiff, and to live separate and apart from *his*," etc.

[1] We find from an examination of the evidence taken at the trial in the case at bar that the defendant, in the month of April, 1928, stated that "she never cared for Mr. Brown"; that "she never lived with him and never wants to live with him"; and many other statements are contained in the transcript in support of the complaint, which, if believed by the trial judge, were sufficient proof of desertion before the filing of the complaint on November 28, 1928, and after the period embraced within the complaint filed in the state of Nevada on November 18, 1927.

We have not had our attention called to any insufficiency of the evidence as introduced in support of the California complaint.

We will now consider the objection to the decree from the point of estoppel by reason of res judicata.

[2, 3] From what we have already said, it is conceded there is identity of parties, but there is not identity of cause of action. When the defendant, after the end of the first action, and during the time covered by the action at bar, stated that "she would not live with plaintiff"; that "she never cared for Mr. Brown"; that "she never lived with him and never wants to live with him"; and many other statements made by her after she had come from her victory in the divorce case in Nevada, and while stopping in Los Angeles before returning to Vermont, without giving a sufficient excuse to satisfy the court, the court, with this corroboration and other evidence appearing in the record, together with the plaintiff's evidence in the record, was clothed with the power to render a decree against her.

It is true the plaintiff in the case at bar testified that the defendant was first guilty of desertion on the 17th day of April, 1923, "and at all times since said date continued to so desert and abandon plaintiff, and to live separate and apart from *his*, without any reason therefor, and against his will and without his consent."

There are also certain statements made in the findings of the Nevada court that the plaintiff here had committed certain acts of cruelty, but the court did not find plaintiff guilty of extreme cruelty in the findings, nor in the decree and judgment, and denied all relief asked for by both parties, ordering that each should pay his costs.

If, as contended by appellant, after the plaintiff was found guilty by the Nevada court of extreme cruelty, which an examination of the record does not so reveal, and as claimed by appellant under section 98 of our Civil Code, the defendant here could not be guilty of desertion, but her desertion could not be justified long after the alleged cruelty occurred, even if the Nevada court had made a decree finding him guilty of extreme cruelty, which we do not find.

[4, 5] There is one other point which we will consider, and that will have a bearing upon the duration of residence after the plaintiff had gone to Los Angeles to reside.

The divorce action in the state of Nevada was tried on the 19th day of April, 1928, and the divorce decree was entered on or about the 2d day of May of the same year. The judge in the Nevada case made the following finding therein: "*That the plaintiff is now* (italics ours) and has been for more than three months last past immediately preceding the commencement of this action, a bona fide resident of the County of Washoe, State of Nevada."

As we have said, the complaint filed in the Nevada court was filed on the 18th day of November, 1927, and all the facts that the court was to hear must have occurred before the date of the filing of the complaint, to wit, November 18, 1927, and the court must make its findings within that date, else it exceeds its jurisdiction; but, according to the facts of record, the court went beyond the record when it found: "*The plaintiff is now*" a resident of Nevada. From an examination of the record it would appear that the findings referred to must have been copied from the first paragraph of plaintiff's complaint, for the reason that the first three and one-half

lines are exactly the same. The language of the complaint is correct, but the words "is now" should have been omitted in the findings. From an inspection of the record, we should say it was an inadvertence.

We have examined the findings filed in the Nevada court and find they consist of complaint, demurrer, answer, reply, amended answer, and supplemental reply, and nowhere is it claimed the plaintiff asserts a different residence than that of three months' residence in the county of Washoe, state of Nevada, immediately next preceding the filing of the complaint, to wit, on the 18th day of November, 1927.

Under the authorities, where the judgment exceeds the jurisdiction of the court and the judgment is offered to establish a fact, the court may refuse to be guided by the judgment as being void, and we think the California court could and did so disregard it. In support of this point we cite the following authorities: 24 Cal. Jur. 977–983; First National Bank of Findlay v. Terry, 103 Cal. App. 501, 285 P. 336; Greenzweig v. Strelinger, 103 Cal. 278, 37 P. 398; Smith v. Moore Mill and Lumber Co., 101 Cal. App. 492, 281 P. 1049; Estate of Pusey, 180 Cal. 368, 181 P. 648.

Keeping in mind the date of the filing of the complaint in the Nevada case and the findings therein, the statement incorporated in the findings of said case, "that the defendant did not, for more than one year last past, *or at all*, desert or abandon plaintiff," must also be disregarded, upon the above reasoning and authorities.

We think from an examination of the whole record that the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

12? Cal.App. 275

OLDS v. SIMMONS.

Civ. 8073.

District Court of Appeal, First District, Division 2, California.

May 2, 1932.

Rehearing Denied June 1, 1932. Hearing Denied by Supreme Court July 1, 1932.

1. Corporations ⇐79.

In action for money had and received, finding contract for services in promotion of corporation provided for sale of stock therein *held* warranted.

The contract to engage plaintiff to aid in the promotion of a proposed corporation by selling stock provided that plaintiff pay one-half the costs of promotion up to $5,000; that he give his entire time to furthering the promotion of the corporation; that he pay one-half of $1,000 paid for an "interest" of inventor in a lotion and "right to commercialize it"; and that he receive five thousand shares of stock and one-fifth of a share as commission for each share sold.

2. Licenses ⇐39.

Under contract for sale of stock in corporation, collection of part of price before permit to sell stock was obtained *held* unlawful (St. 1925, p. 972, § 25).

3. Licenses ⇐39.

One buying stock in corporation to be organized before permit for sale was issued *held* not in pari delicto with seller, as respects right to recover payments (St. 1925, p. 972, § 25).

4. Licenses ⇐39.

One paying money under void executory contract for sale of stock in corporation, before permit of sale was issued, *held* entitled to recover same (St. 1925, p. 972, § 25).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by F. Olds against Frank A. Simmons. From a judgment for plaintiff, defendant appeals.

Affirmed.

Shortridge & McInerney, Joseph McInerney, and Henry C. Clausen, all of San Francisco, for appellant.

Joseph Bien and Werner Olds, both of San Francisco, for respondent.

STURTEVANT, J.

As assignee of Leon A. Kutner, the plaintiff commenced an action against the defendant for moneys had and received. The defendant answered and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed and has brought up a typewritten record.

Heretofore the plaintiff's assignor and the defendant executed a written instrument which is as follows:

"This agreement made and entered into this 25th day of November, 1929, by and between Frank A. Simmons, party of the first part, and Leon A. Kutner, party of the second part,

"Witnesseth

"Whereas, the party of the first part is about to form a corporation under the laws of the State of Nevada, with a capital stock of one thousand shares of no par value Class A stock and one hundred thousand shares of no par value Class B stock, the Class A stocks to have the sole voting privileges but no right to dividends or assets upon dissolution, said corporation to be formed for the purpose of commercializing a certain lotion known as Fatoph, and

"Whereas, the party of the first part is desirous of engaging the services of the party of the second part to assist him in promoting said corporation and in selling upwards of one hundred thousand dollars of its Class B capital stock,

"Now, therefore, in consideration of the premises and of the mutual covenants and agreement of the parties hereto hereinafter contained, said parties do hereby agree as follows:

"That the party of the first part upon the formation of said corporation will cause five thousand shares of said Class B capital stock to be issued to the party of the second part and in addition thereto will cause said corporation to issue to the party of the second part one-fifth of a share of Class B capital stock as a commission for each and every share of said Class B capital stock sold by the party of the second part, it being understood and agreed that the party of the first part will be the sole judge of whether or not the party of the second part has made any particular sale or sales.

"That the party of the second part will pay to the party of the first part one-half of any and all obligations contracted by the party of the first part in promoting said corporation and/or in commercializing said lotion up to the time that said corporation is financed, the party of the first part being made the sole judge of when said corporation has been financed. It is further agreed that in no event shall the party of the second part be obligated to pay in excess of the sum of five thousand dollars as his share of the above mentioned obligations which the party of the first part under the terms hereof is given the right to contract.

"That the party of the second part, upon the execution of this agreement, will pay to the party of the first part the sum of five hundred dollars, said sum being one-half of the sum heretofore paid by the party of the first part to M. Todt for an interest in said lotion and the right to commercialize same by the formation of said corporation.

"That the party of the second part will devote his entire time and attention to the promotion of said corporation and the commercialization of said lotion under the direction and supervision of the party of the first part until the time that said corporation has become financed.

"In witness whereof, the parties hereto have hereunto set their hands the day and year first hereinabove written.

"Frank A. Simmons,
"Party of the First Part.
"Leon A. Kutner,
"Party of the Second Part."

It should be noted that Simmons agrees to form a corporation having one thousand shares of class A stock and one hundred thousand shares of class B stock. Nothing to the contrary appearing, the entire block of stock will belong to Simmons. The inventor, Todt, will get no stock, as he has been paid $1,000 for "an interest in said lotion and the right to commercialize" it. The instrument provides that Kutner will advance moneys up to the sum of $5,000, but it is silent about the repayment of said moneys in any manner except as we shall recite. It is provided that five thousand shares of class B stock will later be issued to Kutner, but no consideration therefor is mentioned, and the only conclusion one can draw is that the advancements, $5,000 or less, so agreed to be made by Kutner, will stand as at least a part of the consideration for the five thousand shares which it is flatly agreed will be issued to Kutner. Of the sums agreed to be paid by Kutner, the instrument further provides that $500 will be paid on the "execution of this agreement." As the "promotion of said corporation and the commercialization of said lotion" involves the rendition of many services and perhaps the expenditure of much money besides the mere matter of selling shares of stock, the instrument on its face requires that Kutner do more than pay the moneys above mentioned for the shares of stock so allotted to him.

The document also provides that Kutner "will devote his entire time and attention to the promotion of said corporation and the commercialization of said lotion," and that for sales of stock made by him he will be paid "one-fifth of a share of Class B capital stock" for each share of such stock sold by him.

In setting forth separately the two agreements in the two paragraphs immediately above, we are not to be understood as holding that the purported contract was severable. As to that we are not called upon to express any opinion. Moreover, on the face of the instrument the parties have not attempted to state the consideration for each promise made by Kutner.

It was stipulated in open court that the corporation was never organized, and that no permit was ever obtained.

On December 5, 1929, Kutner paid to Simmons $1,250, and on January 4, 1930, he paid

him $1,500, making in all $2,750, which is the amount the trial court found to be due.

[1, 2] The defendant asserts that the evidence was insufficient to support the findings. He says the contract made no provision for a sale by the defendant and a purchase by the plaintiff's assignor of shares of the capital stock of a corporation thereafter to be formed. The point may not be sustained. The instrument is plainly to the contrary. As no permit had been obtained, it was unlawful to collect any part of the $5,000. Stats. 1925, chap. 447, p. 972, § 25. If no other objection existed, the findings should stand as being sustained by the evidence.

[3] But the defendant next asserts that, even though the document executed by the parties was illegal, the plaintiff should not have been given judgment because they were in pari delicto. The plaintiff takes issue with the defendant in making that contention. He quotes from Walker v. Harbor Realty & Development Corp. (Cal. Sup.) 3 P.(2d) 557. In that case the same contention was made that this defendant now makes. The plaintiff had been sold shares in a corporation to be formed, and had paid the purchase price before a permit was issued. She was one of the incorporators, was elected a director, and met with the directors. It is clear that she assumed to do all that Kutner in writing agreed to do. But, in passing on the point, at page 558 of 3 P.(2d), the court said: "No facts have been presented or offered which could bring this case within the exceptions noted in such cases as Moore v. Moffatt, 188 Cal. 1, 204 P. 220; Domenigoni v. Imperial Live Stock Co., 189 Cal. 467, 209 P. 36; and Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418, where rights of others than the parties to the void sale or contract were involved and the buyer had by his own conduct made himself answerable to the claims of such third parties. See Tatterson v. Kehrlein, 88 Cal. App. 34, 51, 263 P. 285. The present action involves the rights only of the parties themselves." The contention of the defendant may not be sustained.

[4] The defendant states that the money he received was disbursed by him in due course of the business between him and the plaintiff. In his closing brief he says that, by this statement, he contends that the moneys sued for were received as voluntary contributions from Kutner after Kutner and Simmons had told their attorney not to proceed with the incorporation of the company and were used in the business of the parties. He then cites authorities to the effect that payments knowingly and voluntarily made, in the absence of fraud, mistake, or duress, cannot be recovered back. Detroit Edison Co. v. Wyatt Coal Co. (C. C. A.) 293 F. 489, 494. That rule was applicable to the facts of that case. But that case involved an executed valid contract. In the instant case the purported contract was void. It was not executed, but was executory. The plaintiff received nothing and was entitled to recover the payments he had made. Smith v. Bach, 183 Cal. 259, 263, 191 P. 14; Smith v. Bach, 53 Cal. App. 63, 199 P. 1106; Smith v. Bach, 54 Cal. App. 236, 201 P. 611; People v. Oliver, 102 Cal. App. 29, 37, 282 P. 813; Tatterson v. Kehrlein, 88 Cal. App. 34, 48, 263 P. 285. For the reasons just stated the rule in the Detroit Edison Case is not applicable. 13 C. J. 501.

The defendant makes several other points in his brief. However, if we are correct in our treatment of the foregoing points, and we firmly believe we are, then it is unnecessary to take up the remaining points discussed in the brief.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 177

PEOPLE v. CARSKADDON.

Cr. 1200.

District Court of Appeal, Third District, California.

April 29, 1932.

1. Infants ⇐20.

Information which described acts by means of which lascivious conduct was committed upon body of minor child and alleged intent to gratify lust *held* good, though failing to charge lewd or lascivious intent (Pen. Code, §§ 288, 958).

2. Criminal law ⇐742(1).

Credibility of alienist appointed by court *held* for jury (Pen. Code, § 1027).

3. Criminal law ⇐696(2), 698(1).

Accused who made no objection to appointment, stipulated to qualifications, and made no motion to strike testimony, of alienist *held* to have waived objection to qualification for bias (Pen. Code, § 1027).

4. Criminal law ⇐452(2).

In determining competency to testify as to person's sanity as "intimate acquaintance," trial court has wide discretion which, absent abuse, is conclusive (Code Civ. Proc. § 1870, subd. 10).

[Ed. Note.—For other definitions of "Intimate Acquaintance," see Words and Phrases.]

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Criminal law ⇐452(2).

Conclusion of "intimate acquaintance" as to person's sanity is no stronger than related facts upon which it rests (Code Civ. Proc. § 1870, subd. 10).

6. Criminal law ⇐452(2).

Court's permitting clerk in jail, wherein accused was imprisoned for four months, to testify as "intimate acquaintance" as to accused's sanity *held* not abuse of discretion (Code Civ. Proc. § 1870, subd. 10).

7. Criminal law ⇐981(2).

Mere conflict of evidence as to accused's sanity *held* insufficient to show that trial court abused discretion in denying motion to suspend judgment and try accused on issue of then insanity (Pen. Code, §§ 1367, 1368).

8. Criminal law ⇐981(2).

Rule that whether accused's sanity will be inquired into before pronouncing sentence rests within sound discretion of court, also applies where judge passing on motion did not preside at accused's trial (Pen. Code, §§ 1367, 1368).

9. Criminal law ⇐1159(5).

Appellate court cannot weigh conflicting evidence as to accused's sanity.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Le Roy Carskaddon was convicted under Penal Code, § 288, of lascivious conduct, and he appeals.

Affirmed.

Archibald M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was charged under the provisions of section 288 of the Penal Code with the crime of lascivious conduct alleged to have been committed upon the person of a minor child who was under sixteen years of age. The defendant admitted the perpetration of the offense as charged in the information, but pleaded not guilty by reason of insanity. A jury was impaneled for the purpose of trying that issue, and rendered a verdict finding that he was sane at the time of the commission of the offense. A motion in arrest of judgment under the provisions of section 1185 of the Penal Code was made on the ground that the information fails to state facts sufficient to constitute a public offense. This motion was denied. The defendant thereupon demanded a trial as to his present sanity under the provisions of section 1201 of the Penal Code. This motion was also denied. The defendant was then sentenced to state prison at Folsom for the term prescribed by law. From this judgment of imprisonment the defendant has appealed.

The appellant contends: (1) The information is fatally defective, for the reason that it fails to charge that the felonious acts were performed with lewd or lascivious intent; (2) the court failed to appoint two impartial medical alienists, as required by section 1027 of the Penal Code, to examine the accused with regard to his sanity; (3) the court erred in permitting a nonexpert witness to testify regarding the mental status of the defendant; (4) the court erred in denying the defendant's motion for a trial upon the issue of his present sanity as provided by section 1201 of the Penal Code; and (5) the verdict respecting the sanity of the defendant at the time of the commission of the offense with which he is charged is not supported by the evidence.

[1] The information sufficiently charges a public offense under the provisions of section 288 of the Penal Code. It omits the use of the words "lewd and lascivious." But it includes language which is equivalent, and which leaves no doubt regarding the nature of the offense charged. The information describes the acts by means of which the defendant is charged with perpetrating the offense, and alleges that they were performed "upon and with the body" of the minor child, "with intent then and there arousing, appealing to and gratifying the lust and passion of sexual desires." Such acts as are here described which are performed with the intent assigned are necessarily lewd and lascivious. The omission of those words are therefore harmless. Section 958 of the Penal Code provides that: "Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used."

[2, 3] The record indicates that the court complied with the requirements of section 1027 of the Penal Code in the appointment of alienists to investigate the mental status of the defendant with relation to his plea of insanity. That section merely requires the court to "appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals," who shall "examine the defendant and investigate his sanity, and * * * testify * * * [in regard thereto] in any proceeding in which the sanity of the defendant is in question." It is then provided that the alienists so appointed may be called and examined by either of the parties to the action, or by the trial judge himself. The object of this statute is to obtain expert evidence of the mental responsibility

of a person who is accused of a crime, which shall be entirely free from any possible bias which may influence the employment of an alienist by either party to the action. In the present case, the court appointed two medical experts, one of whom is the assistant superintendent of the Napa State Hospital. Both alienists became witnesses at the trial. The testimony of one was favorable to the defendant. The other was unfavorable. It is now contended this unfavorable witness, who was Dr. Wilder, was a biased partisan, because he had previously examined into the mental condition of the defendant at the request of the district attorney. It does appear that this physician examined the accused in October, two months after the date of the alleged lascivious acts, and some time prior to the trial. He testified that the defendant appeared to be mentally defective, and that he was a moral degenerate, but that he considered him sane and believed he understood and appreciated the nature and evil of the lascivious acts with which he was charged. He said: "In my opinion, he was sane at the time of the commitment of the act. * * * I thought that he understood the nature and quality of the act." Regarding his conversation with the district attorney, he said: "I told them that he was sane at the time of the commitment of the act, and I stuck to it." We may not assume the doctor "stuck to it," regardless of his honest conviction. There is no evidence that he was biased and prejudiced on account of his former employment by the district attorney. The doctor had practiced medicine for thirty years. The presumption is that he stuck to his assertion that the defendant was sane because he believed it to be true. Repeated examinations of a patient ought to give added weight to a physician's judgment regarding his sanity. At least, the credibility of the witness was a matter for the determination of the jury. Moreover, Dr. Wilder was examined as a witness at the trial, without objection. A lack of qualifications on the part of the doctor was specifically waived. The attorney for the defendant said: "I will stipulate * * * Doctor Wilder's qualifications." No motion was made to strike his testimony from the record. It is too late for a defendant to object to the qualifications of a witness for the first time on appeal. The lack of qualifications of an alienist on the ground of bias is waived by failure to object to his appointment or his testimony at the trial, in the absence of a motion to strike his evidence from the record. People v. Wiley, 111 Cal. App. 622, 295 P. 1075.

[4-6] The denial of defendant's motion to strike out the testimony of James Hester, regarding the sanity of the accused, is assigned as erroneous. Mr. Hester was a deputy sheriff who acted as recording clerk in the county jail where the defendant was imprisoned for four months prior to his trial. He was quaintance of the defendant under the proviquaintance of the defendant under the provisions of subdivision 10 of section 1870 of the Code of Civil Procedure. It appears that he had observed the defendant every day during this period of four months. He had talked with the accused "practically every day." He watched his conduct, and marked his manner of speech. Over the objection of the defendant that the evidence is incompetent, irrelevant, and immaterial, and that the witness "has not shown himself to be an expert," he was permitted to testify that the defendant appeared to be and talked rational; that he had observed no change in that regard during the four months he had watched him; and that in his opinion the defendant was sane. A motion to strike out the evidence of this witness, on the ground that "no qualification of this man is made as an expert," was denied. Neither the objection to the evidence nor the motion to strike it from the record assigned the proper ground. The witness was not permitted to testify as an expert on mental disease. He was permitted to testify as an intimate acquaintance under the provisions of section 1870, supra, assigning his reasons for the opinion which he expressed. In determining the qualifications which render a witness competent to testify as an intiinate acquaintance concerning the sanity of an individual, the trial judge has a wide discretion which will not be interfered with except for evident abuse thereof. People v. McCarthy, 115 Cal. 255, 46 P. 1073. This discretion is wisely conferred upon the judge for the reason that it is frequently difficult to determine the exact character and extent of a previous acquaintance which will qualify one to express an opinion regarding the sanity of another. The theory upon which an intimate acquaintance is permitted to testify regarding the sanity of another is that he may be so well acquainted with the patient that he is able to distinguish between traits of character and peculiarities of speech which are natural to the subject, and such unusual conduct as is likely to indicate a deranged mind. Estate of Carpenter, 94 Cal. 406, 414, 29 P. 1101. Moreover, the testimony of an intimate acquaintance must be founded upon related facts which furnish the reason for his conclusion. It follows that the conclusion of an intimate acquaintance regarding the sanity of another is of no greater value than the reasons which he assigns in support of his conclusion. If the reasons are valueless, the conclusion falls of its own weight. We are not prepared to say the witness Hester was not qualified to testify under the provisions of section 1870, supra. At least it does not appear the court abused its discretion in passing upon his qualifications.

[7, 8] The refusal of the court to suspend the pronouncing of judgment and impanel

another jury to try the question of the defendant's sanity at that time, under the provisions of sections 1367 and 1368 of the Penal Code, is assigned as error. We are of the opinion this assignment of error is without merit. The alleged offense of lascivious conduct occurred August 26, 1931. The defendant was immediately apprehended and detained in the county jail until the time of his trial, which occurred on December 28th and 29th. The verdict was rendered against him on the last-mentioned date. The cause was continued to January 12, 1932, at the request of the defendant, for the purpose of presenting a motion for new trial. The cause was tried before the Honorable J. R. Hughes, as judge of the superior court. During the interval between the time when the verdict was rendered and the time which was set for pronouncing sentence, Judge Hughes died. Judge Martin I. Welsh was appointed to succeed the late Judge Hughes, and presided at the hearing of the motion for a new trial, and at the motion to suspend judgment and examine into the present sanity of the defendant. Judge Welsh was not present during the trial of the case upon its merits. The defendant was present in court during the entire proceedings. The motion for new trial was heard upon affidavits, argued at length, and denied. Not until the denial of that motion was the present sanity of the defendant suggested to the court. No evidence was adduced upon the motion to suspend judgment and examine into the sanity of the accused under section 1367, supra. It appears that the defendant's counsel relied upon the record of the trial, which discloses a sharp conflict of evidence regarding the sanity of the defendant, in support of his motion. He said: "I feel that we are amply justified, from the transcript as it appears [in asserting] that the defendant at this time is insane." Nothing in the conduct or appearance of the defendant as he presented himself in court during the proceedings was suggested as reasons for believing he was presently insane. Indeed, he was not called as a witness in his own behalf at the trial or during the subsequent proceedings. Within fourteen days from the time the motion was made to examine into his present mental condition, a jury had pronounced him sane. The mere fact that there is a conflict of evidence regarding the issue of his sanity is not sufficient ground upon which an appellate court may hold that a trial judge has abused its discretion in denying a motion to suspend judgment and again try a defendant upon the issue of his present sanity. People v. Croce, 208 Cal. 123, 131, 280 P. 526. Apparently there was nothing in the appearance or conduct of the defendant as he presented himself in court which led the judge to entertain a doubt as to the defendant's present sanity. In denying the motion the judge said: "There has been no showing made to the court at this time that the defendant is at this time insane. Therefore, the court has no doubt. * * * It must indulge the presumption that he is sane." The physician upon whom the defendant chiefly relied to establish his insanity, at the trial, was Dr. Scanland, who was a member of the medical staff of Napa State Hospital. Dr. Scanland saw the defendant for the first time the day before the trial of the cause. The doctor testified that the defendant was afflicted with dementia præcox, which is a permanent deterioration of the brain tissue accompanied by hallucinations. It is a progressing and incurable type of insanity. While it is true the issue of insanity which was decided by the jury applied to the mental condition which existed August 26th, when the crime was committed, rather than the mental status as it existed at the time of the trial, still the record discloses the fact that the alienists who supported the defendant's claim of insanity based their testimony on the theory of permanent insanity which it is unreasonable to presume would make any substantial progress during the few days which elapsed after the rendering of the verdict. In view of the recent verdict on December 29th, which found the defendant sane, it seems absurd, in the absence of evidence to the contrary, to assume there was any substantial change in the defendant's mental condition within the intervening fourteen days, which would raise any additional doubt as to his sanity at the time of pronouncing judgment. The question as to a defendant's sanity, so as to require the trial of that issue under the provisions of section 1367 of the Penal Code, before pronouncing sentence, after the conviction of a crime, rests in the sound discretion of the court. People v. Croce, 208 Cal. 123, 280 P. 526. The rule is not otherwise, even though the judge who passes upon the motion to suspend judgment did not preside at the trial of the cause at which the accused was convicted. The record in this case presents no abuse of discretion on the part of the court in denying the motion.

[9] Finally, it is asserted the verdict of the defendant's sanity at the time of the commission of the offense is not supported by the evidence. There is a sharp conflict of evidence regarding this issue. Dr. Scanland, who testified positively that the defendant was insane and irresponsible, was one of the alienists appointed by the court. He was supported in this conclusion by Dr. Howard. Standing alone, the evidence of these two physicians, regarding the insanity of the defendant, is very convincing. Upon the contrary, two other alienists, to wit, Drs. Wilder and Barrette, testified that the defendant was sane, and in their judgment understood the nature and vice of the lascivious acts of which he was convicted. Two nonex-

pert witnesses also testified to facts strongly corroborating the theory that the defendant was sane. Regardless of what a reviewing court may think about the wisdom of a verdict, it has no power to weigh the evidence upon an issue regarding which a substantial conflict exists. There is a conflict of evidence as to the sanity of the defendant. The verdict of the jury is therefore controlling.

The judgment and the orders are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

123 Cal.App. 196

OHANIAN v. KAZARIAN et al.

Civ. 397.

District Court of Appeal, Fourth District, California.

April 29, 1932.

Rehearing Denied May 26, 1932.

1. Vendor and purchaser ⇐299(2).

Where vendor agreed under conveyance contract to deliver deed and take back mortgage when payments reached certain balance, thereafter made payable in installments, vendor's assignee could not claim forfeiture for such unpaid balance without tendering deed.

Conveyance contract provided when purchase price was reduced to $4,000, vendor would execute deed, and that purchaser should execute note secured by mortgage for unpaid principal payable thereafter in installments of $1,000 annually, first installment to be payable on November 1 of year next ensuing execution of deed and so on, in each year, until whole balance was paid.

2. Vendor and purchaser ⇐299(3).

Evidence in suit by vendor's assignee to quiet title to land subject to conveyance contract disclosed assignee's predecessor had defaulted in not delivering deed, precluding assignee from claiming forfeiture for unpaid balance of purchase price.

3. Vendor and purchaser ⇐187.

Default of vendee's assignee under conveyance contract *held* waived by acceptance by predecessor of vendor's assignee, of portion of payments due and failure to deliver deed, precluding vendor's assignee from claiming forfeiture without tendering deed.

4. Equity ⇐66.

Vendor's assignee under conveyance contract submitting to equity in asking forfeiture for unpaid purchase price could not deny equitable relief available to vendee's assignee.

Facts disclosed vendee's assignee under conveyance contract applied insurance received for burned buildings to purchase money due under contract, and that such application made vendee's assignee several years ahead in his payments under contract, and thereafter assignee defaulted in certain payments, and vendors acquiesced in delay and thereafter assigned their interest to assignee who claimed forfeiture for unpaid balance under contract.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Suit by Pakrad D. Ohanian against Harooteun Kazarian, Aram Merzoian, and another. From a judgment for plaintiff, defendant Aram Merzoian appeals.

Reversed and remanded, with directions.

Frank Kauke, of Fresno, for appellant.

Ben H. Johnson, of Fresno, for respondent.

BARNARD, P. J.

On August 21, 1917, one Ludwig Wass and his wife sold certain real property in Fresno county to Malcon Garabedian under a contract for $13,950, payable $3,250 in cash, $500 on November 1, 1918, and $500 on November 1 of each succeeding year until the balance was reduced to $4,000, and thereafter $1,000 or more on November 1 of each year until the entire purchase price was paid. The interest of Wass and his wife duly passed to Belle Wass, Lida Wass, and Mrs. C. C. Anderson, and the interest of Garabedian was acquired by the appellant herein. Subsequently the appellant sold the property on another contract to Harooteun Kazarian, one of the defendants herein, who was in possession of the property at all times material hereto. All payments coming due under the first-mentioned contract were paid by appellant up to and including November 1, 1928. During 1929 the proceeds of certain insurance on some buildings on the property which had burned were received and applied upon the contract. From this source, on July 6, 1929, the sum of $4,263.15 was paid, and on October 16, 1929, a further sum of $450 was paid, leaving an unpaid balance on the purchase price of $1,287.60. On November 6, 1930, the respondent herein received from Belle Wass, Lida Wass, and Mrs. C. C. Anderson a deed to the property subject to the contract first above mentioned, having paid to them the remaining sum of $1,287.60 with interest to date. On November 14, 1930, the respondent exhibited his deed to the appellant and said: "Mr. Merzoian, I got the deed and I want you to make the payments from now on to me, and it is due now." The respondent tes-

tified that the appellant replied as follows: "I am not going to pay you, not a penny, until I get it from Harooteun Kazarian," although the making of this statement is denied by the appellant.

On November 17, 1930, this action was filed in the form of an ordinary quiet title suit. An answer and cross-complaint was filed setting up, among other things, the contract in question with the various assignments thereof; that the respondent acquired title to the property subject to the terms of this contract; that the appellant had kept and performed the terms of said contract; that all of the purchase price for the real property had been paid save and except the sum of $1,291.60 or thereabouts; that the appellant had requested a deed, and had offered to pay the balance of the purchase price in full; that the appellant was ready, able, and willing to make full payment of the balance due; that no deed had been executed or tendered to him; that the appellant offered to pay to the respondent or to whomsoever was entitled to receive the same, the remaining unpaid balance of $1,291.60 or such other or different or further sum as the court shall find remains unpaid on the purchase price, together with all accrued interest; and that the appellant is entitled to a deed to the premises. The prayer was that the respondent take nothing by reason of the action, and that the appellant have judgment requiring the respondent to convey the property to the appellant in accordance with the terms of the contract, and that the appellant's title be quieted against the respondent and all persons claiming under him, and for such other and further relief as to the court shall seem equitable. After a trial, the court found that no deed had been tendered to the appellant, and also found that on or about the 6th day of July, 1929, Belle Wass, Lida Wass, and Mrs. C. C. Anderson offered to execute and deliver to the appellant a deed to said real property "upon the sole condition that he pay the balance due on account of the purchase of said property, or execute to said Vendors his promissory note in the amount of said purchase price and secure said promissory note by a mortgage on said real property which should be a first lien thereon, all as provided by said agreement to purchase dated August 21, 1917, and that said Defendant, Aram Merzoian, refused to comply with the conditions entitling him to demand and receive a deed to said real property and at no time thereafter has the said Defendant, Aram Merzoian, offered to comply with said terms and conditions." Judgment was entered in favor of the respondent, from which this appeal is taken.

[1] The only question here presented is whether, under such circumstances as here exist, in an equitable action, the respondent is entitled to claim a forfeiture without himself tendering a deed and demanding performance, and whether the tender by the appellant of the remaining balance due must, under the circumstances, be held to have been properly refused. In our opinion, there are several reasons why the respondent may not be allowed to claim such a forfeiture, only a part of which will be here discussed.

The contract in question contains the following clause: "On the payment by second party of all of said purchase price, except $4,000.00 or less, together with all interest that has accrued to such date, and upon the performance by him to such time of this contract in all other respects, first parties will execute and deliver to second party their grant, bargain and sale deed, conveying to second party a good title to said premises subject, however, to rights of way for roads and ditches and public utilities, and subject to water rights, and at the same time second party shall execute and deliver to first party his promissory note in the sum of $4,000.00 or less, according to the amount of principal then unpaid, payable in instalments of $1,000.00 annually, the first instalment to be payable on November 1st of the year next ensuing the execution of said deed and so on in each year until the whole has been paid. Said note shall bear interest at the rate of seven per cent per annum payable on November 1st of each year. At the same time second party shall execute his real property mortgage covering the above described land securing said note, which mortgage shall be a first lien on said land."

The balance due under the contract was reduced below $4,000 by the payment made on July 6, 1929. Thereafter the installments coming due became $1,000 instead of $500 each. But the vendor agreed to then deliver a deed and take back a mortgage payable according to the terms stated. If the language of the contract above quoted be interpreted as calling for a payment of $1,000 on November 1, 1929, then the entire balance became due on November 1, 1930, and all of the installments of the purchace price were past due before any action was taken by the respondent. Under such circumstances the respondent could not recover in this action until after he had tendered a deed. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; Sherwood v. Greater Berkeley Land Co., 99 Cal. App. 663, 279 P. 167. If, however, this language of the contract is interpreted as making the first installment of $1,000 due after the execution of the deed called for, since that deed has never been given, the appellant has never been in default in the making of any such payment.

[2] It further appears that the respondent was himself in default and in no position to maintain this action. As noted above, the court found that the respondent's predecessors on or about July 6, 1929, offered to ex-

ecute and deliver to the appellant a deed to this property upon the sole condition that he would pay the balance due or execute a promissory note for said balance, secured by a first mortgage upon the real property. This finding is not supported by the evidence. The uncontradicted evidence is that after the payment was made on July 6, 1929, which matter was handled by an attorney for the vendors, the appellant demanded a deed. This attorney testified as follows: "Well, as I remember the conversation he said, 'Now, that the principal is reduced to less than $4,000.00 I suppose I am entitled to a deed,' and I said 'Yes, you are entitled to a deed, when you can give us a mortgage on the property which will be a first lien on the property.' I wanted Mrs. Wass to have that mortgage without any equity of any kind on it, 'and if you will go'—I told him at that time, if he would go to the abstract company and get me a certificate showing that the mortgage which he could give to Mrs. Wass would be a first class mortgage, that he could have the deed any time. * * * A. We discussed it, and I told him he better check up and find out whether he had a suit against him, because we were not going to take a mortgage on the property, with a judgment ahead of it.

"Q. And what did he say? A. He said he was going to look into it and find out, and the thing just dragged along and nothing was done at all.

"The Court: Q. And then this other party came along, this man here, and paid off the balance? A. Paid off the balance and I gave him a deed subject to the contract, this agreement, I think that is in the deed, and got out of the picture."

While the contract provided that the mortgage to be given should be a first lien upon the property, nothing in the contract required the appellant to furnish a certificate of title, and it thus appears that while, as found by the court, the appellant demanded a deed, the vendors did not offer the same upon the sole condition of the contract being complied with by the giving of a first mortgage upon the property, but the deed was offered by the vendors upon a condition which, under the contract, they had no right to make.

[3] If it be considered that the appellants were, after November 1, 1929, in default in the making of any payment then due, we think it thus satisfactorily appears that any such default was waived by the predecessors of the respondent by their own default in failing to give a deed, in allowing the matter to drag along for more than a year as testified to by their attorney, in accepting $450 instead of $1,000, if $1,000 was due on November 1, 1929, and in letting the whole matter rest until the final payment became due on November 1, 1930, in accordance with that construction of the contract which is most favorable to the respondent. Under such circumstances, under the authorities above referred to, it was incumbent upon the respondent to tender a deed to the appellant before a forfeiture could be claimed.

[4] The respondent admits that such cases as Boone v. Templeman, supra, would be controlling in this case had the appellant set up an equitable defense, but maintains that the appellant is relying entirely upon his strict legal rights, and that therefore these authorities do not apply. Respondent himself chose his forum, and, while seeking to hold the respondent to strict rules of law, he asks the aid of a court of equity in taking his pound of flesh, regardless of whatever must be taken with it, to which he is not entitled. Not only has the appellant in his answer and cross-complaint set up in part an equitable defense and asked for equitable relief, but, by bringing this suit in equity, the respondent has subjected himself to its rules, one of the most familiar of which is that "He who seeks equity must do equity." As was said in O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861, 864, this "means that the court will not confer its equitable relief upon one seeking its interposition and aid—'unless he has acknowledged or conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adverse party, and growing out of or necessarily involved in the subject-matter of the controversy.' Pomeroy's Eq. Jur. § 386; Cox v. Hughes, 10 Cal. App. 553, 102 P. 956; 10 Cal. Jur. 508. This principle of equity is applicable to an action to quiet title. Holland v. Hotchkiss, 162 Cal. 366, L. R. A. 1915C, 492, 123 P. 258, 22 Cal. Jur. 134, and cases cited." In determining the conditions to be imposed in doing equity, a court should, in order to do justice, take into consideration all of the circumstances. In the case before us, the final payment under the contract would not have come due until about seven years later, if the vendee had elected to rebuild the burned buildings, as he had a right to do under the terms of the contract, instead of applying the insurance money on the purchase price. As an actual fact, the purchase price was almost paid out years ahead of the time when it was contemplated that it should be paid. All payments had been made as they became due up to November 1, 1929, the then vendors were perfectly satisfied, they acquiesced in the ensuing delay, and they had in fact caused this delay by demanding as a condition for the giving of a deed, something to which they were not entitled. While the matter thus "dragged along," without objection from the vendor, and, in part, at least, through their fault, the respondent purchased the interest of the vendors in the contract for $1,287.60 and some interest. It is hardly to be supposed that he paid out this amount for the purpose of im-

mediately getting it back from the appellant. His actions show that his only purpose must have been to either acquire the property for less than it is worth, or to assist his father-in-law, Harooteun Kazarian, in getting the property without paying the amount due to the appellant upon the second contract. The demand he then made upon the appellant was equivocal and misleading, and he himself testified that he did not then, or at any other time, name any particular amount as due from the appellant. Even in his answer to the cross-complaint filed by appellant, the respondent denies that the balance due is the amount named by the appellant, but alleges that the balance due "was in excess of said sum," without saying what amount was claimed. If the appellant was in default, the entire balance of the purchase price was due. Under these circumstances it would be inequitable to permit the respondent to recover this property, sold for $13,950, upon a claimed default in the payment of the last few hundred dollars, in an equitable action brought by him when the vendee is in court offering to pay and seeking to be allowed to pay the balance due, with interest.

The judgment is reversed, and the case remanded, with directions to the trial court to enter a judgment in conformity with the views herein expressed, giving a reasonable opportunity to the appellant to pay the balance due and receive a deed to the property before providing for any judgment for the respondent.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 378

SAN JOAQUIN VALLEY SECURITIES CO. v. PRATHER et al.

Civ. 376.

District Court of Appeal, Fourth District, California.

May 9, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 8, 1932.

1. Automobiles ⇐19.

Title to automobile did not pass where motor vehicle department did not receive old registration certificate nor issue new one, notwithstanding it issued new ownership certificate (St. 1923, p. 524, § 45, subds. a, b, d, e, as amended by St. 1925, p. 402, § 7).

2. Automobiles ⇐19.

Transferee of automobile has burden of obtaining and sending to motor vehicle department registration certificate; precluding effective transfer on not doing so (St. 1923, p. 524, § 45, subds. a, b, d, e, as amended by St. 1925, p. 402, § 7).

3. Automobiles ⇐19.

Statutory provision for transferring legal ownership without affecting registered ownership *held* inapplicable where registered owner's interest is to be transferred (St. 1923, p. 524, § 45, subds. a, b, d, g, as amended by St. 1925, p. 402, § 7).

4. Automobiles ⇐19.

Owner retaining automobile and not executing registration certificate *held* not estopped from denying transfer of title, notwithstanding delivery of ownership certificate (St. 1923, p. 524, § 45, subds. a, b, d, e, as amended by St. 1925, p. 402, § 7).

5. Automobiles ⇐19.

Finance company neglecting to obtain registration certificate of automobile and evidence indicating its reliance on party negotiating transfer, could not claim owner was estopped from denying transfer (St. 1923, p. 524, § 45, subds. a, b, d, e, as amended by St. 1925, p. 402, § 7).

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by the San Joaquin Valley Securities Company against John F. Prather and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Harris, Willey, Griffith & Harris, of Fresno, for respondent.

BARNARD, P. J.

This action, with four companion cases, arose as a result of a rather unique series of frauds practiced by an automobile agent. During the first half of 1927, and for some years prior thereto, Frank H. Davis, operating as Frank H. Davis, Inc., was the agent at Fresno for Packard automobiles. In April, 1925, the respondent, Hutchison, had purchased from Davis for cash a new Packard automobile, which had not been entirely satisfactory. In May, 1927, Davis represented to the respondent that it was the desire of himself and of Earle C. Anthony, Inc., general distributors for the Packard, to replace respondent's automobile with a new car that would be more satisfactory. On May 20, 1927, Davis obtained respondent's signature to a "cash order," by the terms of which she agreed to purchase a new Packard car for $2,928, payable $2,500 at the time of signing the order and the balance on delivery of the

car. At the bottom of this order, Davis signed a receipt for $2,500 as deposit on the purchase price of the order, "representing trade allowance on 1925 Packard." At the same time the respondent signed her name on the certificate of ownership, commonly called the "pink slip," and handed it to Davis, the testimony being that this was "turned over to Davis for Earle C. Anthony," and that this was done because Davis told her that he would have to have the pink slip in order to show Earle C. Anthony that he was going to make this trade. The evidence also shows that Davis agreed to return the pink slip to the respondent. The respondent at all times retained possession of the car and at all times retained possession of the certificate of registration, commonly called the "white slip." On the same day, May 20, 1927, Davis signed a conditional contract of sale, purporting to sell this same car to one John F. Prather for $2,034.21, acknowledging receipt of $760 in cash and providing for the payment of the balance in installments. Attached to this conditional contract of sale is an assignment from Davis to the appellant dated the day before, May 19, 1927. This assignment also contains provisions by which Davis guaranteed to warrant and defend the title to the property, and guaranteed the fulfillment of the contract according to its terms, and also contains the following:

"That the information concerning the purchaser, given on the blank provided on the contract for that purpose, was truly recorded as the same was given by said purchaser; that the said contract is bona fide and was actually signed by the person named therein as purchaser; that the property which is the subject of said contract is truly and accurately described therein, and that said property has been delivered into the possession of the purchaser; and that I have the full and complete title to said property, subject only to the rights of the purchaser under and by virtue of said contract."

The evidence shows that on or about May 20, 1927, Davis transferred this purported contract with Prather to the appellant and received a check for the proceeds, less various charges in accordance with an arrangement between them. At the same time he turned over to appellant the pink slip which bore the signature of Mrs. Hutchison, both as registered owner and as legal owner, the signature of Frank H. Davis, Inc., as first buyer, and the signature of John F. Prather as second buyer. This was then signed by the appellant as new legal owner. While the record shows that a blank was provided for the insertion of a date in connection with each of such signatures, no date was inserted as to any one of them. The record shows a copy of another pink slip issued by the chief of the division of motor vehicles covering this car under date of June 2, 1927, purporting to be issued to John F. Prather, with the name of appellant given as the legal owner.

It appears from the uncontradicted evidence, and is freely admitted by the appellant, that the respondent never received from Davis a new car; that Davis went out of business a month or two after this transaction; that Prather was either a fictitious person or that he was induced by Davis to sign the conditional sales contract for the purpose of perpetrating this fraud; that he paid nothing on the contract; that he was then unable to make the payments, and had no intention to either buy the car or make such payments; and that the respondent knew nothing about any such purported resale of her car until months afterward. After several defaults in the payment of installments and after Davis had gone out of business, this action was brought by the appellant in the ordinary form of a claim and delivery action. The defendant Prather defaulted, and the respondent answered, denying the appellant's title and right of possession and setting up separate defenses based upon the above state of facts, and alleging title and right of possession in herself. The court found that the appellant is not the owner or entitled to the possession of the car in question, but that the respondent is, and at all times material has been, the owner and entitled to the possession of the same; that the defendant Prather has never been in possession of the automobile, and has never been entitled to such possession; that the appellant never has had possession of the car; that the purported conditional sale contract with Prather was fraudulent and fictitious; that the appellant did not exercise ordinary care in purchasing said contract, and, had it used such care before accepting said fictitious contract, it would have learned the true situation; and that, if the appellant parted with anything of value, it did so because of its own negligence and not otherwise. From the judgment which followed this appeal is taken.

As grounds for reversal, the appellant relies upon two theories: (1) That the legal title and right of possession passed to the appellant; (2) that the respondent is estopped to deny the passing of title to the appellant, for the reason that she invested Davis with the indicia of ownership, and thereby caused appellant to part with value in reliance upon the apparent title.

[1] In support of its contention that title had passed, appellant relies upon the provisions of the California Vehicle Act and the following statement which appears upon the so-called pink slip: "This certificate is evidence of legal ownership of vehicle it describes. Place same in safe or bank vault. Do not place in machine. When car is sold this instrument properly endorsed must be

presented to the Division before transfer can be made."

Since the appellant relies upon the provisions of the statute to overcome the circumstance that the respondent retained the possession of the car, it is important to examine the statute, and, in particular, to inquire as to whether its terms were complied with. Section 45 of this act (St. 1925, p. 402, § 7), as it then existed, covered the matter of transferring both the legal title to an automobile and any other interest therein. Subdivision (a) of this section provided that, upon a transfer of the title or of an interest in the vehicle registered, the person or persons whose title or interest was to be transferred and the transferee should sign the certificate of ownership in the place provided upon the reverse of said certificate. Subdivision (b) provided that within ten days thereafter the transferee should forward both the certificate of ownership, so indorsed, and the certificate of registration to the division, which should file the same. Subdivision (d) provided that, upon the receipt of both of these certificates, the division should re-register such vehicle and should issue to the owner and to the legal owner, entitled thereto by reason of such transfer, both a new certificate of registration and a new certificate of ownership, respectively. Subdivision (e) then provided: "Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

[2] In at least two respects the record fails to show a compliance by the appellant with these provisions of the statute. It does not appear that the transferee of this certificate of ownership forwarded the same within ten days of the time it was signed. It affirmatively appears, however, that this transferee forwarded only the certificate of ownership, and that the certificate of registration, which is also required to be forwarded, was never sent in. While it appears from the evidence that a new certificate of ownership was issued by the motor vehicle department, it does not appear that a new certificate of registration, as required by the act, was ever issued. In any event, the division was not authorized to re-register the car or issue a new certificate of ownership and new certificate of registration, until it had received both the certificate of ownership and the certificate of registration, as provided in the statute. The division not having issued these certificates in accordance with the provisions of subdivision (d) of this section of the act, under the provisions of subdivision (e) thereof, the title to the automobile must be deemed not to have passed, and the purported transfer was incomplete and not valid or effective for any purpose. True v. Crane (Cal. App.) 7 P. (2d) 357; Parke v. Franciscus, 194 Cal. 284, 228 P. 435. Not only was this purported transfer ineffective, but it became so because of a failure on the part of the appellant to obtain and forward the certificate of registration, a burden placed upon it by the statute itself. In Samuels v. Barnet, 79 Cal. App. 529, 250 P. 405, 406, the court said:

"The appellant bases his right of action on a purported transfer of a secondhand automobile, wherein he failed to meet the requirements of the statute. The section quoted provides that, unless these restrictions are followed, the 'intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.' The Legislature could scarcely have used words which would have been more expressive of the intention to declare that such transfers should not be effective for any purpose. Such being the case, the transfer could not be effective for the purpose of conferring upon appellant the right of possession necessary for the maintenance of this action."

[3] Appellant argues that this particular transfer was governed, not by those portions of section 45 of this act to which we have referred, but by subdivision (g) thereof. It is argued that the first part of this subdivision, referring to the transfer from one legal owner to a new legal owner, without affecting the interest of the holder of the certificate of registration, has no application to the rest of the subdivision, and that the remainder thereof permits a transfer in the manner apparently followed in this case. We think all of subdivision (g) must be taken together, and that it provides, as stated therein, a manner of transferring the interest of one legal owner to another legal owner, when the interest of the holder of the certificate of registration is not to be affected thereby. It refers throughout to a transfer from one legal owner to a new legal owner, and the plain meaning of the provision, that in such a case the division shall issue a new certificate of ownership to the "new legal owner" and a new certificate of registration to the "registered owner," is that, while there is a change in the legal ownership, the registered ownership remains the same. This is also indicated by the language which follows providing that the registered owner, upon receiving the new certificate of registration, shall sign the same and place it in the vehicle to which it refers and destroy the former certificate of registration. We think that this subdivision (g) has application only in a case where the interest of the registered owner is not being affected, and that it has no application in a case like the one before

us, where the interest of the registered owner is not only affected but is supposed to be absolutely transferred to another party. The new certificate of ownership issued in this case purported to change the legal ownership from the respondent to the appellant, and also purported to change the registered ownership from the respondent to Prather, which could only be done in the manner provided for in subdivisions (a), (b), and (d). We conclude that title to this automobile did not pass to the appellant.

[4] Nor do we think the circumstances are such as to estop the respondent from denying such passing of title, as having parted with the apparent title in such a manner as to have deceived the appellant. While the respondent parted with the possession of the so-called pink slip, she not only retained possession of the car but of the certificate of registration as well. She had a right to rely upon her rights under the statute, and had no reason to apprehend that an attempt would be made to deprive her of her rights so long as she held the certificate of registration which, under the statute, must also be sent in by the transferee to the division, in order to complete a transfer. Until this certificate of registration was obtained by the transferee, the indicia of ownership relied upon by appellant was incomplete.

[5] Appellant, not having complied with the law, and having made no effort to obtain the certificate of registration, is in no position to set up the partial indicia of ownership as estopping the respondent from asserting her rights. The court found that the appellant was negligent in the matter, and this finding is amply supported by the evidence. Not only was it negligent in not complying with the law as to the transfer it sought, but it relied upon the pink slip alone, without any investigation as to where the white slip was. There was also evidence that in one of these cases the appellant was told, by a person supposedly referred to by the purchaser of the car, that this purchaser was honest, but that he was in no position, financially, to undertake such a contract. The appellant called as a witness the officer of another loan company for the purpose of showing the custom of these companies in buying such contracts, and even this witness testified that, in the purchase of a used-car contract, his company required that both the registration certificate and the ownership certificate be furnished with the contract. The guarantees included in the assignment from Davis to the appellant and the other evidence introduced strongly indicate that the appellant was not relying entirely upon the so-called pink slip, but to a large extent upon the integrity and responsibility of the automobile agent with whom they were dealing. In our opinion, the appellant was not such an innocent purchaser as would be entitled to claim an estoppel against the respondent, and no such equitable circumstances here appear as will relieve the appellant from the effect of its lack of compliance with the provisions of the statute governing the transaction.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 771

SAN JOAQUIN VALLEY SECURITIES COMPANY (a Corporation), Plaintiff and Appellant, v. Albert E. HENRY, Defendant; J. M. Swift, Defendant and Respondent.

Civ. 377.

District Court of Appeal, Fourth District, California.

May 9, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 8, 1932.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Theodore M. Stuart, of Fresno, for respondent.

BARNARD, P. J.

All of the material facts in this case are essentially the same as those in San Joaquin Valley Securities Company, a Corporation, v. Prather (Cal. App.) 11 P.(2d) 45, this day decided, except for a difference in names, dates, and amounts. The cases were tried together, in conjunction with three other cases, and this appeal is from a judgment in favor of one of the defendants. While there is a separate appeal in each case, all five cases were submitted upon a single transcript and a single set of briefs.

For the reasons given in San Joaquin Valley Securities Company, a Corporation, v. Prather, supra, the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 772

SAN JOAQUIN VALLEY SECURITIES COMPANY (a Corporation), Plaintiff and Appellant, v. A. D. HUGHES, Defendant; Guy M. Lowe, Defendant and Respondent.

Civ. 378.

District Court of Appeal, Fourth District, California.

May 9, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 8, 1932.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Guy Knupp, of Porterville, for respondent.

BARNARD, P. J.

All of the material facts in this case are essentially the same as those in San Joaquin Valley Securities Company, a Corporation, v. Prather (Cal. App.) 11 P.(2d) 45, this day decided, except for a difference in names, dates, and amounts. The cases were tried together, in conjunction with three other cases, and this appeal is from a judgment in favor of one of the defendants. While there is a separate appeal in each case, all five cases were submitted upon a single transcript and a single set of briefs.

For the reasons given in San Joaquin Valley Securities Company, a Corporation, v. Prather, supra, the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 773

SAN JOAQUIN VALLEY SECURITIES COMPANY (a Corporation), Plaintiff and Appellant, v. Robert Edward LEWIS, Defendant; M. E. Newlin, Defendant and Respondent.

Civ. 379.

District Court of Appeal, Fourth District, California.

May 9, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 8, 1932.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

F. H. Pearson, of Fresno, for respondent.

BARNARD, P. J.

All of the material facts in this case are essentially the same as those in San Joaquin Valley Securities Company, a Corporation, v. Prather (Cal. App.) 11 P.(2d) 45, this day decided, except for a difference in names, dates, and amounts. The cases were tried together, in conjunction with three other cases, and this appeal is from a judgment in favor of one of the defendants. While there is a separate appeal in each case, all five cases were submitted upon a single transcript and a single set of briefs.

For the reasons given in San Joaquin Valley Securities Company, a Corporation, v. Prather, supra, the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 774

SAN JOAQUIN VALLEY SECURITIES COMPANY (a Corporation), Plaintiff and Appellant, v. E. M. HARRIS, Defendant and Respondent; Lester M. McDonald, Defendant.

Civ. 380.

District Court of Appeal, Fourth District, California.

May 9, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 8, 1932.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Harris, Willey, Griffith & Harris, of Fresno, for respondent.

BARNARD, P. J.

All of the material facts in this case are essentially the same as those in San Joaquin Valley Securities Company, a Corporation, v. Prather (Cal. App.) 11 P.(2d) 45, this day decided, except for a difference in names, dates, and amounts. The cases were tried together, in conjunction with three other cases, and this appeal is from a judgment in favor of one of the defendants. While there is a separate appeal in each case, all five cases were submitted upon a single transcript and a single set of briefs.

For the reasons given in San Joaquin Valley Securities Company, a Corporation, v. Prather, supra, the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 362

In re HULBERT.

Civ. 4624.

District Court of Appeal, Third District, California.

May 7, 1932.

1. Infants ⇐16.

Superior court, acting as juvenile court, could determine from evidence whether minor had unlawfully assaulted another, and, on finding that he did, could declare minor to be ward of court, and provide for his custody (St. 1915, p. 1225).

2. Infants ⇐16.

No authority is invested in juvenile court to place minor on probation (St. 1915, p. 1225; Pen. Code, § 1203).

3. Infants ⇐18.

Superior Court, acting as juvenile court, had no jurisdiction to grant probation in case where minor made assault on another (St. 1915, p. 1225; Pen. Code, § 1203).

4. Infants ⇐18.

Superior court acting as juvenile court had no jurisdiction to try minor for offense of simple assault (St. 1915, p. 1225).

5. Infants ⇐16.

Juvenile court, finding that minor unlawfully assaulted another, exceeded its authority in placing minor on probation and requiring him to pay $100 to probation officer (St. 1915, p. 1225, §§ 1, 4d, 5; Pen. Code, § 1203).

Appeal from Superior Court, Mendocino County; M. H. Iverson, Judge.

A petition was filed charging Donald Hulbert, a minor, with having committed an assault, and, from a judgment adjudging him to be a ward of the juvenile court and placing him on probation and requiring him to pay a penalty, he appeals.

Judgment modified, and, as modified, affirmed.

Charles Kasch, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

A petition was filed in the superior court of Mendocino county, sitting as a juvenile court, charging Donald Hulbert, a minor of the age of 18 years, with having committed an assault upon Inez Pinoli, thereby causing her serious injury, and that by reason thereof he was a person coming within the provisions of the Juvenile Court Law (St. 1915, p. 1225 as amended).

Upon the hearing of said matter, the said Donald Hulbert was adjudged to be a ward of the juvenile court, and, until the further order of the court, was placed in the custody of his parents. It was further adjudged by the court that said minor be placed on probation under the supervision of the probation officer of said county, and that during the period of said probation the said minor should pay to the probation officer the sum of $100 to reimburse Mrs. Elvira Pinoli, the mother of said Inez Pinoli, for the expense made necessary by the injuries inflicted as the result of said assault. From this judgment, Donald Hulbert has appealed.

He does not upon this appeal question the action of the court making him a ward of the juvenile court, but bases his ground for reversal solely upon the proposition that the juvenile court was without jurisdiction to require the payment to the probation officer of the $100.

Respondent relies upon the provisions of section 1203 of the Penal Code for the authority of the court in placing the said minor on probation. This section provides that, after conviction of a public offense, the court may, in the exercise of its discretion, place the defendant upon probation, and, in doing so, may provide reparation in proper cases, and compensation for any injury done to any person resulting from the unlawful act.

[1] Therefore, the question to be determined in this case is whether or not the court was authorized to place appellant on probation, for, if it had authority so to do, the right to require reparation would follow. Acting as a juvenile court, it had the right under section 1 of the Juvenile Court Law (St. 1915, p. 1225) to ascertain whether or not appellant came within the provisions of said section, and for that purpose to hear evidence which tended to show that appellant had unlawfully assaulted Inez Pinoli, and, having found that he did unlawfully assault her, to declare him to be a ward of said court, and make such disposition respecting the custody of said appellant as to the court seemed to be for his best interests.

The evidence in this case shows without contradiction that at the date of the alleged offense appellant was of the age of 17 years.

Section 4d of the Juvenile Court Law provides that: "No person under the age of eighteen years at the time of the commission of an alleged offense or crime shall be prosecuted for crime until the matter has first been submitted to the juvenile court by petition as hereinbefore provided, or by certificate of the lower court as hereinafter provided"; and section 5 of said act provides: "In no case shall an order adjudging a person to be a ward of the juvenile court be deemed to be a conviction of crime."

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[2] No authority is vested in the juvenile court to place a minor on probation, for it is given no authority to administer punishment if it finds that he or she has violated the law. If it finds that a minor under the age of eighteen years has violated the law, its duty is to make him or her a ward of the court, and provide for his or her custody and welfare during minority.

[3] Nor did the superior court have jurisdiction to grant probation in this case.

[4] Section 1203 of the Penal Code provides that the court can grant probation after conviction of a public offense. This court had no jurisdiction to try appellant for the offense charged in the petition. The charge set forth there is for a simple assault of which only a justice of the peace or police magistrate would have jurisdiction.

[5] We are of the opinion the court exceeded its authority in placing appellant on probation and requiring him to pay $100 to the probation officer during the term of the probation.

The judgment is therefore modified by striking out that part of the judgment placing appellant on probation and requiring him to pay to said probation officer $100, and, as so modified, is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

123 Cal.App. 204

BASHFORD v. A. LEVY & J. ZENTNER CO. et al.

Civ. 369.

District Court of Appeal, Fourth District, California.

April 29, 1932.

Rehearing Denied May 26, 1932. Hearing Denied by Supreme Court June 28, 1932.

1. Partnership ⇐216(2).

In breach of contract action, wherein defendants cross-complained against plaintiff and another, allegation that plaintiff represented that other cross-defendant was plaintiff's partner *held* insufficient to admit evidence of partnership.

2. Contracts ⇐333(8).

In breach of contract action, allegation of misrepresentations upon which no damages were predicated *held* immaterial.

3. Pleading ⇐312.

Pleading, even if alleging partnership, *held* negatived by alleged partnership contract attached to pleading and not signed by one of alleged partners not named as party in contract.

Facts disclosed that the attached contract named only plaintiff as party of the second part and was not signed by plaintiff's alleged partner, which fact, in the absence of any other allegation from which it might appear that the alleged partner who did sign the contract acted for the one who did not in signing it, nullified the allegation of the pleading that the one who did not sign it entered into the agreement.

4. Principal and agent ⇐41.

In principal's cross-action against fruit purchasing agent for breach of duties, whether agent made contracts paying more than maximum authorized prices *held* for jury.

5. Appeal and error ⇐1002.

Appellate court *held* bound by jury finding on conflicting evidence.

6. Principal and agent ⇐65.

Fruit purchasing agent did not breach duty in personally paying hauling charges unauthorized by principal.

7. Principal and agent ⇐61(1).

Fruit purchasing agent *held* required only to use ordinary care and skill in handling and packing fruit.

Such agent was required to use ordinary care, skill, and prudence in handling and packing the fruit, but was not required to produce a perfect pack where such results were not obtained in the district by the best and most careful and skillful packers.

8. Appeal and error ⇐1056(1).

In principal's cross-action against purchasing agent for breach of duties, excluding evidence that agent was to buy exclusively for principal *held* not error, where record did not disclose whether purpose for which evidence was offered was to modify written agency agreement not containing such restriction (Civ. Code, § 1698.)

Civ. Code, § 1698, provides that a contract in writing may be altered by contract in writing, or by an executed oral agreement, and not otherwise.

9. Principal and agent ⇐41.

In fruit purchasing agent's breach of contract action against principal, damages from loss of profits following breach *held* within issues, authorizing proof of such loss.

Facts disclosed that by the terms of the contract plaintiff was to work as fruit purchasing and packing agent for defendant during the 1929 season; that plaintiff began his duties on June 10, 1929, and was prevented from further performance by defendant's action on July 9, 1929; and that the gist of his action was for damages consisting in the loss of profits on the

fruit to be packed between July 9th and the end of the 1929 season.

10. Appeal and error ⇐1056(4).

Excluding evidence regarding extent of damages allegedly suffered by party alleging breach of contract *held* harmless error where jury found contract was not breached.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by W. L. Bashford against A. Levy & J. Zentner Company and others, in which named defendant cross-complained against plaintiff and another. From the judgment for plaintiff, named defendant appeals.

Affirmed.

H. A. Savage and Gilbert H. Jertberg, all of Fresno, for appellant and cross-complainant.

Fernand de Journel, of Reno, Nev., and Louis C. Levy, of Fresno, for respondents and cross-defendants.

MARKS, J.

Plaintiff instituted this action to recover damages for an alleged breach of a written contract. The case was tried before a jury, which returned a verdict in favor of the plaintiff in the sum of $6,632.38. Defendant is here on appeal from the judgment which was entered upon this verdict.

The record is a large one and many grounds are presented upon which it is urged that the judgment must be reversed. A number of them depend upon an asserted partnership which defendant maintains existed between the cross-defendants during all times material to this action. Our task in deciding this case can be shortened by our first considering this question of partnership, as we have concluded that the pleadings do not present any issue of such a relation existing between the cross-defendants and, therefore, that the trial court committed no error in excluding evidence of its existence and damages which defendant asserted it suffered by actions of Sawyer, one of the supposed partners.

On May 3, 1929, plaintiff and defendant entered into a written contract, the material parts of which are as follows: "Memorandum of agreement made and entered into 3rd day of May, 1929, by and between A. Levy & J. Zentner Co., Fresno Shipping Division, Fresno, Calif., party of the first part, and W. L. Bashford, of Fresno, Calif., party of the second part. Witnesseth: Second party agrees to solicit fresh deciduous fruits and grapes for first party, on terms and contracts furnished by first party; pack and load same in refrigerator cars, during season 1929, all at the expense of second party. It is agreed that first party shall pay second party the regular commercial packing rates for the several varieties secured, packed and loaded; specifically set forth hereunder, to-wit: (Unit prices follow) Second party guarantees above prices to be in line with packing charge made by Pacific Fruit Exchange, California Fruit Exchange, Stewart Fruit Co., and other legitimate consignment dealers. It is understood and agreed that above charges include all costs of securing the fruit, material, labor, warehouse rental, and equipment, and that packing charges are payable to second party when cars are loaded and billing surrendered to first party. First party agrees that second party shall have the packing and loading of all fruits secured from growers for first party in the San Joaquin Valley, tributary to the following loading stations: Visalia, Hanford, Dinuba, Parlier, Sanger (or vicinity), Fresno (Levy Zentner Warehouse). First party agrees to advance to second party a sufficient amount weekly to cover soliciting expenses, house equipment, field boxes, etc., and not less than $100.00 weekly, if needed, this advance to be charged to second party and deducted from packing charges at the rate of $50.00 per car. (Signed) A. Levy & J. Zentner Co., Fresno Shipping Division, By H. I. Lewis, Mgr. (party of the first part), (signed) W. L. Bashford, By W. L. Bashford (party of the second part)."

[1, 2] It is alleged in the complaint and established by the evidence that the plaintiff secured packing houses, material, equipment, supplies, and labor to perform his part of the contract and, upon instructions from the defendant, entered upon the performance of his obligations under the contract about June 10, 1929; that on July 9, 1929, the defendant notified plaintiff that he had violated the provisions of his contract and thereafter refused to permit him to perform, which caused him the damage claimed. The answer denied many of the allegations of the complaint and in a separate defense alleged that its refusal to permit the plaintiff to perform after July 9, 1929, was due to and excused by many serious breaches of the contract by Bashford and Sawyer. It sought to recover damages against the cross-defendants under the allegations of the cross-complaint in which the same breaches of the contract were alleged as in the answer. A copy of the contract was attached to each pleading we have mentioned.

The allegations under which defendant claims the right to have introduced evidence of a partnership are found in the separate defense of the answer and in the cross-complaint. In the answer it is alleged: "That at the time said agreement, Exhibit 'A,' was entered into, the said plaintiff did represent to defendant that one M. L. Sawyer and plaintiff were partners in the business ar-

rangement undertaken by said Exhibit 'A,' and that said M. L. Sawyer would continue to be a partner of plaintiff and would loyally and continuously work with plaintiff as a partner, and give defendant the benefit of his ability and acquaintance with farmers and fruit conditions in the districts covered by said agreement; that plaintiff then and there represented to defendant that the said M. L. Sawyer was a silent partner and could not sign the contract for the reason that certain litigation and claims were pending against him and that the said Sawyer was owing certain moneys, and the creditors of said Sawyer might interrupt the arrangement set forth in Exhibit 'A.'" The substance of this allegation is repeated in the cross-complaint with "cross-defendants" used instead of "plaintiff" and plurals substituted for the singular where necessary. It is obvious that these portions of the pleadings fail to allege that a partnership existed between Bashford and Sawyer. These misrepresentations, if they are such, are immaterial because no damages are predicated upon them in either of the pleadings.

[3] The cross-complaint contains the following allegation, from which a joint liability of Bashford and Sawyer might be inferred had the exhibit not been attached to the pleading and made a part thereof by reference: "That heretofore and on or about the 3rd day of May, 1929, the parties hereto entered into that certain memorandum of agreement attached hereto and made a part hereof and marked Exhibit 'A.'" The Exhibit A referred to is the contract between Bashford and the defendant from which we have already quoted. It was not signed by Sawyer, and in the absence of any other allegation from which it might appear that Bashford acted for Sawyer in signing the contract it nullified the allegation of the pleading that Sawyer entered into the agreement.

The rule that the allegations of a pleading which are negatived by the express and certain language of a written instrument set forth therein, or made a part thereof by reference, are to be disregarded was recognized by the early case of Stoddard v. Treadwell, 26 Cal. 294, where it was said: "The complaint not only sets out the contract in hæc verba, but contains a statement of its legal effect according to the views of the pleader; and it is insisted that the consideration upon which the promises of the defendants, for breaches of which the counts respectively proceed, has been misapprehended in that statement. Should all this be conceded, still the erroneous version of the pleader may be rejected as surplusage, for the true relations of the different parts of the contract to each other are disclosed by the contract itself. A contract may be declared on according to its legal effect or in hæc verba. If the former mode should be adopted, then the defendant may by the rule of the common law in a proper case crave oyer of the instrument, and if it appear that its provisions have been misstated, he might set out the contract in hæc verba and demur on the ground of the variance. But where a plaintiff himself sets forth the contract in the terms in which it is written, and then proceeds by averment to put a false construction upon the terms, the allegations, as repugnant to the terms, should be regarded as surplusage, to be struck out on motion. Utile per inutile non vitiatur. (1 Ch. Pl. 232.)"

This case was cited with approval in Silvers v. Grossman, 183 Cal. 696, 192 P. 534, and in Peak v. Republic Truck Sales Corp., 194 Cal. 782, 230 P. 948, 950, where it was said: "It may be said in this connection that when a pleader sets forth in his pleading what he either admits or alleges to be the substance or legal effect of an instrument in writing and in the same pleading sets forth in hæc verba the written instrument itself, if the latter is unambiguous (Silvers v. Grossman, 183 Cal. 701, 192 P. 534), the matter in the pleading inconsistent with the text of the writing will be treated as surplusage."

The pleadings do not present the issue of a partnership existing between Bashford and Sawyer. Alleged violations by Sawyer of the duty which an agent owes his principal, and the rulings of the trial court in refusing to admit evidence proffered by the cross-complainant of the existence of a partnership relation between the two cross-defendants, were, therefore, not prejudicial and need not be further considered by us. This leaves for our consideration the question of whether or not Bashford violated the duties which an agent owes to his principal to such an extent that the defendant was justified in terminating the agency and ending Bashford's rights under the agreement. These alleged breaches are numerous and fall into somewhat similar classes, so we need only consider one out of each class typically illustrative of the question there involved.

[4, 5] The defendant maintains that the plaintiff purchased fruit for it at a price in excess of the amount specified by its managing agent as the maximum price to be offered to the growers. It should be observed that of the numerous contracts for the purchase of fruit of which the defendant complains under this specification of error, Bashford testified that a number of them were not executed by himself or his agents and that the fruit was purchased and the contracts made by the managing agent of the defendant or his agents without the knowledge or consent of Bashford. Of course this evidence, although contradicted by other witnesses, furnished sufficient reason for the elimination of these purchases from consideration by the jury as indicating a breach of duty by

Bashford. If he or his agents did not make these contracts and did not purchase the fruit described in them, he could not have violated any instructions as to the maximum price to be paid for the fruit. The jury accepted his testimony as true and we are bound by its finding where there is a conflict in the evidence.

The plaintiff did purchase plums from one George Albert Smith for more than the maximum price set by the defendant. The fruit was accepted, shipped, and paid for by defendant. The matter was thoroughly considered and discussed by Bashford and defendant's managing agent and the breach waived. The defendant maintains that Bashford purchased other plums at a price of $5 per ton more than that specified. Bashford testified that the managing agent of the defendant instructed him in connection with these purchases that "he was willing to pay the same as any other legitimate shipper in the deal"; that other legitimate shippers were paying the higher price for the plums at the time of his purchase for defendant. This created a conflict in the evidence which the jury resolved in favor of the plaintiff.

The defendant maintains that Bashford bought many more carloads of peaches than he was instructed to purchase and as the market price for the fruit dropped, serious loss was caused to the defendant. Bashford denied this and testified that he purchased less peaches than the maximum number of cars he was permitted to purchase under the instructions of defendant's managing agent. The jury evidently accepted Bashford's testimony as true.

[6] The defendant complains because of the purchase of two hundred tons of peaches from one Ayers for $50.00 per ton plus $1.25 for hauling, contrary to specific instructions concerning this crop. The written contract covering the purchase of this crop was introduced in evidence. The purchase price therein specified was $50 per ton with nothing said about hauling. It is shown by the evidence that the refusal of defendant to pay the hauling charge was communicated to Ayers and that Bashford agreed to personally pay this charge if it were not otherwise paid. This occurred before the written contract was signed and it is evident that Bashford did not obligate defendant to pay this hauling charge. We know of no rule of law, and there is certainly nothing in the contract, that would prohibit Bashford from personally paying these hauling charges if he desired to do so.

[7] The defendant maintains that there was poor packing of grapes, plums, and peaches, and that the piling of boxes of peaches on top of each other caused damage to the fruit, the exact extent of which does not appear. It should be observed that all the fruit packed by Bashford passed official inspection. The defendant's witnesses testified that in perfect packing of fruit the defects complained of would not occur. They also testified that a perfect pack was never obtained in the best regulated houses and that similar defects in packing and handling fruits were apparent in all packs. The plaintiff was required to use ordinary care, skill, and prudence in handling and packing the fruit but was not required to produce a perfect pack where such results were not obtained in the district by the best and most careful and skillful packers. The jury was justified in concluding from the evidence that Bashford packed and handled the fruit with due care and skill; that the results obtained by him were equal to those of the best packers of fresh fruit in the district; and that the few defects in his packing and handling of the fruit shown by the evidence furnished no sufficient ground for the defendant discharging him and terminating the contract.

The defendant next complains of the failure to pack seventy-five crates of plums for shipment to San Francisco by truck and thence by boat to Honolulu. The order to pack these plums was given to Sawyer and not to Bashford, who knew nothing about the matter until the next day. As a matter of fact, the plums were actually packed late in the day the order was given Sawyer and were shipped according to the original plan.

The defendant complains of what it terms "The unloading of peaches purchased by Sawyer and Copa de Ora Fruit Company onto A. Levy & J. Zentner Co., at a time when the market had broken badly," and, "the loading of Levy & Zentner peaches in Copa de Ora boxes." An examination of the record discloses that the defendant did not permit Bashford to use its Fresno warehouse and that with its knowledge he packed fruit at a packing house used by Sawyer and the Copa de Ora Fruit Company; that through a mistake of an employee the fruit in question was received on the tags of the defendant and paid for by it; that as soon as Sawyer learned of the mistake he immediately repaid the defendant all of the money which it had paid out for this fruit. The money was accepted by the defendant and the mistake was rectified by this payment.

[8] The defendant attempted to introduce evidence of a conversation between its managing agent and Bashford and Sawyer which occurred after the execution of the contract of May 3rd, 1929, wherein it was claimed that the agent told them that they were to solicit and buy fruit for the defendant exclusively. This evidence was excluded. Under the pleadings and evidence the defendant and cross-complainant was not entitled to any relief against Sawyer and the correctness of the ruling in so far as it affected evidence

against him is not open to question. Bashford had a written contract with the defendant that did not provide that he should work exclusively for it. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Section 1698, Civ. Code. Just what the defendant expected to prove by the evidence which was excluded does not appear from the record. It does not intimate that the contract of May 3d was modified by another written agreement. It did not offer to prove that it had been modified by an executed oral agreement. The trial court admitted evidence which showed that Bashford did not solicit, buy, or pack any fruit for any person, association, or corporation other than defendant until after July 9, 1929, when the defendant dispensed with his services. We find no error in this ruling of the court.

[9] The defendant assigns as error the ruling of the trial court in admitting in evidence proof of loss of profits to the plaintiff on fruit purchased by and packed for it at points named in the contract of May 3, 1929, after July 9th, and during the season of 1929, urging that this damage was not within the issues of the pleadings. We cannot agree with this contention. It clearly appears that the plaintiff entered on the performance of his duties on June 10, 1929, and was prevented from further performance by action of the defendant on July 9, 1929. He was paid in full for his services to the latter date. The gist of his action was damages for breach of the contract. These damages consisted in the loss of profits on the fruit to be packed between July 9th and the end of the season of 1929. The contract clearly and definitely provided that Bashford "shall have the packing and loading of all fruits secured from growers for first party (defendant) in the San Joaquin Valley, tributary" to named points. Under this contract he was entitled to pack and load the fruit in question or collect his profits on such operation unless his dismissal by the defendant was justified. The jury decided that this dismissal was not justified and we think correctly so.

[10] The defendant complains of a ruling of the trial court sustaining objections to the introduction of evidence by it in support of the allegations of its cross-complaint as to the extent of the damages suffered by it because of the alleged breach of contract by the plaintiff. Counsel for both parties have devoted much energy to a technical discussion of the cross-complaint, whether general or special damages are alleged and whether the plaintiff could lawfully demand a bill of particulars from the defendant setting forth the detailed items of damage it claimed to have suffered. We do not find it necessary to consider and decide these questions. The defendant's right to recover on its cross-complaint depended on whether or not there had been a breach of the contract by Bashford. The jury by its verdict decided that the contract had not been breached by Bashford but had been violated by the defendant and cross-complainant. As Bashford had not broken his contract he could not be held to respond in damages in any amount to the cross-complainant. Therefore the amount of their alleged damages became immaterial. This ruling of the trial court, though erroneous, was not prejudicial.

The other errors of which the defendant complains are so similar to those we have already considered that no good purpose could be served by discussing them in detail here. This would unnecessarily extend the length of this opinion.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

123 Cal.App. 316

TUCKER v. AMERICAN INS. CO. OF NEWARK, N. J.

Civ. 330.

District Court of Appeal, Fourth District, California.

May 5, 1932.

1. Appeal and error ⇐688(2).

Record *held* to show that insurer's counsel led insured's counsel to believe that insurer admitted assignment of fire policy, estopping insurer to complain of lack of proof thereof on appeal.

It was generally assumed during trial that assignment had been made, and insurer pleaded that it had been made, although insurer also denied similar allegation in insured's complaint. In response to statement by insured's counsel that assignment was admitted fact, insurer's counsel said: "I am referring, however, not to the assignment, but to the consent of the insurance company to the assignment." Thereafter the evidence was directed to the matter of the insurer's consent.

2. Insurance ⇐665(1).

Evidence *held* to support finding that fire policy had been assigned to purchaser of property with insurer's consent.

3. Insurance ⇐665(8).

Evidence *held* to support finding that fire insurer had notice of, and consented to, commencement of mortgage foreclosure proceedings.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Fred Tucker against the American Insurance Company of Newark, New Jersey. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

Orrick, Palmer & Dahlquist, of San Francisco, for appellant.

Gallaher & Jertberg, of Fresno, for respondent.

BARNARD, P. J.

On November 28, 1927, the defendant, through one Petersen, who was its agent with full authority to issue insurance policies, issued to one Martha Arslanian a policy of fire insurance in the sum of $1,000, covering a dwelling house on real property owned by her. Martha Arslanian had acquired this real property shortly prior to that date from the plaintiff herein through an exchange which had been negotiated by Petersen as a real estate agent. At the time of the exchange and at the time of the issuance of the policy, the property was incumbered by a mortgage and a deed of trust, securing separate obligations. On July 2, 1928, proceedings were begun to foreclose this deed of trust by recording the required notice in the office of the county recorder of Fresno county. Early in October, proceedings were begun to foreclose the mortgage referred to; summons being served on Martha Arslanian on October 10, 1928. Subsequently Petersen negotiated a retransfer of this property from Arslanian to the plaintiff herein; the property being conveyed to the plaintiff by deed dated November 21, 1928, and recorded December 5, 1928. On December 21, 1928, the building insured under the policy was destroyed by fire. This action was brought to recover on the insurance policy referred to and, from a judgment in favor of the plaintiff, the defendant has appealed.

[1, 2] Appellant contends that the court erred in finding that the policy in question was assigned to the respondent. It is urged that this finding is based upon an allegation in one of appellant's separate defenses, in which it was alleged that such an assignment had been made, and it is urged that this allegation may not be considered, since a similar allegation in the complaint was denied in another defense set up by the appellant. Conceding this to be the law, we cannot agree that this finding rests entirely upon this allegation in the appellant's pleading. While it is true that no witness testified that such an assignment had been made, a number of the witnesses spoke of the matter as if an assignment had been made, and during the trial the attorney for the respondent said: "Your Honor, they have pleaded under their oaths there was an assignment made so that would seem to establish that fact." Shortly thereafter, the attorney for the appellant stated that they had also denied that fact upon lack of information and belief, whereupon the attorney for the respondent stated: "That is very well, but nevertheless it is an admitted fact in the case." To this the attorney for the appellant replied: "I am referring, however, not to the assignment but to the consent of the insurance company to the assignment." Following that statement, the trial proceeded with evidence as to the consent of the insurance company to the assignment. Counsel for the appellant practically agreed to the statement made by counsel for respondent, to the effect that the existence of this assignment was an admitted fact in the case by thus directing the inquiry to the matter of the consent of the company to such assignment, and the appellant should not now be permitted to complain upon appeal that no further evidence was put in on that subject, especially since it specifically admits, in arguing another point, that this transfer actually occurred. In addition to this, the evidence shows that the obtaining of such an assignment was left by respondent to appellant's agent, who was also the real estate agent who had handled the deal. This phase of the matter is interwoven with the second point raised by appellant, which is, that the court erred in finding that the appellant had consented to this assignment. In this connection it is urged that the policy itself remained in the hands of the mortgagee, that it was never delivered to Mr. Petersen, appellant's agent, that no indorsements were made upon the policy, and that nothing further appears than that the agent intended to consent to the assignment at some future time. The respondent testified that he employed Mr. Petersen to have this property retransferred to him, and paid him for his services; that he knew that Petersen was the agent for the appellant; and that he knew that the policy here in question had been issued by him. He also testified that, after Mr. Petersen had procured the deed he desired, he asked him to transfer the insurance to him; that Petersen told him he held the policy and that he would take care of it; and that he made no further inquiry about the matter until after the fire, because in all his insurance transactions he left these matters with the agent. He further testified that Petersen told him that he had written the policy; that he himself did not then know where it was, although he later obtained it from the mortgagee after the fire; that he did not know that Petersen had not taken care of the matter until after the fire; and that he requested him when he got the deed to transfer the insurance also. Petersen testified that the respondent requested him to see to the transfer of the insurance on the place; that he asked him to see that it was done; and that he told him he would look it right up and take care of it as best he could. He also testified that he had every intention

to make the indorsement upon the policy when he knew the transfer was complete. This is most significant, as he himself had handled the transaction and had already obtained the deed which completely transferred the title as far as the insured, Arslanian, was concerned. Without question, the respondent put himself in the hands of the same agent of the appellant who had issued the policy, and it seems apparent that the respondent was lulled into relying upon the fact that the transfer had been taken care of by the assurances and actions of this agent, upon whom he had a right to rely, and who was in possession of more of the facts than was the respondent. We think that this evidence, with the reasonable inferences therefrom, is sufficient to support both of the findings complained of.

The next point raised relates to a purported release of this policy by the insured Arslanian, in consideration for a return of $7.50 on the premium. While this release was introduced in evidence, there is no evidence as to when or how it was secured or under what circumstances. Upon its face it purports to have been issued from the Petersen agency under date of November 28, 1928, and to have been signed by Martha Arslanian. The court found that it did not precede the assignment of the policy by Arslanian to the respondent. The deed from Arslanian to the respondent was dated November 21, 1928, while this release is dated November 28, 1928. The entire transaction was handled by the agent of the appellant who testified that he had agreed to have the insurance assigned to the respondent at or immediately after the time the property was transferred. While the evidence is most meager and unsatisfactory in relation to this release, it cannot be held that there is no evidence to support the finding complained of.

[3] It is next urged that the court erred in finding that the defendant had notice of and consented to the commencement of the two foreclosure proceedings. While it is admitted that the evidence shows that the agent Petersen had knowledge of one of these foreclosure proceedings, it is maintained that there is no evidence of knowledge on his part as to the other of such proceedings and also that any knowledge Petersen had in reference to these matters was obtained by him while acting as the agent of the respondent in a real estate transaction, and that this is not binding upon the appellant. It fully appears that Petersen had knowledge of this mortgage and trust deed at all times; that he issued the policy of insurance in question in the light of such knowledge; that he knew of at least one of the foreclosures, and the reasonable inference from the evidence is that he knew of the other; and that he undertook to look after the assignment of this insurance under such circumstances. In the light of his promise to the respondent upon the matter of this insurance, it cannot now be held that he knew part of these facts as a real estate agent, and did not know them as the agent of the appellant.

While the appellant has pleaded that it did not consent to the transfer of the policy, no evidence was introduced to this effect which has been called to our attention. There is no evidence to the effect that Petersen did not know the situation and act accordingly. The appellant relies on Petersen's testimony where he was asked if the respondent had told him that the mortgage and trust deed were both being foreclosed. He stated he was not sure that Tucker had told him this. Under further questioning, he stated that he thought the respondent spoke of the second mortgage as being foreclosed; that he may or may not have spoken of the foreclosure of the other; that he knew one mortgage had been foreclosed; and that the respondent desired to protect himself by clearing up the lien of the other. He testified that the respondent "had negotiated one and in order to protect himself was going to negotiate the other." And also, "that in order to clean up the entire situation he wanted him to secure a quitclaim deed from the Arslanians * * * all the encumbrances so he regain title of the property." At no time did Petersen testify that he did not know that both mortgages were being foreclosed, and, while his use of the word "negotiate" is not clear, it fully appears that a short time previous to this transfer he had arranged a transfer of this property from the respondent to Arslanian, subject to both of the incumbrances, and it is a natural inference from the fact that, in arranging this second transfer, he found it necessary to do something more with reference to the mortgage and trust deed than was done the first time, he did have such knowledge. The trial court was entitled to draw all reasonable inferences from the evidence, and we do not feel justified in holding that there is no evidence to sustain the finding complained of. There were two breaches of this same clause in the contract, and since it fully appears that the appellant waived one of them, and as all of the facts were apparently in the possession of the appellant's agent, all of the natural inferences would be in favor of the view taken by the trial court in making this finding. This view is all the more reasonable in view of Petersen's testimony that after the fire, when asked about the insurance by the respondent, he told him that his company was reputable, and that he needn't worry about it.

The only other point raised is that the court erred in allowing interest on the amount found due under the policy from the date of the loss, December 21, 1928. Appellant urges that, under the terms of the policy, the amount of the loss was not payable, in

any event, until April 20, 1929, and that interest could be allowed only from that date. This is conceded by the respondent, with the stipulation that the judgment may be modified in that respect. The judgment is hereby modified by striking therefrom the words "together with interest thereon at the rate of seven per cent (7%) per annum from the 21st day of December, 1928, to date of judgment," and inserting therein, in lieu thereof, the following: "Together with interest thereon at the rate of seven per cent (7%) per annum from the 20th day of April, 1929, to date of judgment."

As so modified, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 329

MITCHELL v. PORTER et al.

Civ. 8015.

District Court of Appeal, First District, Division 2, California.

May 6, 1932.

1. Automobiles ⇐19.

Evidence sustained owner's recovery of automobile on ground owner's signatures to certificate, under which purchaser claimed, were forged.

2. Estoppel ⇐75.

Owner whose agent intrusted automobile and blank certificate to third person *held* not estopped to assert recovery against one purchasing from third person on forged certificate.

Appeals from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by John F. Mitchell against W. E. Porter and others. Judgment for plaintiff, and defendant named and another appeal.

Affirmed.

John A. Murphy, of Salinas, for appellants.

Edward J. Clark, of Salinas, for respondent.

STURTEVANT, J.

In two actions involving the title and the possession of an automobile the trial court rendered judgments in favor of the plaintiff and the defendants, Porter and Caldwell, have appealed, bringing up typewritten transcripts.

Heretofore John F. Mitchell was residing in Oakland, and was the owner of the automobile the subject of the suit. At the time he purchased it, the motor vehicle department issued to him a certificate of registration. California Vehicle Act, § 41. He took out insurance on the automobile, and policies were issued to him. A little later he became ill and went to Arizona for his health. Before leaving Oakland, he appointed R. J. Mitchell, his father, as his agent, and authorized him to negotiate a sale of the automobile. Mr. R. J. Mitchell advertised the car for sale. In response to the advertisement a man giving the name of C. E. Marks appeared at the home of Mr. R. J. Mitchell and commenced negotiations to purchase the automobile. Marks produced a check and tendered it in payment. Mr. Mitchell stated that, before he turned over the automobile or papers, he must be given time to ascertain whether the check was good. To that suggestion Marks gave his consent, but asked permission to drive the automobile to the insurance office, where he proposed to have new insurance issued in his own name, and promised that he would return as soon as Mr. Mitchell had obtained information about the check. For the purpose of obtaining the insurance, Marks asked to have possession of the old policies and the "pink slip." Certificate of Ownership, St. 1925, p. 401. Accordingly those papers were intrusted to him. When John F. Mitchell received the pink slip from the motor vehicle department, he signed on the last line on the face of it. Before he went to Arizona, he delivered the pink slip to his father. When his father delivered the document to the man claiming to be Marks, the blanks on the reverse side "signature of registered owner" and "signature of legal owner" had not been filled. No writing appeared on those lines when Mr. R. J. Mitchell delivered the paper to Marks. When the old insurance policies were delivered to Marks, the blanks for assignments had not been filled. No bill of sale, or anything purporting to be one, was delivered to Marks by Mr. R. J. Mitchell. After Marks received the above-mentioned papers and left to go to the insurance office, he was never seen again. A few days afterwards the same individual appeared at the place of business of the defendant Porter in Salinas. At that time he represented himself as John F. Mitchell. After some negotiations, he made a purported sale of the automobile to the defendant. At that time, with the pen and ink furnished by the defendant, he filled in the blanks on the pink slip, signing "John Mitchell" three times—once on the face immediately above the genuine signature of John Mitchell and twice on the reverse side. At the same time Mr. Caldwell, acting for the defendant Porter, wrote out a bill of sale and the same man signed that document as John Mitchell. By stipulation of the parties the pink slip and the bill of sale

have both been brought up as parts of the record.

When Mr. R. J. Mitchell presented the check to ascertain whether it was good, he learned that the drawer of the check had no account at the bank.

When Mr. Porter sought to register the transfer of the automobile to him the above-mentioned forgery was detected. A little later a demand was made on him for the possession of the automobile, but he refused to surrender it. An action in claim and delivery was instituted, and at about the same time another action was commenced by the plaintiff seeking to enjoin the motor vehicle department from registering the purported transfer to the defendant Porter. Both actions were tried together, but a separate set of findings was made and a separate judgment was rendered in each action. The records have been consolidated for the purposes of this appeal.

In his complaint in claim and delivery the plaintiff inserted the ordinary allegations. In his complaint asking for injunctive relief, the plaintiff alleged that the signatures made at Salinas and purporting to be the signatures of John Mitchell were forgeries. W. E. Porter was made a defendant in each action. In the action for injunction, T. Caldwell, who acted as the agent of Mr. Porter, was made a defendant, and Frank B. Snook, as chief of the division of motor vehicles, was also made a defendant. Mr. Porter answered in each action, but the other defendants did not. Mr. Porter has taken an appeal in each action. In his answer in the claim and delivery suit he denied the allegations of the complaint. In his answer in the injunction suit he denied some of the allegations of the complaint, but he did not deny the forgery and he did not plead negligence, nor did he plead an estoppel. In making its findings the trial court did not make any findings outside of the issues made by the pleadings.

[1] The defendant claims that the evidence is insufficient. He asserts that the signature of the forger who impersonated John F. Mitchell and signed the certificate of ownership is enough like the true signature of John F. Mitchell to mislead any person who is not a handwriting expert. Granting all that the defendant claims in this behalf, the point presents nothing but a conflict in the evidence, but the conflict, if any, was addressed to the trial court. By stipulation of the parties the original exhibits, the pink slip and the bill of sale, have been brought up as a part of the record. In passing, we might say that we have examined all of the signatures and are quite unable to state that the trial court abused its discretion in holding that the signatures made at Salinas were forgeries.

[2] In his second point the defendant asserts that the trial court determined that, even though the plaintiff was admittedly negligent in permitting the forger to take the Buick automobile without sufficiently investigating his credentials and determining the worth of the check tendered the plaintiff at the time of the first sale, still defendants were negligent regarding closer inspection of the aforementioned signatures and the identity of the forger. To this point there are several replies. As indicated above, negligence was not made an issue by the pleadings. Properly, therefore, there was no finding on the subject, and no opportunity for a finding. True it is that culpable negligence may with other facts constitute an estoppel (Parke v. Franciscus, 194 Cal. 284, 297, 228 P. 435), but that defense was not pleaded, nor do we understand the defendant to claim it as being in this case. However, the negligence of the vendor, which may create an estoppel, was not present under the facts of this case. In People's Trust Co. v. Smith, 215 N. Y. 488, 109 N. E. 561, L. R. A. 1916B, page 840, Ann. Cas. 1917A, 560, Mr. Justice Cardozo, speaking for the New York Court of Appeals, fully discussed the subject. On page 491 of 215 N. Y., 109 N. E. 561, 562, L. R. A. 1916B, 842, Ann. Cas. 1917A, 560, he said: "To make out an estoppel on that ground, it is not enough to show that the owner was careless. He must have been careless in respect of some duty owing to the plaintiff or the public. [Citing cases.] * * * 'Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, and not the vigilance of parties in excluding all possibility of committing it.'" If the plaintiff had inserted his signature in the blanks on the reverse side of the certificate of ownership, and if he had thereafter intrusted his automobile and the certificate so filled out into the hands of Marks, the defendants might have cause to complain. National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 33 S. Ct. 818, 57 L. Ed. 1241. However, the plaintiff did not do so, and under well-settled rules, the blanks in the certificate not having been filled in, no ground of estoppel was established. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1, 10. The defendant cites and relies on Knapp v. Lyman, 44 Cal. App. 283, 186 P. 385. It is a sufficient comment to state that we find nothing in the case helpful to the defendant. The case of Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 P. 915, is more helpful. The facts in the instant case are far more favorable to the plaintiff than were the facts in the Clark Case. Nevertheless in that case the court held that the owner was entitled to pursue and reclaim his property.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 247

CALLISON et al. v. MT. SHASTA POWER CORPORATION et al.

Civ. 4317.

District Court of Appeal, Third District, California.

April 30, 1932.

1. Waters and water courses ⊂=85.

Injunction restraining power company from maintaining dam and tunnel in fashion that interfered with upper riparian owners did not wrongfully require company to maintain fixed level so as to exceed court's jurisdiction.

Such injunction did not wrongfully require defendant to maintain arbitrary levels of water as a condition on which it was permitted to maintain its dam, penstock, and tunnel for diverting water used for electric power purposes, because injunction recited defendants could so maintain and operate their dam, tunnel, and penstock that surface elevations of waters adjacent to lands of riparian owners would be maintained the same as in a state of nature, and that maintenance by defendants of water elevations in the river at their dam, at natural elevations during different seasons, should constitute compliance with the decision requiring them to maintain natural surface elevations adjacent to upper riparian owners' lands.

2. Appeal and error ⊂=931(1).

Appellate court, in absence of conflicting evidence, must assume that seasonal water elevations as fixed by trial court in suit to restrain unreasonable damming and diverting thereof are substantially correct.

3. Waters and water courses ⊂=46.

Power company had right to use of its reasonable proportion of waters of river for generating electric power.

4. Waters and water courses ⊂=42.

What is reasonable share of water of stream each riparian owner may use is generally question of fact.

5. Waters and water courses ⊂=85.

Injunction restraining power company from maintaining dam and tunnel in certain fashion, but permitting reasonable use of water for generating electricity, granted company its reasonable correlative share of water for riparian purposes.

Injunction restraining power company from operating and maintaining dam so as to interfere with water levels adjacent to riparian owner's land granted company its reasonable correlative share of water for riparian and power purposes because injunction specifically provided power company could use in a reasonable manner waters of the river for riparian purposes, including the generation of electrical energy, and that power company's maintenance of water levels at dam at levels occupied in natural state would constitute compliance with decision requiring it to maintain water elevations.

6. Appeal and error ⊂=931(1).

Appellate court must assume, in suit to restrain unreasonable damming and diverting of water, that natural water levels ascertained by trial court represent water remaining after pumping by riparian owners.

7. Waters and water courses ⊂=85.

Injunction restraining damming and diverting of water that interfered with upper riparian owners did not require defendant to maintain arbitrary levels, notwithstanding effect of droughts or floods.

8. Appeal and error ⊂=909(1).

Appellate court could assume in support of judgment enjoining unreasonable damming and diverting of water that, when power company opened tunnel, natural flow of water was rapidly withdrawn so as to damage riparian owner's crop.

9. Waters and water courses ⊂=85.

Upper riparian owners could enjoin unreasonable diminution of water supply by power company's tunnel resulting in damages to owners' crops.

10. Waters and water courses ⊂=171(1).

Lower riparian owners may not maintain dam so as to injuriously flood upper riparian owner's lands.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Suit by F. M. Callison and others against Mt. Shasta Power Corporation. From a judgment restraining flooding of lands or diversion of waters so as to deprive plaintiffs of their riparian rights, defendants appeal.

Affirmed.

William B. Bosley, Thomas J. Straub, Jones & Dall, and Athearn, Chandler & Farmer, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellants.

Jesse W. Carter, of Redding, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an injunction restraining the defendants from flooding plaintiffs' lands or diverting the water of Fall river so as to deprive them of their riparian rights thereto for the purposes of irrigation and domestic use. The appellants will be hereinafter referred to as defendant.

Fall river is a small stream which flows southerly in Shasta county through a flat basin, emptying into Pit river at Fall River Mills. Fall river has an average summer flow of 1,200 cubic feet of water per second. It has low receding banks in the vicinity of plaintiffs' lands. One mile above the mouth of this river there is a natural rock reef dam which extends across the entire stream, retarding the flow and impounding the water therein. The defendant is a hydroelectric power corporation which is engaged in manufacturing and supplying its customers with electricity for heating and lighting purposes. The power company owns all of the land adjacent to Fall river on both sides of the stream for a distance of two and one-half miles above its mouth. In 1920 this company constructed a concrete dam across Fall river just above the rock reef for the purpose of impounding and diverting the water of that stream. From a point directly above this concrete dam the defendant dug a tunnel southerly connecting with Pit river six miles below its juncture with Fall river. At this point a hydroelectric power house was constructed. At the Fall river entrance to this tunnel a penstock and diverting apparatus were installed to control the discharge of water into the canal. The power house, penstock, and tunnel have a capacity of 1,800 cubic feet of water per second. This is adequate to divert the entire flow of water from Fall river.

Twenty-six plaintiffs are involved in this action. Each of them owns land above the concrete dam and riparian to Fall river. The complaint alleges, and the court found, that the defendant exercising an unreasonable use of the water of Fall river, alternately impounded it so as to cause the injurious flooding of plaintiff's lands, and upon the contrary, at other times, diverted the entire stream to their detriment, thus depriving them of necessary water for irrigating their lands and for domestic use. An injunction was thereupon issued restraining the defendant from interfering with the natural flow of the stream or the normal level of the water of Fall river as it passes over, across, or adjacent to the lands of plaintiffs.

[1] The appellant does not contend that the findings lack adequate support of the evidence. It is, however, asserted a court of equity is powerless to compel a lower riparian owner of land, in view of his correlative water rights, to maintain fixed levels of a stream at all seasons, regardless of possible periods of drought or times of flood; that upper riparian owners of land have no title or right of control over the water of a stream after it has passed their land.

The appellant contends that the injunction wrongfully requires it to maintain arbitrary levels of water in Fall river as a condition upon which it is permitted to maintain its dam, penstock, and tunnel for diverting the water to be used for hydroelectric power purposes. We think the injunction may not reasonably be so construed. The court found that the flow of the stream in its natural condition, as it passes over, through, and adjacent to the lands of the upper riparian owners, "was practically the same each year"; in other words, that the normal level of the stream is substantially uniform from year to year, varying to conform with the seasons. The approximate variance and normal level of the stream is ascertained and declared. The normal depth of the stream is measured with relation to the height of the defendant's concrete dam. The court adopted findings in this regard as follows: That from May 15th to August 15th of each year the surface of the water was level with the top of the concrete dam; from August 15th to September 1st there was an increase of the depth of the stream of 1.5 inches; from September 1st to October 1st there was an additional increase of water of 2.5 inches; from October 1st to February 1st there was a further increase of 8 inches in depth; from February 1st to April 15th there was a further increase of 4 inches in depth; from April 15th to May 15th there was a gradual decrease in depth until the water again reached the top of the concrete dam.

The court then found that: "The defendant is entitled to have all of the waters of said Fall River continue in its customary flow by through, over and upon the said riparian lands subject only to such diminution of flow as results in the reasonable and lawful use by upper riparian proprietors on their riparian lands; and it (the defendant) is entitled to take, divert and use in a reasonable manner the waters of said Fall River on its said lands for riparian purposes, including the generation of electric energy. * * *"

The injunction then restrained the defendant from "maintaining or operating their said concrete dam across said Fall River at intake, or the canal, tunnel, surge chamber, penstock or power house in connection therewith, (so) that the natural elevations of the surface of the water in said river is raised or lowered where the same flows through, over, along, across, by, upon and from the lands of said plaintiffs."

The injunction further recites that: "Said defendants may, and they are hereby permitted to so maintain and operate their said dam, canal, tunnel, surge chamber, penstock and power house that the surface elevation of the waters in said river, where the same flows through, over, along, across, by, upon and from the said lands of said plaintiffs, and each of them, will be maintained as the same existed in a state of nature. * * * That the maintenance by said defendants of the elevation of the water surface in said Fall River at their said concrete dam at the

elevations hereinabove * * * set forth, and during the times therein specified, shall constitute a compliance with this decision requiring said defendants to maintain the surface elevation of the waters in said river," adjacent to the upper riparian lands of the plaintiffs.

[2] It appears from the terms of the injunction that the court merely seeks to restrain the defendant from operating or maintaining its dam, penstock, and tunnel in such a manner as to interfere with the "natural elevations of the surface of the water" in Fall river, as it flows over or adjacent to the lands of plaintiffs so as to deprive the upper riparian owners of their vested water rights for irrigation and domestic use. The court fixes the natural elevation of the water for the various seasons. We must assume these figures are substantially correct. We are cited to no evidence in conflict therewith.

[3] The appellant concedes it was not authorized to flood the lands of upper riparian owners by maintaining a dam which backed the waters up so that it overflowed their lands. The opening brief contains this language: "We freely admit that defendant has no right to overflow the lands of plaintiffs by damming back the waters of Fall River." But the defendant asserts "it is entitled to correlative rights, and that it cannot be compelled to maintain fixed levels of the stream at its diversion dam." In support of this claim the case of Turner v. James Canal Company, 155 Cal. 82, 99 P. 520, 525, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, is cited. That case declares: "It is accordingly well settled here that each riparian owner has a right to a reasonable use of the water on his riparian land for the irrigation thereof, and that the so-called common-law right of each to have the stream flow by his land without diminution is subject to the common right of all to a reasonable share of the water."

[4] This statement is supported by numerous California cases. In the case of Fall River Irrigation District v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A. L. R. 264, it was held that this appellant's reasonable use of the water of Fall river upon its riparian lands for hydroelectric power purposes is a proper riparian use thereof. It must therefore be accepted as the law of this case that the appellant has a right to the use of its reasonable proportion of the water of Fall river for the generating of electric power. In the case of Turner v. James Canal Company, supra, it is said: "The determination as to what is the reasonable share of each riparian owner is a question of fact, to be decided according to the circumstances of the case."

[5] The injunction in the present case may be construed to grant to the appellant this reasonable correlative share of the water of this stream for riparian and power purposes. It specifically so provides. The injunction declares in that regard: "The defendant * * * is entitled to take, divert and use in a reasonable manner the waters of said Fall River on its said lands for riparian purposes, including the generation of electric energy." It is true the quantity of water which the defendant may be permitted to take as its reasonable proportionate share is not fixed and determined in specific terms of cubic feet or second feet of water. The apportionment of water was not an issue in the case. The injunction will be construed to mean that the natural elevations of the surface of the stream, as found by the court, will be deemed to have been maintained, subject to the defendant's right to use its reasonable proportion therefrom for riparian purposes. The injunction does further provide that: "The maintenance by said defendants of the elevation of the water surface in said Fall River at their said concrete dam at the elevations herein above set forth, during the times therein specified, shall constitute a compliance with this decision requiring said defendants to maintain the surface elevations of the waters in said river."

In reconciling the language of the injunction so as to uphold the judgment, it may be said this does not mean that any variance from these specified depths caused by a reasonable riparian use of the water will necessarily constitute a violation of the injunction on the part of the appellant.

[6] The same construction of the injunction must be applied to any variance from these ascertained elevations which may occur by reason of the pumping of water from the stream by upper riparian owners of land. The appellant contends that the record shows that upper riparian owners pumped from the stream in 1927 the aggregate quantity of 109.5 cubic feet of water per second, and that this constituted nearly one-tenth of the entire summer flow of the stream. We must assume, however, that the natural elevations of the stream which were ascertained and declared by the court, made due allowance for such pumping of water by riparian owners other than the defendant. In other words, it is reasonable to assume the specific levels which were ascertained by the court represent the amount of water which naturally remained in the stream after the pumping of water which the record discloses.

[7] It is asserted that the injunction is invalid because it attempts to require the defendant to maintain arbitrary elevations of the water, regardless of the effect upon the stream caused by unusual periods of drought or times of flood. We think there is no merit in this contention. Such unusual conditions of flood or drought are not natural. Eleva-

tions of the stream which are caused by unusual floods or drought are not natural conditions. It would be a complete defense to a charge of violating the injunction to show that the deviations from the normal elevations of the stream were caused by unusual floods or periods of drought, so long as the defendant does not contribute thereto by an unreasonable diversion of the water.

There is no merit in the appellant's contention that the injunction is invalid because some upper riparian owners of land were not interested as parties in this particular litigation.

The appellant cites the case of Miller & Lux, Inc., v. Worswick, 187 Cal. 674, 203 P. 999, 1003, in support of its contention that the court is without authority to interfere with the diversion of the water of Fall river after it has passed the property of the upper riparian owners. The opinion in that case contains this language: "The law as established and recognized by the decisions of this state, in every case in which it has been considered, is declared to be that the rights of a riparian owner in the waters of the abutting stream are not affected by any interference with the waters of the stream, made on privately owned land after they pass below the boundaries of such riparian land. Such use below, no matter how long continued or what may be the nature of the claim of right thereto by the user thereof, in no manner affects the riparian rights pertaining to the land above the place of use and point of diversion."

This declaration of principle is based upon the facts of that particular case which conclusively show the upper riparian owner was not damaged by the lower appropriator's use of the water after it had passed beyond the complainant's control. An abundance of authority sustains that avowed principle under such circumstances. That this decision was dependent upon proof of an absence of damage to the property of the upper riparian owner is evidenced from the following language therein contained: "The rule that such diversions do not affect the upper riparian rights follows logically from the well-settled rule stated in the above-cited cases, and in every other case on the subject of prescription, that—'In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party.' Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 192, 30 P. 623, 625."

[8, 9] The Worswick Case from which the foregoing language is quoted does not hold that an upper riparian owner of land is without his remedy to prevent the abnormal and unreasonable diverting of the water of a stream, or the impounding thereof so as to injuriously flood his land, even though this damage is inflicted by a lower riparian owner by means employed on his own land. It must be apparent that the damage to upper riparian land may be just as great, as a result of drought or flooding, whether that condition is unlawfully produced by artificial means applied from above or below one's land. In support of the judgment, we may assume the evidence shows that the natural rock reef dam across Fall river retarded the velocity and flow of the water of that stream so as to retain the approximate depths ascertained by the findings at the various specified seasons of the year, and thus adequately supply plaintiffs' land with water by percolation so as to produce their crops. And that, by opening defendant's penstock and tunnel which were situated above this rock reef dam, the natural flow of the river is rapidly withdrawn from its channel so as to deprive the plaintiffs of its normal beneficial use. Allowing for the reasonable proportionate share and riparian use of the water by the defendant, certainly the plaintiffs may enjoin a further trespass upon their rights which results in the unreasonable diminution of water and drought of their lands so as to destroy or seriously damage the crops thereon. We are cited to no evidence in conflict with the foregoing findings of court.

We are not in accord with the appellant's contention that it is physically impossible for a lower riparian owner of land to diminish the flow of water adjacent to the property of an upper riparian owner on the same stream. It is said in the opening brief that: "As the diversion works of defendant are downstream from the lands of plaintiffs, it can never diminish the flow at the lands of plaintiffs." While it is true that substantially all the water which reaches the lands of the appellant in its course down the river bed must first pass the lands of the upper riparian owners, it is quite apparent the natural rock reef dam retarded the flow and impounded the water so as to raise the surface level for a considerable distance up a comparatively flat basin with low and receding banks so as to irrigate the soil by percolation to a very great extent. It is equally obvious that the presence of a tunnel and penstock which are located immediately above the concrete dam, with a capacity of diverting the entire stream, may so rapidly draw off the water of Fall river as to materially lower the normal level of the stream to the serious detriment of the upper riparian owners of land.

[10] Upon the contrary, the concrete dam which was erected by the defendant above the natural rock reef successfully impounds the water of Fall river at certain seasons, while the penstock and tunnel are closed, so as to

flood the lands of plaintiffs and destroy their crops. Numerous authorities hold that a lower riparian owner may not maintain a dam and impound the water of a stream so as to injuriously flood the land of upper riparian owners. Indeed, the appellant concedes this is the law.

In view of the foregoing construction of the injunction which was issued in this proceeding, we are of the opinion it does not exceed the jurisdiction of the court.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

123 Cal.App. 358

DIETRICHSON v. WESTERN LOAN & BUILDING CO.

Civ. 8250.

District Court of Appeal, First District, Division 2, California.

May 7, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 5, 1932.

1. Mortgages ⇐37(2).

Deed, absolute on face, may in equity be shown by parol to have been intended as security for debt.

2. Mortgages ⇐27.

Interlocutory decree in quiet title action providing for conveyance to plaintiff if he made certain payments within specified time, and final judgment, did not constitute equitable mortgage, giving plaintiff right of redemption (Civ. Code, § 2922).

Facts as alleged in complaint disclosed that title was quieted in defendant in certain quiet title action and that pending entry of final decree, by agreement of parties, an interlocutory decree was made to effect that if plaintiff made certain payment to defendant within specified time defendant was to convey premises to plaintiff; that plaintiff failed to make such payment and final judgment was entered for defendant; and that while plaintiff's appeal therefrom was pending parties entered verbal agreement that appeal would be dismissed and that plaintiff should have right to redeem within thirty days; and that on failure to make payment under such second agreement plaintiff contended interlocutory decree and final judgment constituted equitable mortgage giving him right to redeem.

3. Mortgages ⇐32(5).

Whether deed can be treated as mortgage depends upon whether there was continuing indebtedness from grantor to grantee (Civ. Code, § 2922).

4. Judgment ⇐89.

Plaintiff in quiet title action by agreeing to entry of interlocutory decree waived any irregularity because of entry of such decree.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Elving H. Dietrichson against the Western Loan & Building Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

L. H. Phillips and W. C. Dalzell, both of Los Angeles, for appellant.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This action was brought to redeem certain real estate which plaintiff alleges in his complaint was mortgaged property. Defendant demurred to the complaint on the ground that it failed to state a cause of action. The demurrer was sustained without leave to amend and judgment was thereupon rendered for defendant. From this judgment plaintiff has appealed.

The complaint is in two counts. In substance it is alleged in the first count of the complaint that on October 27, 1925, appellant was the owner of the land described in the complaint and that on March 12, 1926, the record title to said land passed to one John M. Fulton; that on May 17, 1926, appellant began an action against the said Fulton in the superior court of Los Angeles county, to quiet his title to said land. To this action the said Fulton filed an answer and cross-complaint in which he sought to have his title to said land quieted against appellant. Upon the trial of said case the court rendered its decision in favor of Fulton quieting his title to said land, and pending the entry of the final decree, by agreement of the parties, an interlocutory decree was made by the court to the effect that Fulton having purchased said land at a foreclosure sale for the sum of $2,189.78, including taxes and interest on incumbrances existing against it, that appellant be given until February 15, 1927, thereafter in which to pay said sum to Fulton and upon such payment within said time Fulton was thereupon to convey said land to appellant. It is alleged that Fulton took possession of said land on March 12, 1926, and that he and his grantees have continued in possession of same. That it was intended by them that the title to said land thus vested in said

Fulton should be held by him as security for said sum. That by mesne conveyances the title to said land had become vested in respondent, and that it had actual and constructive notice of appellant's rights therein.

Apparently appellant failed to make the said payment. In the second count of the complaint it is alleged that on March 23, 1927, a final judgment was rendered in said action, in favor of Fulton, and from this judgment appellant appealed, and while this appeal was pending a verbal agreement was entered into by appellant and said Fulton by which it was agreed that the appeal would be dismissed, and that said Fulton would hold said land for thirty days, and that within the thirty days appellant should have the right to redeem the said land by paying to said Fulton the aforesaid sum, and that upon such payment the said Fulton would convey said land to appellant. And thereupon appellant dismissed his appeal, but failed to pay to Fulton said sum.

That by mesne conveyances the said land has become vested in respondent and that it had actual and constructive notice of appellant's rights.

Appellant contends that the interlocutory decree and final judgment constitute an equitable mortgage and that he has the right of redemption. Section 2922 of the Civil Code provides that a mortgage can be created, renewed, or extended only in writing, executed with the formalities required in the case of a grant of real property.

[1] But it is the well-settled law of this state and elsewhere that a deed absolute on its face may, in equity cases, be shown by parol evidence to have been intended as security for a debt or obligation. 17 Cal. Jur. 776, and cases cited. In all of these cases there were debts existing between the parties at the time the conveyance was executed and the theory upon which a court of equity acts is that a person who accepts a conveyance with the understanding that it operates merely as a security for the payment of a debt owing to him by the grantor is chargeable with constructive or quasi fraud if he subsequently denies the existence of such an understanding, and the instrument will be enforced by a court of equity according to the contract of the parties. 19 R. C. L. 251.

In the instant case the money agreed to be paid to Fulton by appellant was not for a debt existing between them at the time said agreements were made. Appellant relies upon the case of Bunn v. Braswell, 139 N. C. 135, 51 S. E. 927, to sustain his contention that the judgment is an equitable mortgage. In that case a default had been entered against the defendant. He made a motion to set it aside, and thereupon the parties agreed that the judgment be modified to declare that the defendant had an equity to redeem upon payment to plaintiff of a certain sum before a certain date, and if such payment be made that plaintiff convey the premises to defendant.

The court held in this case that the judgment was an equitable mortgage, basing its decision largely upon the fact that the judgment was a consent judgment, that it was therefore to be construed in the same way as if the parties had entered into the contract in writing duly signed and delivered, also because the judgment expressly declared that the right to redeem existed.

[2] In the case now under consideration it cannot be said that the judgment is a consent judgment. The complaint contains a portion of the finding of the court in the case of appellant against Fulton. From these findings it appears that a trial was had and a decision was made quieting Fulton's title to said land. That pending the entry of the final judgment, appellant and Fulton entered into the verbal agreement for the interlocutory decree. No mention is made in this interlocutory decree of any right given appellant to redeem. It merely provided, in effect, that if appellant complied with the agreement within the specified time the judgment would be satisfied and the land conveyed by respondent to appellant.

Nor was the final judgment a consent judgment. It was rendered pursuant to the said decision of the trial court, made after a trial of the said case; and it became final for the reason that appellant failed to pay Fulton the agreed sum within the thirty days.

[3] Whether a deed can be treated as a mortgage or not must depend upon whether there was a continuing indebtedness from appellant to respondent to be secured by it, for if there was no indebtedness there clearly could be no mortgage. Ahern v. McCarthy, 107 Cal. 382, 40 P. 482; Beckman v. Waters, 161 Cal. 581, 119 P. 922; Stevens v. Fetterman, 76 Cal. App. 741–752, 246 P. 102.

It is manifest from the allegations of the complaint that the money to be paid under said agreements was not a debt owing by appellant to respondent. It was entirely optional with appellant whether he paid said sum or not, and in the event that he decided not to pay it, no liability or debt was thereby created against him in favor of respondent for said sum.

[4] Appellant further contends that the court had no authority to render an interlocutory decree in this case. He cites no authority supporting this contention. By his agreement to have the interlocutory decree entered, he waived any irregularity that occurred by reason thereof.

However, there is authority for a court of equity to make interlocutory decrees. 14 Cal. Jur. 867; Thompson v. White, 63 Cal. 505.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

123 Cal.App. 350

BARTOLINI v. ANDRIOLI et al.

Civ. 7943.

District Court of Appeal, First District, Division 1, California.

May 7, 1932.

1. Trial ⇐29(3).

Court's correct statement concerning witness' uncertainty and suggestion that counsel finish with him as soon as possible *held* not to go to weight to be given to testimony by jury, in viw of subsequent admonition.

2. Appeal and error ⇐201(2).

Where court's comment on witness' testimony was not objected to and no request that jury disregard it was made, error, if any, was waived.

3. Appeal and error ⇐1170(9).

Instructions that plaintiff must show jury "beyond any question of doubt" that defendants' car was parked in highway, and that most of instructions requested by plaintiff and given by court were pertinent, *held* reversible error (Const. art. 6, § 4½).

The instructions were reversible error because they required too high a degree of proof by plaintiff, and permitted jury to determine which instructions were pertinent and which were not.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Silvio Bartolini against E. Andrioli and others. From judgment for defendants, plaintiff appeals.

Reversed, and new trial ordered.

William M. Malone, of San Francisco (Conrad T. Hubner, of San Francisco, of counsel), for appellant.

Edmund Scott, of Redwood City, for respondents.

ROBINSON, Justice pro tem.

This is an appeal from the judgment following verdict for defendants in an action for damages growing out of a collision between two vehicles on a public highway in San Mateo county. The evidence as to negligence and contributory negligence is conflicting, but both issues went to the jury under proper instructions defining same.

[1, 2] Appellant claims that the court erred in making certain remarks in the examination of the witness Roy Elvin, but addressed to examining counsel in the face of interruption by opposing counsel, as follows: "The trouble is that the witness is hardly positive about anything, it seems to me. Why does he not answer a question directly, and then we will have no trouble. I think you had better get through as soon as you can."

It appears from the transcript, page 33, lines 9 to 13, that the following occurred during the examination of the witness Elvin:

"Q. And that (the accident) was on December 6, of 1929? A. *I believe* that is when it was.

"Q. Around the hour of five thirty, was it not? A. No, *I guess* when I saw him it was around ten after five, quarter after five."

And on page 34, line 5, as follows:

"Q. Now, after you got to the northerly limit of the race track, the highway dips down a little, does it not, there is an incline? A. *I believe* there is a slight incline."

And on page 34, lines 20 to 26:

"Q. And where was it when you first saw it? A. *I believe* it was about—it came into view about 10 feet in front of me.

"Q. That was the first time that you saw it? A. It was.

"Q. And at that time was the Fageol truck standing still or was it moving? A. Well, *I cannot say* whether it was absolutely stopped, but if it was moving at all it was going very slowly."

From page 35, lines 2 to 5, we quote:

"Q. Did you observe whether or not the lights were on the truck immediately after the accident? A. *I cannot say for sure* that they were not, but I know, as a matter of fact, that I did not notice any lights."

And on page 35, lines 24 to 26:

"Q. And did you observe as to whether or not he applied the brakes of the truck? A. Well, there was a little commotion at the time, and *I cannot say that he did, or I cannot say that he did not.*"

And again, referring to the direction in which he was looking, the answer is, "Straight ahead, *I believe.*" (Emphasis ours.) Then follow in the transcript several like "hardly positive" answers, all of which the jury must have noticed, and the remark of the court was only in line with what was apparent to all. It does not, we think, go to the *weight* to be given by the jury to the testimony of the witness.

Furthermore, the court instructed the jury that "any action the court may have taken in ruling upon the admission of evidence or the conduct of the trial you will not take as an expression of an opinion by the court for one side of this case or the other side of the case. * * * You are the sole and exclusive judges of the value and effect of the evidence." No objection was made to the remark of the court at the time or afterwards during the trial; nor was the court's attention directed thereto, nor any request made to the court to admonish the jury to disregard the remarks of the court. This counsel should have done, and, not having done so, any apparent error was waived.

"Counsel cannot sit quietly by, knowing that error has been committed, and await the verdict of the jury, and then upon motion for a new trial urge such error as a ground for new trial." Hurt v. Monumental Mercury Min. Co., 35 Idaho, 295, 302, 206 P. 184, 186, cited in Murphy v. Zwieg, 100 Cal. App. 266, 269, 279 P. 1062, 1064. And the latter case holds the same rule on motion for a new trial "as well as on appeal." "If no assignment of error was made, and no request for an instruction, how could the trial court say that an error of law occurred which was prejudicial?" We see no reason why this rule should not apply to the remarks of the court as well as those of counsel.

[3] After stating some of the issues, the court instructed the jury as follows: "But there is another feature in this case which I will state to you now because you are the ones who have got to decide whether the plaintiff is entitled to damages, and, if so, how much. The plaintiff's case rests upon this one point and no other: Was this automobile, Fageol automobile of the defendants parked in this highway at Tanforan track? Now, you all understand what it means when the counsel states in his complaint and in his argument now that this automobile was parked in this highway at Tanforan park. In order to recover damages the plaintiff will have to show to you, *beyond any question of doubt*, that this Fageol automobile was parked in the highway near Tanforan park. If you find from the evidence that the Fageol automobile was not parked there, then of course the plaintiff will not claim, I believe, that he has any case because he rests his case upon that point, and in order to render a verdict for the plaintiff you have got to find that this automobile, Fageol automobile, was parked there at the time and place, and if you find it was not parked there at that time and place, why, then of course it will be unnecessary for you to consider the matter any further because the plaintiff claims damages only for that one reason, that this car was parked there and he ran into it there parked." (Emphasis ours.)

It is claimed that this instruction was error. This related to the parked car and to nothing else. While standing alone, it possibly was error (which respondents conceded). Yet it now becomes necessary to determine whether it was misleading or conflicting.

In Galloway v. United Railroads, 51 Cal. App. 575, 581, 197 P. 663, 666, where an instruction was given, "Before you can render a verdict against the defendant, *the evidence must satisfy your minds to a moral certainty and by a preponderance of the whole evidence*," and another instruction, "If, therefore, the evidence upon this point is equally balanced or if it *does not satisfy your minds to a moral certainty and by a preponderance*, * * * your verdict must be in favor of the defendant," the court said: "To instruct the jury, therefore, that the evidence must satisfy their minds to a moral certainty and by a preponderance was error, as it clearly required satisfaction beyond a reasonable doubt, which is not necessary in a case of this nature"—citing cases.

In Greenleaf v. Pacific Tel. & Tel. Co., 43 Cal. App. 691, 185 P. 872, the trial court instructed: "Before you can find a verdict for the plaintiff the evidence must satisfy you that the fire was caused by the acts of the agent or employee of the defendant in placing hot ashes containing fire near or against plaintiff's warehouse; and if the preponderance of the evidence fails to satisfy you that the fire was so caused, *or leaves in your mind any doubt, confusion or uncertainty as to the origin of the fire, your verdict should be for the defendant.*" The court says: "To what avail are the instructions as to the sufficiency of a preponderance of the evidence to support a verdict and as to its efficacy if it produces unprejudiced conviction in their minds, when followed by the explicit direction that the degree of certainty indicated must not only be beyond a reasonable doubt, but *must not admit of any doubt at all?* [Emphasis ours.] Even in a criminal case, requiring the minds of the jurors to be satisfied beyond a reasonable doubt, this instruction would be erroneous. * * * The mere knowledge of the jurors that they might be governed by a preponderance of the evidence was not enough, when they were told that the effect of such preponderance must be such as to remove *any doubt* as to the origin of the fire."

In Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237, 238, the court, speaking of a formula instruction, ruled that it must contain all the elements essential to a recovery, "and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. This principle is well stated in Beyerle v. Clift, 59 Cal. App. 7, 9, 209 P. 1015, 1016, wherein it is held that: 'If an instruction by

its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced. "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state." * * * The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions. "It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a *clear conflict* [emphasis ours] in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff" * * *'"—citing many cases.

It will be noted that the court in its instruction quoted used the following language: "In order to recover damages the plaintiff will have to show to you, beyond any question of doubt, that this Fageol automobile was parked in the highway near Tanforan Park. * * * and in order to render a verdict for the plaintiff you have got to find that this automobile, Fageol automobile, was parked there at the time and place, and if you find it was not parked there at that time and place, why, then of course it will be unnecessary for you to consider the matter any further because the plaintiff claims damages only for that one reason, that this car was parked there and he ran into it there parked." That instruction eliminated from the consideration of the jury certain other matters submitted to them for their consideration, to wit, imminent danger, unavoidable accident, automobile lights, speed, careful operation when truck was being driven.

In Murphy v. Waterhouse, 113 Cal. 467, 473, 45 P. 866, 867, 54 Am. St. Rep. 365, the court said: "The court, after having told the jury that the burden of proof was upon appellant to show that there was no value or consideration for the note, said, 'It is for him to satisfy you, by such evidence as convinces your mind, that no value was paid for that note.' In a civil case it is error to tell the jury that there must be evidence sufficient to *convince their minds* of any fact necessary to be shown by either party. The weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case." (Reversed.) Cited with approval in Pitt v. Southern Pacific Co. (Cal. App.) 9 P.(2d) 273.

In People v. Miller, 171 Cal. 649, 154 P. 468, an insanity case, where the rule of reasonable doubt does not apply, it was held (syllabus): "In a criminal prosecution, after the court had correctly instructed the jury that the burden of establishing the defense of insanity rested on the defendant, and that the insanity may be established 'by a preponderance of evidence merely,' it was erroneous to further define that phrase as meaning 'that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds.' The definition so given was substantially the same as that of *'proof beyond a reasonable doubt,'* and the instruction in effect erroneously told the jury that it was incumbent on the defendant to establish insanity beyond a reasonable doubt." (Emphasis ours.) The case was reversed, and not aided by section 4½, article 6, of the Constitution. Cited in Estate of Ross, 179 Cal. 629, 633, 178 P. 510. See, also, Barrett v. Southern Pac. Co., 207 Cal. 154, 277 P. 481. To the same effect is Rush v. Lagomarsino, 196 Cal. 308, 319, 237 P. 1066 (reversed).

Furthermore, the court may have left it—and it is capable of that interpretation—to the judgment of the jury as to whether they would apply the claimed erroneous instruction *"beyond any question of doubt"* or the many instructions on the question of the weight and preponderance of the evidence.

Though we find this instruction given: "They (referring to counsel) have worked assiduously and presented many instructions and I shall give you most of them, and you will take them as the instructions of the court. Some of them I have refused, but I have *given* you the instructions because they have handed them to me and *most of them are pertinent* to the case. But, as I have before suggested, it is for you to determine whether that automobile was parked there in the highway at that time" (emphasis ours)—it must have related back to the last claimed erroneous instruction referred to, and left it to the jury to say *which* were pertinent and which were not. The *law* is for the court; the facts for the jury, to which they must apply the law. They may not speculate and determine which instructions are "pertinent."

In Turner v. Turner, 187 Cal. 632, 635, 203 P. 109, it was held that a finding that all the "material" allegations are true will not support a judgment; insufficient for any purpose; uncertain; and "no one can know what averments were deemed material." This rule we think would apply with greater force if it were left to the jury to determine the "materiality" or the "pertinency" of one or more of them. That should not be left to the jury. Admitting that the court in other instructions

correctly defined "preponderance" of the evidence, yet it cannot be determined which instructions were followed, and is reversible error. Alcamisi v. Market St. Ry. Co., 67 Cal. App. 710, 714, 715, 228 P. 410.

Taking the instructions by their four corners, and after viewing the evidence, we are unable to say that the jury was not misled by the erroneous instruction; section 4½, article 6, of the Constitution not controlling.

We are satisfied the judgment must be reversed. Therefore it is not necessary to notice any other of the claimed errors; and, if any, they will undoubtedly be corrected on a new trial.

The judgment appealed from is reversed, and a new trial ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 347

PEOPLE v. WEAVER.

Cr. 143.

District Court of Appeal, Fourth District, California.

May 6, 1932.

1. Criminal law ⇐1159(3).

Appellate court is not authorized to reverse judgment of conviction because of conflicting testimony, unless testimony is inherently improbable.

2. Homicide ⇐276.

Evidence as to self-defense in prosecution for assault with deadly weapon with intent to commit murder *held* for jury.

3. Homicide ⇐257(1).

Evidence *held* to support verdict that accused was guilty of assault with deadly weapon with intent to commit murder.

4. Witnesses ⇐242.

District attorney may refresh recollection of his witness by asking leading questions.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

L. Weaver was convicted of assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMSON, Justice pro tem.

By an information filed in the superior court, defendant and appellant was charged with the crime of assault with a deadly weapon, with intent to commit murder, to which he entered a plea of "not guilty." A trial was had before a jury, and the jury returned a verdict of guilty as charged in the information. This appeal is taken from the judgment of conviction and from the order of the trial court denying appellant's motion for a new trial.

Appellant makes two general assignments of error: First, that the evidence does not support the verdict; and, second, that the trial court erred in its rulings upon the admissibility of evidence.

Under appellant's first assignment of error he argues that the evidence establishes the fact that appellant's assault was justified in defense of appellant's person. The record discloses that an altercation took place between defendant and the complaining witness in a store operated by the complaining witness, about 10 minutes before the assault with which the defendant is charged. There is a conflict as to how this first altercation began, between the testimony of defendant and the testimony of the complaining witness. However, the evidence shows that in the first altercation the complaining witness struck defendant over the head with a revolver, using the same as a club. Defendant immediately left the store and went to the home of his mother in the same vicinity, where he obtained a pistol and walked back to a point close to said store, arriving there approximately 10 minutes after the first altercation. A witness for the people testified that he saw defendant returning with the pistol in his hand and heard him threaten to kill the complaining witness. Two witnesses for the defendant claimed that they saw the defendant return, but did not see a pistol in his hand and did not hear him threaten anybody. These same two witnesses testified that, when defendant was returning and had reached a point near said store, complaining witness hurried out to meet the defendant, holding a revolver in his hand and threatening the defendant with the revolver, said he would kill the defendant. On the other hand, the complaining witness testified that he did not have the revolver on his person at the time of the second altercation, and that he did not threaten the defendant. The uncontradicted evidence shows that the defendant, upon this second meeting with the complaining witness, shot the complaining witness three times with a pistol which appellant had in his hand, causing serious wounds.

[1] With the condition of the evidence as shown above, the most that can be said for the defendant is that the evidence presents a

substantial conflict on material matters. Appellate courts are not authorized to reverse a judgment of conviction because of conflicts in the testimony, nor is it the province of appellate courts to pass upon the credibility of witnesses in support of a verdict, or to determine the weight to be accorded their testimony. These matters are within the province of the jury and its decision is final, unless the testimony is inherently improbable and unbelievable. People v. Williams, 133 Cal. 165, 166, 65 P. 323; People v. Durrant, 116 Cal. 179, 200, 48 P. 75; People v. Clayberg, 26 Cal. App. 614, 624, 147 P. 994. An appellate court cannot substitute its judgment for that of the jury, there being nothing inherently improbable in the evidence. On appeal, the evidence even though conflicting, must be considered and resolved favorably to the finding of the jury. People v. Silva, 48 Cal. App. 728, 737, 192 P. 330.

[2, 3] Under the facts and circumstances above set forth, the question of self-defense was properly left to the discretion of the jury, and we cannot say that the jurors were not justified in disbelieving the defendant and his said witnesses and believing the testimony of the complaining witness and the other evidence on behalf of the people, and concluding therefrom, beyond all reasonable doubt, that the defendant returned to the scene of the trouble and shot the complaining witness with the deliberate and specific intent to murder him. People v. Owens, 3 Cal. App. 750, 751, 752, 86 P. 980. We are of the opinion that in the case at bar there was an abundance of evidence to support the verdict.

[4] Under appellant's second assignment of error he objects to the ruling of the trial court allowing the district attorney, over appellant's objection, to ask a witness called by the people, certain leading questions concerning former statements made by the witness which were inconsistent and at variance with his present testimony. The district attorney stated that he was asking such questions for the purpose of refreshing the recollection of the witness, and the nature of the questions asked indicates that such was the purpose. Under the authority of People v. Deckert, 77 Cal. App. 146, 152, 246 P. 157, and the cases therein cited, we have no doubt that the district attorney was justified in asking the questions objected to, and that the trial court's ruling was correct. As stated in said last-named case, at page 154 of 77 Cal. App., 246 P. 157, 161: "The propriety of the procedure adopted by the district attorney in the instant case is illustrated in the case of People v. Durrant, 116 Cal. 179, 214, 48 P. 75, 84, where it is said: 'When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury.'"

The judgment and order appealed from are, and each of them is, affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 373

MARLIN et al. v. ROBINSON.

Civ. 8186.

District Court of Appeal, First District, Division 1, California.

May 9, 1932.

1. Deeds ⇐93.

Determining factor in interpretation of conveyance is parties' intention at time of execution (Civ. Code §§ 1066, 1636).

2. Evidence ⇐448.

In construing conveyance, language therein must be considered before resorting to extrinsic evidence (Civ. Code, §§ 1066, 1636).

3. Deeds ⇐93.

Intent governing construction of conveyance is not grantor's intent, but joint intent of grantor and grantee (Civ. Code, §§ 1066, 1636; Code Civ. Proc. § 1860).

4. Deeds ⇐93.

Conveyance must be considered in its entirety to give effect to true intent of grantor and grantee (Civ. Code, §§ 1066, 1636; Code Civ. Proc. § 1860).

5. Easements ⇐1.

Conveyance without reservation between private parties may convey fee or easement, depending on construction of instrument under circumstances (Civ. Code, §§ 1066, 1636).

Such conveyance may convey a fee or an easement, depending on the construction of the instrument, the circumstances under which it was made, its usage, the situation of the subject and the parties.

6. Evidence ⇐450(3).

If language in conveyance is so ambiguous that intent cannot be ascertained, even considering surrounding circumstances, then resort may be had to parol evidence (Civ. Code, §§ 1066, 1636).

7. Easements ⇐1.

Grant for road purposes only may be consistent with fee-simple transfer or with

retention of fee with passing of easement, depending on intent of parties (Civ. Code, §§ 1066, 1636).

8. Easements ⇐1.

Conveyance to private adjoining owner for road purposes only *held*, under circumstances, to reserve fee and convey right of way only (Civ. Code, §§ 1066, 1636; Code Civ. Proc. § 1860).

Facts disclosed that grantor conveyed to grantee by a grant deed standard in form a strip of land off the side of his property about 16 feet wide and 75 feet long; that immediately following the description were words to the effect that the strip was along the same road then traveled by grantor, "the conveyance being for road purposes only." Furthermore, such strip for a long time prior to and subsequent to the conveyance was the only means used by grantor and grantee in going to and from their respective homes.

9. Appeal and error ⇐522(1).

Where court overruled objection to evidence pro forma, stating it would make formal ruling thereon before final decision, which it failed to do, evidence remained part of record.

10. Appeal and error ⇐1051(4).

In controversy between grantors' and grantee's respective successors to determine whether land conveyed for road purposes only conveyed fee or easement, admission of grantee's predecessor's statement that he understood only easement was conveyed, even if erroneous, *held* harmless (Civ. Code, §§ 1066, 1636; Code Civ. Proc. § 1860).

The admission of such testimony, even if erroneous, was harmless, since the instrument itself, construed in the light of the circumstances surrounding its execution, without any parol evidence conclusively showed that only an easement was conveyed.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action to quiet title by Laura B. Marlin and another against Jane Storey Robinson, formerly Jane Storey White. From a judgment for plaintiffs, defendant appeals.

Affirmed.

J. A. Bardin and J. T. Harrington, both of Salinas, for appellant.

Silas W. Mack and John Thompson, both of Monterey, for respondents.

WARD, Justice pro tem.

Plaintiffs filed suit to quiet title to a strip of land, alleging that they were the owners in fee, subject to an easement for road purposes only by defendant. Defendant answered, denying plaintiffs' ownership, and alleged that defendant was the owner in fee of the property and that plaintiffs had no right, title, or interest or estate in the land except that acquired by user; namely, a right of way for road purposes over and along said strip of land. The trial court found in favor of plaintiffs, and defendant appealed.

John Goodrich was the owner of a piece or parcel of land in Monterey county adjoining the real property of his brother-in-law John R. Cantua. In November, 1913, Cantua, whose property abutted a road, conveyed to Goodrich by a grant deed, standard in form, a strip of land off the north side of his property approximately sixteen feet wide by seventy-five feet in length. Immediately following the description in the deed, the following words appear: "It being along the same road now traveled by said J. R. Cantua. The conveyance being for road purposes only." The case involves the construction of the words attached to the granting clause. Plaintiffs and respondents now own the Cantua parcel, and defendant and appellant succeeded to the interest in the Goodrich property.

[1-4] Except as provided in article 4, chapter 1, title 4, of the Civil Code, grants are construed under the same rule as contracts. Civ. Code, § 1066. The intention of the parties at the time of execution is the determining factor in the interpretation of a conveyance. Civ. Code, § 1636. The language in the conveyance is to be first considered and the intention of the parties gathered therefrom before resorting to extrinsic evidence. Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 32, 276 P. 1017. It is not the intent of the grantor that governs in such cases. It is the joint intent of the grantor and the grantee. The court's duty is to assume the positions of the parties and to consider the circumstances of the execution of the conveyance, and therefrom, if possible, gain the intent of the parties. Code Civ. Proc. § 1860; Devlin v. Powell, 67 Cal. App. 165, 170, 227 P. 231. The conveyance in its entirety and each part thereof is to be considered, to give effect to the true intent of the grantor and the grantee. Las Posas W. Co. v. County of Ventura, 97 Cal. App. 296, 275 P. 817; Pitcairn v. Harkness, 10 Cal. App. 295, 101 P. 809.

[5] In considering this clause, it must be borne in mind that this was a conveyance giving the right of way for a private and not a public road. The clauses in several deeds may be quite similar, but the intent of the parties entirely different. If a grantor conveys, without condition or reservation, a strip of land to a municipal corporation for road purposes, he loses any right of dominion over the land, for the reason that the public body must of necessity control the use and operation of the road.

In Whitaker v. Regents of University of California, 39 Cal. App. 111, 117, 178 P. 308, 311, the court said: "In conclusion, it may be proper to remember that this gift was for a public purpose, and it should be regarded with even greater consideration than if the grant were for the use and benefit of a certain individual." Between private parties a fee or an easement may be conveyed, depending upon the construction of the instrument, the circumstances under which it was made, its usage, the situation of the subject and the parties to it.

[6, 7] Most of the citations presented by appellant are cases wherein land was conveyed for a public purpose, or, if to a private corporation or individual, there was no trust reserved, nor forfeiture or re-entry clause, depending upon the nature of the conveyance. The decisions in each of these cases recognize the rule that the terms of the conveyance are to be construed strictly against the grantor, but that the real test is the intent of the grantor and the grantee. If this intent can be ascertained from the language of the instrument, the determination is immediate; if not, then it is necessary to consider the surrounding circumstances, etc. If the language used is so ambiguous, indefinite, uncertain, or unintelligible that it is impossible to ascertain the intent even considering the surrounding circumstances, then resort may be had to parol evidence. In Cooper v. Selig, 48 Cal. App. 228, 191 P. 983, 984, the following expression was used: "For the purposes of a public road of said city." The court determined that the intent of the grantor was to pass the fee title. In Forgeus v. County of Santa Cruz, 24 Cal. App. 193, 199, 140 P. 1092, 1094, the court also decided the matter upon the question of intent, holding: "The intention was clearly to grant merely a right of way." In Pellissier v. Corker, 103 Cal. 516–518, 37 P. 465, 466, the following words were used: "* * * For the sole purpose of an alleyway," which was held to limit the estate granted to an easement. In that case the court said: "Section 1105 of the Civil Code declares that a fee-simple title is presumed to be intended to pass upon a grant of real property, unless it appears from the grant that a lesser estate was intended; and in this case it clearly appears * * * that a lesser estate was intended." In Parks v. Gates, 186 Cal. 151–155, 199 P. 40, 42, it was said: "* * * But the grant of land as a right of way recognizes nothing but an easement." The grant of land " 'to be used for a road' " or "for road purposes only" may be consistent with the transfer of a fee-simple title or the retention of the fee with the passing of an easement title, depending upon the intent of the parties.

[8] The strip of land in this case was the only means used by Cantua and Goodrich in going to and coming from their respective homes. It was so used for a long time prior and subsequent to the conveyance. There is no doubt that each party actually intended that it should be used only as a means of travel to the county road. That portion of the disputed phraseology, namely, "It being along the same road now traveled by said J. R. Cantua," is simply descriptive of the particular strip. "The conveyance being for road purposes only" is indicative of the intention that each party would not attempt to use this strip of land for any object or purpose other than a road. If Cantua intended to convey the fee to Goodrich, but to retain a right of way for himself, he failed to designate in exact and definite language his privilege to use the road; and still his action prior and subsequent thereto indicated an intent to retain a right to use this strip as a passageway to the county road. The only purpose in Goodrich acquiring any interest in this parcel of land was to use it as a right of way. He was prohibited from using it for any other purpose. Putting ourselves in the positions of the grantor and the grantee, and considering the prior and subsequent actions of the parties, together with the location of the particular strip relative to the homes of the grantor and the grantee and the phraseology itself, Cantua reserved his fee interest and conveyed only a right of way to Goodrich.

[9] During the trial, the following question was propounded to the grantee Goodrich: "What was your intention when you took that conveyance from Cantua?" To which question Goodrich replied: "I concluded if I ever wanted to sell out—I have a privilege to go out, and if I sell the place I could not go and give anybody else the privilege. I had no papers to show it before I got this document, being one of the family, but I had nothing to show for it, and I concluded if I ever wanted to sell, or they would sell, I had nothing to show I had a right of way to get out and I could not get out any other way." If this answer was admissible in evidence, it put an end to this controversy. It was an admission by the grantee that he only sought and obtained a right of way. An objection was interposed, and the court said: "Overruled proforma, and the court will make its formal ruling upon the matter before decision in the case." If the court had ruled subject to a motion to strike out and appellant failed to present such motion, the evidence would stand without a good objection on appeal. However, the court indicated an intention to rule before decision without further objection or motion by appellant. No ruling was made, and hence the evidence remains a part of the record. In this case it was unnecessary to resort to parol evidence. The language used in the deed, considered with all the surrounding circumstances, was sufficient to determine this question.

[10] Appellant contends that the error was prejudicial and that the decision of the case probably rested upon the testimony of the grantee Goodrich, the predecessor in interest of appellant. The evidence, without the testimony of Goodrich, preponderated in favor of respondents. We are not convinced that the Goodrich statement was the determining factor with the trial court, but, assuming that it was, a reversal upon that ground would not avail to the benefit of appellant. In view of the decision herein, no other judgment could be entered by the trial court.

After an examination of the entire cause, this court is unable to reach an opinion that the error resulted in a miscarriage of justice. Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 365

PEOPLE v. SINGH et al.

Cr. 1193.

District Court of Appeal, Third District, California.

May 7, 1932.

1. Criminal law ⇐1159(4).

Jury's verdict concludes question of credibility of testimony.

2. Witnesses ⇐201(2).

Where attorney visited defendants in jail under contract of employment and appeared as attorney in all proceedings prior to arraignment in superior court, admission of his testimony regarding conversation with one defendant respecting fake alibi and corrupting jury *held* prejudicial error.

3. Witnesses ⇐199(4).

Attorney repudiating employment could not violate confidence reposed in him while acting as counsel.

4. Criminal law ⇐1168(3).

Where defendants were tried together for same crime, attorney's testimony regarding conversation with one defendant respecting fake alibi and corrupting jury warranted reversal of all judgments.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Mukand Singh and others were convicted of the crime of assault with a deadly weapon with intent to commit murder, and Indar Singh, sometimes known as Needham Singh, was convicted of assault with a deadly weapon, and they appeal.

Reversed, and new trial granted.

J. Oscar Goldstein, of Chico, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

On October 29, 1931, the district attorney of Butte county filed an information in the superior court of Butte county, charging the defendants Mukand Singh, Amer Singh, and Indar Singh (sometimes known as Needham Singh) with the crime of assault with a deadly weapon with intent to commit murder, alleged to have been committed on the 8th day of October, 1931, near the town of Richvale, Butte county, Cal. On November 18, 1931, in the same court, the district attorney filed an information charging the defendant Sundar Singh with the same offense, alleging it to have been committed at the same time and place and in company with the other defendants just named. The two actions were consolidated for trial, and were tried upon the informations as filed, and, after such trial, the defendants Mukand Singh, Amer Singh, and Sundar Singh were convicted of the offense set forth in said information, and the defendant Indar Singh (sometimes known as Needham Singh) at the same time, was found guilty of the offense of assault with a deadly weapon. This appeal is prosecuted by the defendants herein, jointly, from the judgment of conviction as made, entered, and rendered against each of them.

Little need be said of the facts offered in support of the charge. It is not contended that the evidence was not sufficient to sustain the conviction.

[1] It is to be noted, however, that defendants and each of them strictly maintained innocence throughout. The defense was alibi and much evidence was offered in support thereof. As the names might indicate, the defendants are natives of Hindostan, as was the prosecuting witness. The record discloses the existence of a long-standing feud between the witnesses for the people and the defendants, and, while witnesses for the people were positive in their identification of the defendants and the presence of all and each of them at the scene of the alleged offense, yet the denial of the defendants was equally positive and supported by much apparently disinterested and credible testimony. However, it is not our province to characterize the testimony or to comment upon its credibility or worth, inasmuch as the verdict of the jury concludes this question. Our purpose is merely to point out the existence of a sharp

conflict which could have been determined either way. It may be conceded that, if the alleged error relied on by appellants was actually error, it must have been error of such a nature as would have caused great prejudice to the rights of the defendants.

[2, 3] At the trial, the people called as a witness one C. I. Bennington. Bennington is and at all of the times referred to herein was an attorney at law engaged in practice in Oroville, Butte county. Over the strenuous objections of appellants, urged sufficiently at all times, Bennington was allowed to testify that he had held a conversation with Mukand Singh, one of the defendants, in the county jail shortly after the latter's arrest; that at that time and place said defendant had confessed to the witness that he, said defendant, together with two of his codefendants, namely Amer Singh and Sundar Singh, had committed the offense with which they were charged. Further the witness testified that at the same time and place the said Mukand Singh had disclosed plans to bribe witnesses to support an alibi, and had also suggested to the witness the plan of bribing one or two jurors at the trial.

The ground of appellants' objection to the testimony of Bennington was and is that, at the time of the alleged conversation, the relation of attorney and client existed between Bennington and Mukand Singh, and therefore all conversations between them were confidential and privileged.

The history of the relationship between Bennington and the defendants or any of them may now be detailed. We repeat Bennington is an attorney at law residing in Oroville, Butte county. The crime charged to defendants was committed in the said Butte county. On the day after Mukand Singh, one of the defendants, was arrested the conversation between him and Bennington is alleged to have occurred. This conversation took place in the county jail at Oroville. Thereafter, and within a few days, three of the defendants, being all excepting Sundar Singh, were taken before a justice of the peace of Butte county on proceedings referred to throughout the record as an arraignment, but being in fact proceedings relative to fixing the date for the preliminary examination.

The record of the justice court proceedings shows that Bennington appeared as counsel for the three defendants then in custody, and was actively participating in the proceeding on behalf of said defendants. The said Bennington requested that the record show that he appeared as attorney for the said defendants. Sundar Singh had not then been arrested.

The first question discussed between counsel was on the matter of bail. Bennington, representing the defendants, argued for a reduction of bail. This question being disposed of, the said Bennington, on behalf of the defendants, waived the reading of the complaint, entered a plea of not guilty, and requested the setting of a date for hearing. He then discussed the setting date and consulted his convenience in stipulating a satisfactory date for hearing. Throughout the entire record Bennington acted as attorney for the defendants. Thereafter, at the preliminary hearing, Bennington was entered of record as attorney for defendants, though the transcript of the said hearing does not show that he participated further than his mere presence.

Notwithstanding the foregoing record, Bennington testified that he never was the attorney for any of the defendants. His version of the matter may now be related. One Kishan Singh, a countryman of the defendants, first approached Bennington with reference to the case. A tentative arrangement was made concerning fees to the end that at a designated time, but a few days distant, Kishan Singh was to make a payment of some one thousand dollars as a fee. However, without awaiting the payment, Bennington commenced acting in behalf of the defendants.

It is Bennington's claim that his employment was to be in the interests of Amer Singh, and that nothing was said about Mukand Singh. Yet he visited Mukand Singh in the jail, and had the conversation concerning which he testifies. According to Bennington's testimony, Mukand Singh stated that he, Mukand Singh, accompanied by Amer Singh and Sundar Singh, went down to the shack of the prosecuting witnesses and fired several shots, and thought they had killed every one there; that thereafter these defendants went to Stockton, having the auto at all times running and prepared for quick flight. Bennington detailed further conversations to the effect that Mukand Singh suggested a plan of defense consisting mainly in the procuring of perjured testimony to support an alibi and the bribing of one or two jurors.

We think that the admission of this testimony from the witness Bennington was prejudicial and reversible error. Whatever may have been the disappointment of Bennington in not receiving his fee, he had fastened upon himself the status of attorney for these three defendants. His visits to them in the jail under a contract of employment, his appearance as attorney of record and participation in all of the proceedings prior to the arraignment in the superior court left his position clearly defined. Conceding that he had the right, for nonpayment of fees or for any other good reason, to repudiate the employment and be relieved from further obligation, he had no right to violate any confidence reposed in him while acting as counsel.

We state with some pride that our profession has been singularly free from instances of this sort. From time immemorial the position of an attorney has been one of signal honor, reflecting much in the progress and strength of our jurisprudence. The dignity of the lawyer has been recognized in every movement against oppression, and in every step for better government. Approval of conduct here met would go a long way toward the undoing of the accomplishment of the past, and relegate the lawyer to the ranks of the charlatan and mountebank. No amount of sophistry or platitude can disguise the exact relationship between Bennington and these defendants, with whom he consulted and for whom he appeared. If we concede that he at first was to represent Amer Singh, yet in the course of that employment he did confer with Mukand Singh, a codefendant jointly charged, and a defendant whose defense was essentially a part of the defense of Amer Singh. Bennington represented to Mukand Singh that he was attorney for Amer Singh, and it was all the same. Bennington's own testimony was that he wanted to be their attorney if they would put up the money. In his own words: "I attempted to be their attorney with the understanding that Kishan Singh was to bring the thousand dollars but I was not their attorney until I was paid. * * * I appeared at the arraignment with the understanding that on that date they would bring me the thousand dollars they owed me and if they brought it I would go on with the case just like any lawyer."

Nothing further need be said. We may quote from Ex parte McDonough, 170 Cal. 231, 149 P. 566, 567, L. R. A. 1916C, 593, Ann. Cas. 1916E, 327, as follows: "However desirable it may be to obtain proofs sufficient to insure the conviction of all persons who commit crimes of the character of those under investigation, and it will readily be conceded that it is most desirable, such proofs may not be obtained from those who are forbidden by our law to give them. In regard to the obligations of an attorney to his client in this respect, our statutes are very explicit, making it his duty 'to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.'"

Indeed, at the trial in the court below, the special prosecutor, in offering the testimony, conceded as follows: "At first blush it would appear that the statements made by Mukand Singh to Mr. Bennington would not be admissible." We agree with this statement, and go further to add that each succeeding blush more clearly reveals the inadmissibility.

[4] Respondent argues that if we hold the admission of this testimony to have been erroneous, yet the error is one affecting the rights of Mukand Singh only, and constitutes no ground for reversal of the judgments against the other defendants. This may argue out from an academic viewpoint. Yet all of these defendants were being tried together for the same crime. The theory of the prosecution was a joint act or conspiracy, and the defendants were united in a joint defense resting upon the claim of alibi. It needs little argument to demonstrate that, when by incompetent and prejudicial testimony the defense of three of them is totally nullified, the remaining defendant's claim is seriously impaired.

The statement, alleged to have been made to Bennington by Mukand Singh, it is claimed can affect only that defendant. The trial court so instructed the jury, but this alleged conversation goes beyond the rule of confession or admission. Technically, and in fact, the statement was neither a confession nor an admission, inasmuch as in both of these cases a statement is made for the express purpose of being binding When one confesses an act there is something voluntary in the act itself, and this is true likewise of an admission. In a confession, one may, in the very nature of things, bind only himself; but, where there is no intent to admit or confess, the situation may become quite different. The statement here made differs from a confession or admission, in that it was a disclosure of plans for a defense rather than intended as a means of admitting guilt.

The testimony was offered without qualification and was received as a part of the prosecution's case as against all of the defendants.

Evidence that one defendant was attempting on behalf of himself and associates to build up a fake alibi and corrupt a jury necessarily affected the joint defense.

The entire theory of the prosecution was on a joint enterprise in which all of the defendants participated, and, under the facts as presented and argued, all were equally guilty.

We may diagram the situation from the record. The witnesses for the prosecution all testified that the four defendants were present and active participants in the assault; being the aggressors therein. The defendants, in turn, denied being present, and each defendant set forth his presence at a different place. Different witnesses were called by each defendant in support of his own alibi. There thus arose what might be termed a series of conflicts; being a separate conflict between the array of the prosecution and each separate defendant's witnesses. The identification by the people's witnesses, being so complete and detailed, must stand or fall as to all the defendants or none.

For instance, the jury in weighing the evidence could not reasonably conclude that the

people's witnesses were truthful in asserting the presence of one defendant, and willfully false in asserting the presence of another. Therefore, when through the incompetent and inadmissible testimony the veracity and credibility of the prosecution's witnesses were affirmed by the confession of one of the defendants, it naturally prejudiced the case of the remaining defendants.

If this were a case of a simple voluntary confession, our views might be different; but here, the statements alleged to have been made by Mukand Singh were what might be called superconfession. The statement of a client to his attorney is much in the nature of a confession to a clergyman. The very nature of the transaction clothes it with a high degree of sanctity. As a matter of common experience, a statement either to counsel or confessor imports a cleaning out of the soul with the utmost of completeness, and is presumed to reflect the fact in its truest detail.

In permitting the judgments herein to stand, we would be sacrificing a part of the body of the law itself in the fatuous hope of preserving the social fabric through a process of destroying the fiber.

The judgments should be reversed, and a new trial granted to each and all of the defendants. Such is the order.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

LADD v. MATHIS et al.*

Civ. 8227.

District Court of Appeal, First District, Division 2, California.

April 30, 1932.

Rehearing Granted May 28, 1932.

1. Chattel mortgages ⇐287.

Where mortgaged chattels were worthless, sale thereof was not essential to deficiency judgment.

2. Judgment ⇐564(1).

Where no appeal was taken from order denying motion to vacate deficiency judgment and execution, order was conclusive as to amount due.

3. Execution ⇐75.

Execution issued without notice more than five years after docketing of foreclosure decree, but within a few days after deficiency decree based on affidavit showing worthlessness of mortgaged chattels, *held* valid (Code Civ. Proc. §§ 681, 685).

4. Fraudulent conveyances ⇐233.

Judgment creditor *held* properly allowed lien on fraudulently transferred trust deed and note and on payments made thereon into court, where proof showed that transferee had collected more than amount allegedly due him.

5. Appeal and error ⇐694(1).

Court's finding as to value of trustee's note sold on execution *held* conclusive, where appellants failed to include in bill of exceptions evidence on which finding was based.

6. Trial ⇐396(3).

Where, in action to have property applied on deficiency judgment, defendant as affirmative defense alleged previous sale on execution of property worth nearly $3,000 for $150, finding respecting value was within issues (Code Civ. Proc. § 462).

Such finding was within issues because new matter set up in defendants' answer is deemed denied.

7. Appeal and error ⇐1039(6).

Where allegation in cross-complaint respecting value of property sold on execution was based on ownership of one person and court found against such ownership, cross-defendant's failure to deny allegation of value *held* immaterial.

Appeal from Superior Court, Los Angeles County; Charles F. Cook, Judge.

Action by Mary A. Gansert Ladd against John Mathis, for whom Ellis F. Mathis, as administrator, was substituted, and others, wherein Ellis F. Mathis, as administrator, Theodosia Mathis, and Ellis F. Mathis filed cross-complaint. From judgment for plaintiff, named defendants and Thomas Tyler Robinson appeal.

Affirmed.

Thomas T. Robinson, of Los Angeles, for appellants.

E. R. Simon and Thomas A. Sanson, both of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

Plaintiff, Mary A. Gansert Ladd, brought this action for the purpose of having applied on a deficiency judgment held by her, a certain trust deed note, hereinafter referred to as "The Cole Trust Deed Note," and the trust deed securing the same, which trust deed and note plaintiff claimed had been theretofore fraudulently conveyed by the judgment debtors, John T. Mathis and Theodosia Mathis, to their son Ellis Mathis, and by him fraudulently conveyed to the defendant Thomas Tyler Robinson, the present holder. Defendants appeal from a judgment in favor of plaintiff.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 1012.

The facts not in dispute are as follows: In December, 1918, defendant John T. Mathis, being indebted to one Charles Britten Ladd, executed a promissory note, in the amount of $480, payable September 1, 1919, to said Charles Britten Ladd. Said note was secured by a chattel mortgage on a certain band of horses, twenty head all told. Both note and mortgage were signed by John T. Mathis, Theodosia Mathis, and Ellis Mathis, said last-named being the son of said John T. Mathis and Theodosia Mathis, and at the time of signing said instruments a minor of the age of eighteen years; the note and mortgage were subsequently assigned by the payee to his wife, Mary A. Gansert Ladd. Default judgment in a foreclosure suit on said note and mortgage was entered and docketed September 24, 1919, for the principal sum of $505.88, attorney's fees, $40, and costs, $82.60, and interest and "judgment over for any deficiency after said sale and return."

In December, 1924, defendants John Mathis and Theodosia Mathis sold and exchanged all property then held by them for three certain trust deeds and notes, which said notes and deeds were assigned to Ellis F. Mathis, their son. Two of said trust deeds and notes being herein referred to as "The Yorston Trust Deed Note" and "The Cole Trust Deed Note," February 20, 1925, a deficiency judgment (without notice of any kind to the defendants therein named) was granted in said foreclosure suit for the full amount of the judgment, and docketed February 25, 1925. Said deficiency judgment was granted on the evidence of four affidavits to the effect that the security given by said chattel mortgage was valueless. Thereafter, on execution issued February 28, 1925, a certain note and trust deed herein referred to as "The Yorston Trust Deed Note," then standing in the name of Ellis F. Mathis, and being one of the trust deeds assigned to him as aforesaid, was levied upon and on April 15, 1925, at sheriff's sale, sold to Charles Britten Ladd, plaintiff's husband, for $150, of which sum $30.50 was credited on the deficiency judgment.

Defendants were not advised of the fact of the deficiency judgment having been granted nor of the levy and sale of the "Yorston Trust Deed Note" before April 17, 1925. Some time thereafter, defendant Ellis F. Mathis, on request of his parents, assigned that certain trust deed and note herein referred to as the "Cole Trust Deed Note" to defendant Thomas Tyler Robinson. At some time in the early part of the year 1925, and before the last-named assignment was made, Mrs. Emma C. Relf had purchased the property described in the "Cole Trust Deed" and assumed the debt thereon, being about $2,300.

On August 12, 1925, the sheriff of Los Angeles county returned an alias writ of execution, setting forth thereon that he had served the same upon Emma C. Relf and Thomas Tyler Robinson; that the same was wholly unsatisfied, with added costs of $30.-25.

On August 25, 1925, defendant Ellis F. Mathis, in said action of foreclosure above mentioned, after due notice, came into court and moved to vacate, annul, and set aside the judgment of foreclosure, deficiency judgment, and execution sale. The motion was duly presented, argued, and denied, and no appeal was taken therefrom.

It was stipulated in open court by counsel for the respective parties that the said instrument designated deficiency judgment and docketed in book 575 at page 371 of judgment records of said court had been obtained ex parte, and without notice of any kind being given to the defendants therein named, and that no steps of any kind had been taken by or on behalf of plaintiff in said action of foreclosure from the date of filing of the foreclosure decree in September, 1919, until the filing of the affidavits and the securing of the purported deficiency judgment on February 20, 1925.

In September, 1925, the complaint in the case at bar was filed. The defendants Mathis, by their answer and cross-complaint, deny and allege as follows: Allege fraud in the procurement of the note and mortgage on which foreclosure was had; that the defendants Ellis Mathis and Theodosia Mathis were not served with summons and copy of the complaint in said foreclosure action; that cross-defendants (plaintiffs) maliciously conspired and caused the sheriff's sale to be held in such a manner that none of the defendants Mathis had notice thereof; deny having made any assignments with intent to defraud creditors; allege a consideration from Robinson for the transfer of the "Cole Trust Deed Note," in that John Mathis was indebted to said Robinson for attorney services; allege the value of the Yorston trust deed note to have been at the time of the sale $2,-918.27 (the amount remaining unpaid thereon), and that defendant Ellis Mathis was the sole owner thereof. They ask the court to vacate and set aside the decree of foreclosure, deficiency judgment, and execution sale, and for damages in the amount of $10,000.

An amendment to the complaint was filed by which defendant Emma C. Relf was brought in, and said defendant, answering, made application to be allowed to pay into court the regular monthly payments due from her on the Cole trust deed note, and thereafter payments to the amount of $1,000 were made to the clerk of the court before judgment was rendered herein.

Plaintiff, in answer to the cross-complaint, sets out the facts of the motion made in said foreclosure action on August 25, 1925, supra, and alleges that the order and decision of the

court denying said motion is a final determination of the issues raised under the cross-complaint, and is a bar to the prosecution of the alleged cause of action therein set forth. During the pendency of the action, defendant John Mathis died and Ellis F. Mathis, as administrator of his estate, was substituted. The appeal is before us on a bill of exceptions.

Appellant urges that the execution was void, having been issued more than five years after docketing of the foreclosure decree; that the deficiency or personal judgment of February, 1925, was void. Section 681 of the Code of Civil Procedure gives the time in which execution may issue as five years after the entry of judgment. Section 685 of the Code of Civil Procedure reads as follows: "The judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings."

In section 10, p. 49, of 11 California Jurisprudence, it is said: "The proceeding to obtain an execution authorized by section 685 of the Code of Civil Procedure is not an action or a special proceeding of a civil nature, and it is unlike a scire facias; it is merely a subsequent step in an action or special proceeding already commenced." Saunders v. Simms, 183 Cal. 167, 190 P. 806; Welk v. Conner, 102 Cal. App. 286, 282 P. 963. In California Jurisprudence, vol. 11, at page 45, it is said: "This rule has been changed in California so as to authorize the issuance of execution, as, of course, at any time within five years after entry of judgment, and thereafter in the discretion of the court. Such statutes are within the undoubted powers of the legislature." In California Jurisprudence, vol. 11, at page 50, it is said: "The proceeding to have execution issued after five years is usually by motion supported by affidavit. The affidavit does not have to stand the test applicable to a complaint. While the court may in a proper case direct that notice of motion be given, notice is not required in the absence of such direction, and is not necessary to constitute that due process of law which is guaranteed by the Constitution of the United States. If the debtor has a good defense or any cause to show against the enforcement of process, he has a plain and speedy remedy in a motion to vacate the order and recall the execution." Doehla v. Phillips, 151 Cal. 488, 91 P. 330.

In the case of Toby v. Oregon Pac. R. Co., 98 Cal. 490, 33 P. 550, where a receiver was appointed pendente lite, upon a showing after trial and before entry of decree that the mortgaged property was deteriorating in value, the court ordered a sale, and after confirmation of sale entered a decree reciting facts awarding judgment for the amount of the debt and interest, requiring the receiver to pay the amount in his hands upon such judgment to the plaintiff, and awarding execution for the balance. The opinion of the court is summarized in the syllabus as follows: "The object of section 726 of the Code of Civil Procedure, in regard to the foreclosure of mortgages upon real or personal property, is to inhibit a personal action to recover a debt secured by mortgage; to confine a recovery in such cases to one action; to make the mortgaged property the primary fund out of which satisfaction is to be had, and to give the plaintiff a personal judgment for such balance as may be found due after the exhaustion of the mortgaged property; but it is not necessary to give effect to the evident intent of the law-makers, that there can be no deficiency judgment without a sale under a decree of foreclosure and a formal return by the sheriff, but whenever an application of the primary fund and a deficit remaining exist, and can only be reasonably ascertained by other means, these facts are not to be ignored because made apparent in a different way." At page 495 of 98 Cal., 33 P. 550, 552 it is said: "The contention of appellant that there can be no deficiency judgment without a sale, and formal return by the sheriff, seems to me too technical to give effect to the evident intent of the lawmakers in many cases." And further, "Suppose, in the present case, the steamship mortgaged had been lost by perils of the sea, pendente lite. Would the plaintiff have been without remedy? Or can it be claimed that the court would have been forced to the useless expedient of foreclosing the mortgage, ordering a sale, and awaiting the return of the sheriff, before a deficiency judgment could be docketed? Would it not rather be said that the court, having obtained jurisdiction of the parties and of the subject-matter, would, under the rules of equity, proceed, under the altered circumstances, and in view of the fact that the security was exhausted, to do justice by the entry of judgment for what would then become the deficiency, viz. the full amount due?"

In Parker v. Parker, 203 Cal. 793, 266 P. 283, 285, the court says: "It is further urged that the original order for the issuance of the execution is void as having been made without notice to the defendant. It has been the law of this state since 1861 that the court, under section 685 of the Code of Civil Procedure (which was a continuance of section 214 of the Practice Act), has power ex parte to order the issuance of an execution on a judgment which has become final more than five years before the application. * * *" It was further said: "But the failure of the plaintiff to disclose the true situation did not go to the jurisdiction of the court to act on the ex parte motion. If the defendant, as

judgment debtor, had good cause to show against the issuance and enforcement of process, he had his remedy by a motion to vacate the order and to recall the execution." In the case cited the motion was made and denied, and the appeal was from the decision denying the motion.

In the case at bar, no appeal was taken from the decision of the court denying the motion to vacate, etc., and said decision has become final.

[1-3] Appellants attempt to show that a deficiency judgment could not be docketed without sale of the mortgaged property having been had; that the action was wrongfully changed from one in rem to one in personam without defendants having had an opportunity to answer.

The deficiency judgment in this case was based upon affidavits to the effect that the mortgaged property was valueless. Defendants, having come into court on their motion to vacate and set aside the deficiency judgment and execution, were heard and their motion was denied. No appeal having been taken from the decision, the decision became final. Our statutes do not require the doing of useless idle things, it having been proven that the property was valueless, the amount of the deficiency was thereby ascertained without the idle and expensive action of levying upon and selling a thing of no value.

We think the reasoning in the following cases will bear out this construction of sections 726 and 685 of the Code of Civil Procedure: Toby v. Oregon Pac. R. Co., supra; Redlands Hotel Ass'n v. Richards, 125 Cal. 569, 58 P. 152, 153; Rein v. Callaway, 7 Idaho, 634, 65 P. 63, 64; Hibernia S. & L. Soc. v. Thornton, 109 Cal. 427, 42 P. 447, 50 Am. St. Rep. 52; 18 Cal. Jur. 505.

In Redlands Hotel Association v. Richards, supra, after referring to Toby v. Oregon Pac. R. Co., supra, the court said: "Under the equitable construction thus given to the statute, it may be that the court, upon proper proof that plaintiff's mortgage was valueless because the property was insufficient to pay and discharge the prior mortgage, could have found that fact, and directed a deficiency or personal judgment against the defendants, without selling the mortgaged property. * * *"

In the case of Rein v. Callaway, supra, it is said: "In this state, as in the state of California, the mortgaged property becomes the primary security, and the personal obligation of the mortgagor a secondary one. The mortgagor, under our statutes, is personally liable only after foreclosure, and then only for the balance shown to be due by the return of the sheriff, unless it is made to appear that the property has been destroyed or otherwise become valueless without the fault of the mortgagee." We are of the opinion that the deficiency judgment and the execution were properly granted and enforced.

Appellants urge that the court erred in refusing to allow the defendants to introduce in evidence, in the instant case, the four affidavits upon which the deficiency judgment in the foreclosure suit was granted, and particularly the one signed by C. B. Ladd. Inasmuch as the decision denying defendants' motion to vacate, etc., has become final without any modification of the amount said to be due in said deficiency judgment, this decision is determinative of the amount due as set out therein. The same defendants in another action to collect on the judgment cannot go back of that judgment to question the amount therein found due. Appellants claim that a certain statement made in the affidavit of Charles Britten Ladd shows a credit which was not applied in rendering said deficiency judgment. If any mistake was made at that time in the amount set out, the defendants, by their motion, were given an opportunity to have the same corrected. The decision, being final, must be assumed to have given a correct interpretation of the evidence then presented.

[4] Appellants urge that the transfer of the Cole trust deed and note to the defendant Thomas Tyler Robinson at the most only constituted a preference, and cannot be attacked except through bankruptcy proceedings, or under the State Insolvency Law.

The Cole trust deed note was one of the three trust deeds and notes which the court found had been fraudulently transferred to Ellis F. Mathis. The court further found that the Cole trust deed and note had been fraudulently transferred by Ellis F. Mathis to Thomas Tyler Robinson.

The court found that the assignment to Ellis F. Mathis was made without valuable consideration of any kind; that said assignment was made with the purpose, design, and intent of John T. Mathis, Theodosia Mathis, and Ellis F. Mathis to cheat, hinder, delay, and defraud creditors, and the plaintiff in particular; that the later assignment by Ellis F. Mathis, under direction of his father, John T. Mathis, and in consideration of $1,000 attorney fee claimed by Thomas Tyler Robinson, was made by John T. Mathis, Ellis F. Mathis, and Thomas Tyler Robinson with the purpose and intent to hinder, delay, and defraud creditors, and that Thomas Tyler Robinson also knew of the fraudulent transfer of said note to Ellis F. Mathis. The court further found that the appellant Thomas Tyler Robinson had collected $1,050 on said trust deed note, which was more than was due to him. The court found as a fact that the said Robinson took and held title to said trust deed and note as a trustee for John T. Mathis and Theodosia Mathis, who were the beneficial owners thereof.

The findings of the court specifically sustain every allegation of fraud as made by plaintiff against the defendants, and find the allegations of fraud made by defendants against plaintiff and cross-defendants to be untrue. In 12 California Jurisprudence, at page 1013: "A creditor receiving a preference may take only enough money or property to satisfy his debt. If the value of the property transferred exceeds the amount of the debt it is, therefore, evidence of a fraudulent intent and the transaction should be subjected to the closest scrutiny. If there is an actual fraudulent intent in giving and taking the property, the transfer is void as against the other creditors of the debtor." We think the trial court correctly gave to plaintiff a lien on the Cole trust deed and note and on the payments thereon which had been made into court.

[5] It is contended by the appellants that the execution sale of the Yorston trust deed note should have been set aside because of a grossly inadequate consideration. Appellants claim that the admitted value of said trust deed note is the sum of about $2,918.27, the sale price being $150.

In the joint answer of the defendants Mathis to the amended complaint, it is alleged as affirmative matter that the amount due and unpaid on said trust deed note was the sum of $2,918.27 or thereabouts, and that the actual market value thereof was, at the time of the sale, and at the time of the filing of the answer, the unpaid balance as above set forth. In the cross-complaint of the defendants Mathis there appears in substance the same allegation of value, and this allegation is not denied in the answer of the plaintiffs to the cross-complaint.

The court, in response to the affirmative defense, specifically found that the actual value of said trust deed and note at the time of the sale or thereafter was not the unpaid balance due thereon, but was the sum of $150. The evidence upon which this finding is based is not contained in the bill of exceptions, and therefore we must accept the finding as sustained by the evidence.

[6] It is claimed by appellant that this finding is clearly outside of the issues raised by the pleadings and therefore a nullity. In presenting this question, the appellants rely upon the rule stated in Welch v. Alcott, 185 Cal. 731, 198 P. 626, that a material allegation of a complaint which is not denied by the answer requires no finding thereon, and a finding contrary to such undenied allegation should be disregarded. The facts in the cases cited by appellant differ from the facts in the case at bar. In this case the answer to the amended complaint made by all of the defendants Mathis alleges the value of said note and trust deed as a part of their second or affirmative defense, and for the purpose of the action such allegation is deemed denied by the plaintiff. Section 462 of the Code of Civil Procedure says: "The statement of any new matter in the answer in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party." This statutory provision is cited in 21 California Jurisprudence, at page 163, § 113, where it is said: "The law thus raises an implied replication, which takes the place of a reply, and relieves the plaintiff of any further pleading." This text is supported by many California cases cited thereunder. In 24 California Jurisprudence, at page 938, § 183, it is said: "Under the same system of express findings now provided for, full findings, unless waived, are required on all material issues. * * * The requirement applies not only to issues raised by denials of the allegations of a complaint, but to issues raised upon affirmative defenses in the answer or upon a cross-complaint." Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A. L. R. 1074. It is therefore clear that the answer of all the defendants having raised the issue of the value of the trust deed note, it was the duty of the court to make a finding thereon, and the evidence upon that issue not having been brought to this court, the presumption must prevail that the finding is sustained by the evidence. The finding is clearly within the issues.

[7] The allegation of value set out in the cross-complaint was based upon an allegation of the sole ownership of defendant Ellis F. Mathis in and to said trust deed and note. The court specifically found against the said allegation of ownership, and under such finding the value of the note, in so far as the cross-complaint is concerned, became an immaterial issue, and the failure of plaintiff and cross-defendants to deny this allegation of value, as therein set out, in their answer to the cross-complaint was not material, and had no bearing on the issue as formed by the amended complaint and answer thereto.

We believe the foregoing disposes of all the material points raised by appellants. The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

123 Cal.App. 339

PEOPLE v. SERRANO.

Cr. 65.

District Court of Appeal, Fourth District, California.

May 6, 1932.

1. Criminal law ⇐1144(1).

Where record did not show otherwise, appellate court would assume that officers making arrest of one who escaped did so regularly (Pen. Code, § 841; Code Civ. Proc. § 1963, subd. 15).

2. Escape ⇐4.

Charge "suspicion of forgery" in jail record *held* sufficient designation of fact that defendant, who escaped, was being held until formal charge of forgery should be made on opening of justice's court on first judicial day following arrest.

3. Arrest ⇐63(4).

Peace officers could arrest defendant, without warrant, for forgery (Pen. Code, § 836.)

4. Escape ⇐4.

Officers arresting defendant for forgery on nonjudicial day could place defendant in city jail, so that he was lawfully in jailer's custody at time of escape (Pen. Code, § 107).

5. Escape ⇐4.

Words "charged with" in statute respecting escape from jail do not mean that formal charge must have been filed against prisoner (Pen. Code, § 107).

[Ed. Note.—For other definitions of "Charge," see Words and Phrases.]

6. Statutes ⇐181(2).

Construction of statute consisting of sound sense and wise policy should be adopted rather than one leading inevitably to mischief or absurdity.

7. Indictment and information ⇐137(5).

Sufficiency of evidence adduced at preliminary examination could not be tested on motion to set aside information (Pen. Code, § 995).

8. Indictment and information ⇐137(5).

Only manner of inquiring into sufficiency of evidence at preliminary examination to justify holding accused is in habeas corpus (Pen. Code, § 1487, subd. 7.)

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Valentine J. Serrano was charged with the crime of escape from jail, and, from an order granting defendant's motion to set aside and quash the information, the People appeal.

Reversed.

See, also, 9 P.(2d) 588.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., of Riverside, for the People.

Joseph Seymour, of Riverside, for respondent.

THOMSON, Justice pro tem.

This is an appeal by the people from an order of the Superior Court of Riverside county granting defendant's motion to set aside and quash an information which charged defendant and respondent with the crime of escape from jail.

The record on appeal shows the following facts: On Saturday, August 29, 1931, the chief of police of the city of Corona was requested by one Holbrook to arrest respondent for giving him a bad check. The chief of police, in company with the city traffic officer and Holbrook, went to respondent's home, where Holbrook identified him as the person who gave him the bad check, and then the officers took respondent to the home of one Enos, who also identified him as one who had passed bad checks. Whereupon the officers placed respondent under arrest and took him to the city jail, where he was booked on the charge of "suspicion of forgery," and incarcerated in the jail at about 4:30 o'clock in the afternoon. Respondent remained in jail Saturday night and Sunday, being last seen there Sunday, August 30th, at about 5:30 o'clock in the afternoon. On Monday morning he was not there. No complaint was filed against respondent until Monday morning, August 31st, after he had escaped.

Respondent moved to set aside the information under the provisions of section 995 of the Penal Code upon the general ground that, before the filing of the information, defendant had not been legally committed by a magistrate.

[1] Respondent first contends that he was never legally arrested, because at the time of his arrest he was not informed that he was under arrest and he was not informed of the intention to arrest him, as required by section 841 of the Penal Code. The record does not show whether or not such information was given to defendant at the time of the arrest, and, in the absence of any showing to the contrary, the court will assume that the officers making the arrest did so regularly. Code Civ. Proc. § 1963, subd. 15.

[2-6] Respondent next contends that there was no escape, because there was no lawful custody of defendant. In support of this contention he relies on section 107 of the Penal Code, the material portions of which are as follows: "Every prisoner charged with or convicted of a felony who is confined in any jail or prison * * * or who is in the lawful custody of any officer or person, who

escapes or attempts to escape from such jail, prison, * * * or from the custody of any officer or person in whose lawful custody he is, is guilty of a felony. * * *" The record shows that the respondent was legally arrested and placed in the city jail on Saturday afternoon, a legal holiday for the justices' courts, prosecuting attorneys, and other officials charged with the duty of enforcing the penal laws of California, under section 10 of the Political Code, and that he escaped before the opening of the justice's court on the next judicial day, at which time a formal complaint against him was filed. Our attention has not been called to any authorities, nor do we know of any, which determine a case of this kind, but we are convinced that the charge "suspicion of forgery" in the jail record was a sufficient designation of the fact that defendant was being held in the city jail until a formal charge of forgery should be made against him upon the opening of the justice's court on the first judicial day following his arrest and detention in jail. Under the provisions of section 836 of the Penal Code said peace officers had a right to arrest the defendant, without a warrant, for forgery. It was the duty of the arresting officer to take defendant before the nearest or most accessible magistrate in the county in which the arrest was made without unnecessary delay. Pen. Code, § 849. The arrest being made on a nonjudicial day, the arresting officer had the right to place defendant in the city jail, and under the circumstances of this case the defendant was lawfully detained by, and was in the custody of, the officer in charge of the jail at the time of the escape. In the case of People v. Garnett, 129 Cal. 364, 366, 61 P. 1114, 1115, the Supreme Court construed the word "charged" as used in section 32 of the Penal Code, relating to persons who harbor and protect persons "charged with" a felony, as follows: "The word 'charged,' as used in the section, means a formal complaint, information, or indictment filed against the criminal, *or possibly an arrest without warrant might be sufficient.*" (Italics ours.) To interpret the words "charged with" in section 107 of the Penal Code in the sense that a formal charge must have been filed against the prisoner would encourage escapes of the kind found in the case at bar and might cause the utmost confusion and disorder. We believe the Legislature intended that a more liberal construction should be given to that language. Section 4 of the Penal Code lays down the rule that all of the provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." In interpreting section 107 of the Penal Code, the Supreme Court said in the case of In re Haines, 195 Cal. 605, 613, 234 P. 883, 886: "When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted. San Joaquin & K. R. C. & I. Co. v. Stevinson, 164 Cal. 221, 128 P. 924." We are of the opinion that the facts and circumstances of the case at bar bring it within the provisions of section 107 of the Penal Code, and that respondent at the time of his escape was a prisoner charged with a felony within the meaning of said statute.

[7] Respondent further contends that the testimony taken at the preliminary examination before the committing magistrate was insufficient to support the allegations of the complaint or the allegations of the information. On the other hand, appellant takes the position that the sufficiency of the evidence adduced at the preliminary examination may not be tested on a motion to set aside the information. This question was presented to this court in the case of People v. Thomas, 104 Cal. App. 392, 285 P. 870, in which case the defendant was accused by an information filed in the Superior Court of the crime of possession of intoxicating liquors, with two prior convictions. At the time of his arraignment and before his plea to the information, defendant moved to set aside the information upon the ground that defendant had not been legally committed by a magistrate as required by section 995 of the Penal Code, for the reason that the evidence before the committing magistrate failed to show probable cause of the two prior convictions. In that case this court said: "It is the well-established rule in California that the question of the sufficiency of the evidence taken before a committing magistrate to show probable cause for holding a defendant for trial in the superior court can be raised by habeas corpus, but not by motion to set aside the information." The Supreme Court of California in the case of People v. Creeks, 170 Cal. 368, 149 P. 821, 822, held that the sufficiency of the evidence to show probable cause to warrant a commitment for trial is not available on motion to set aside an information, and the Supreme Court therein stated: "By reason of an express statutory provision so declaring (Pen. Code, § 1487, subd. 7), such an objection may be raised on habeas corpus, if timely made, and we know of no other way in which it can be raised. * * * The subdivision relied on, that providing for such a motion on the ground that the defendant has not been 'legally committed by a magistrate,' has no reference to the matter of the sufficiency of the evidence upon which a magistrate has acted." The same principle is laid down in the following California cases: People v. Hinshaw, 194 Cal. 1, 11, 227 P. 156; People v. McCurdy, 68 Cal. 576, 578, 10 P. 207; People v. More, 68 Cal. 500, 501, 502, 9 P. 461; People v. Beach, 122 Cal. 37, 38, 54 P. 369; People v. Mitsun-

aga, 91 Cal. App. 298, 302, 266 P. 1020; In re Williams, 52 Cal. App. 566, 572, 199 P. 347. In the case of People v. Beach, supra, an appeal was taken from an order setting aside an information on the ground that the defendant had not been legally committed, and the court said (at page 38 of 122 Cal., 54 P. 369): "If the magistrate had no power or jurisdiction to hold the examination, if no complaint had been made charging the defendants with a public offense, and perhaps if no evidence at all was taken by the magistrate, and there was no waiver by the defendants, it might be held that the defendants had not been legally committed. People v. Howard, 111 Cal. 655, 44 P. 342. * * * If a magistrate, upon a complaint duly made, and charging a public offense, has heard the evidence, and has committed the defendant, that ends the matter so far as concerns this motion." In the case at bar the record shows that a complaint was filed in the justice's court showing on its face that the justice's court had jurisdiction, charging a public offense, and setting forth all of the allegations required under the statutes. A preliminary examination was held and evidence taken, and, after hearing the evidence, the magistrate committed the respondent to the Superior Court for trial. Therefore, under the authorities above cited, the sufficiency of the evidence taken at the preliminary examination to justify the magistrate in holding respondent to answer to the Superior Court cannot be determined on respondent's motion to set aside the information.

Respondent cites in support of his contention that the evidence adduced at the preliminary examination may be tested on a motion to set aside the information, the case of In re Heinze (Cal. App.) 2 P.(2d) 561, 562, decided by the District Court of Appeal for the Third District subsequently to the authorities above cited. In that case, after the information was filed in the Superior Court, the defendant entered a plea of "not guilty" to the information, and the case was set for trial. Thereafter defendant petitioned for a writ of habeas corpus. The court held that the defendant, having pleaded "not guilty" to the information and having failed to move to set aside the information under section 995 of the Penal Code, waived his right to object to the irregularity of the proceedings or insufficiency of the evidence. The court then proceeds to say by way of dictum (because the question was not before the court): "If the petitioner was held for trial in the superior court in the present case upon insufficient evidence, that defect could be taken advantage of only upon motion to set aside the information pursuant to the provisions of section 995 of the Penal Code."

The cases cited in the Heinze Case, and upon which it is based, are the following: Ex parte Moan, 65 Cal. 216, 3 P. 644; In re Ephriam Northcott, 71 Cal. App. 281, 235 P. 458; and People v. Bawden, 90 Cal. 195, 27 P. 204, 205. The case of Ex parte Moan, supra, was an application for discharge on habeas corpus after trial and conviction of manslaughter. As ground for the relief sought, the petitioner contended that there was no commitment in the case. The Supreme Court held that the commitment was sufficient, but said that, even if the commitment were not sufficient, defendant, by entering his plea to the information without making a motion to set aside the information under section 995 of the Penal Code, waived his right to the objection that he had not been examined and committed in the manner required by law. The point ruled upon in the case related to the form of the commitment made by the magistrate and did not relate to the sufficiency of the evidence taken before the magistrate. The case of In re Ephriam Northcott, supra, was an application for a writ of habeas corpus after trial, conviction, and sentence for the crime of murder. Previously an appeal was taken from the judgment and the order denying a motion for new trial, and the judgment was affirmed. As a ground for relief, the petition alleged that the judgment of conviction is void because the magistrate before whom the preliminary examination was conducted held the petitioner for trial without reasonable or probable cause. The appellate court held that the petitioner was being held as a prisoner in the state prison pursuant to a commitment issued by the Superior Court based on the judgment of conviction obtained in said Superior Court, which judgment is not related to, nor is it dependent upon, the order of the committing magistrate holding the defendant to answer for trial. No mention was made in that case of section 995 of the Penal Code, or any rights thereunder. In the case of People v. Bawden, supra, the appellant was convicted of murder, and was sentenced to suffer the death penalty. He appealed from the judgment, from the order denying a new trial, and also from an order denying his motion "to dismiss the information, and all subsequent proceedings." Appellant alleged that there was no preliminary examination and commitment of defendant by a magistrate before the filing of the information, for the reason that defendant was insane at the time of the preliminary examination. The Supreme Court held that such matters did not raise the question of jurisdiction, the preliminary examination and commitment, and the information based thereon, being regular on their face, gave full jurisdiction to the court to try the case. The court said that a motion to set aside the information under section 995 of the Penal Code must be made upon arraignment or the defendant is precluded from afterwards taking such objection. But the court did not need to determine, nor

did it determine, that the sufficiency of the evidence taken at the preliminary examination could be tested by such a motion. From this review of the last three authorities it will be seen that none of the authorities cited in the Heinze Case relate to the question of the sufficiency of the evidence taken at the preliminary examination to warrant the magistrate in committing defendant to the superior court for trial, although they do support the point decided by the Heinze Case. It is apparent that, in the Heinze Case, the court did not intend to overrule, or in any way minimize the force of, the line of California authorities above cited which hold that the sufficiency of the evidence taken at the preliminary examination to warrant the magistrate in committing a defendant for trial may not be determined on a motion to set aside the information under section 995 of the Penal Code, but that such an objection must be raised on habeas corpus before plea to the information. None of those authorities are mentioned in the opinion, and apparently they were not presented to the court nor considered by the court in deciding the Heinze Case.

[8] We are of the opinion, therefore, that the Superior Court in the case at bar, in determining that there was not sufficient evidence to justify the committing magistrate to commit defendant for trial in the Superior Court, exceeded its authority in inquiring into the sufficiency of the evidence taken at the preliminary examination; and that the only manner in which such inquiry may be made is on habeas corpus. Pen Code, § 1487, subd. 7.

The order appealed from is reversed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 334

WHITTY et al. v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

Civ. 399.

District Court of Appeal, Fourth District, California.

May 6, 1932.

Rehearing Denied June 4, 1932. Hearing Denied by Supreme Court July 5, 1932.

1. Evidence ⇨112.

Contract price of work to be performed furnishes some evidence of its reasonable value.

2. Highways ⇨113(4).

Finding that reasonable value of work performed by highway subcontractor was exact sum specified in contract to be paid for it *held* supported.

3. Appeal and error ⇨1011(1).

Findings supported by material and competent evidence cannot be disturbed on appeal because of conflict, even though it appears that preponderance of evidence is contrary to trial court's conclusion.

4. Highways ⇨113(4).

Findings that subcontractors' failure to complete contract within time specified was due to defective power shovel rented to them by contractor *held* supported.

5. Highways ⇨113(4).

Highway subcontractors' failure to complete work within time specified *held* excused by contractor's acts in renting to subcontractors defective power shovel (Civ. Code, § 1955).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by H. C. Whitty and another against the Fidelity & Deposit Company of Maryland and the Callahan Construction Company, in which the last-named defendant filed cross-complaint. From the judgment, the plaintiffs and the cross-complainant separately appeal.

Affirmed.

Strother P. Walton, of Fresno, for Whitty and Cortwright.

Joe Crider, Jr., and George R. Larwill, both of Los Angeles, for Fidelity & Deposit Co.

George S. Dennison, of Los Angeles, and Harris & Hayhurst, of Fresno, for Callahan Const. Co.

MARKS, J.

The Callahan Construction Company was at all times material to this action a corporation engaged in the business of highway construction. About July 1, 1928, it obtained a contract from the state of California, whereby it agreed to construct about eleven miles of the state highway in Placer and Nevada counties. It posted a contractor's bond pursuant to the provisions of the 1925 Statutes of California (chapter 321, at p. 538), with Fidelity & Deposit Company of Maryland, a corporation, as surety thereon. On September 6, 1929, the Callahan Construction Company entered into a subcontract with the plaintiffs, whereby they agreed to construct about one mile of the improvements described in the contract with the state, at a compensation based upon unit prices specified in the subcontract. By the terms of this instrument, the Callahan Construction Company agreed to rent to plaintiffs, for use in performing their subcontract, a Northwestern power shovel, at a rental of $500 for each calendar month. By the terms of both con-

tracts, it was provided that the improvement be completed "before the close down of operations in 1929." It was agreed by all parties that this phrase meant the prevention of work under the contract by the winter snows and storms. The work was not so completed, and the Callahan Construction Company secured from the state of California an extension of the time within which to complete its work under the original contract.

The plaintiffs entered upon the performance of their subcontract using the power shovel rented to them by the Callahan Construction Company. This was returned to the company at its request before the close down of operations in 1929. The following spring, the Callahan Construction Company refused to permit the plaintiffs to continue, and took over their bunkhouses, camps, and other equipment, and completed the undertaking.

The plaintiffs instituted this action to recover from the Fidelity & Deposit Company of Maryland, under the terms of its bond, the reasonable value of the work they had performed; the Callahan Construction Company having refused to pay the amount demanded by them.

The Callahan Construction Company filed a cross-complaint against plaintiffs seeking to recover damages suffered by it from an alleged breach of the contract by the plaintiffs in not completing the work before the close down of operations in 1929.

The trial court found that the plaintiffs had not breached their contract, and that the Callahan Construction Company should not have taken over its completion. It gave judgment for the plaintiffs, and found the reasonable value of the work performed by them to be the exact amount they had been paid on account of such work by the Callahan Construction Company. Judgment was rendered against the Callahan Construction Company on its cross-complaint. The plaintiffs and the cross-complainant have taken separate appeals from the judgment, which appeals are here on a single record.

It is urged by the plaintiffs that the amount of the reasonable value of the services found by the trial court does not find support in the evidence, and is contrary to the evidence. The Callahan Construction Company urges that the finding of the trial court that the plaintiffs did not breach their contract is not supported by the evidence.

[1-3] The plaintiffs aptly argue that the trial court found all material facts in their favor and against the other parties to the action, and rendered a judgment in their favor for the exact amount which they had been paid on account by the Callahan Construction Company, which was a number of thousand dollars less than they had actually expended on the work; that the effect of the judgment in their favor was naked and barren of any benefits to them, and caused them a loss of several thousand dollars. They urge that, as they were prevented from completing their contract by the unlawful action of the Callahan Construction Company, the trial court should have adopted as a measure of the reasonable value of their work, the actual cost of that portion done by them, plus a 10 per cent. profit upon this cost. As a matter of fact, the amount which the trial court found to be the reasonable value of the work performed was the exact sum specified in the contract to be paid for it.

It has been repeatedly held in this state that the contract price of work to be performed furnishes some evidence of its reasonable value. In the case of Divani v. Donovan (Cal. Sup.) 6 P.(2d) 247, 250, it was said: "The contention of the defendants apparently is that, in the absence of any proof other than proof of the price paid, or the contract price, the plaintiff cannot recover. But the lack of merit in this contention is made apparent by a number of decisions in which it has been held that the contract price or the price paid is some evidence of value. Hines v. Brode, 168 Cal. 507, 510, 143 P. 729." It necessarily follows that the findings of the trial court as to the reasonable value of the work done by the plaintiffs finds support in the evidence and in the contract between the plaintiffs and the cross-complainants; the contract price being some evidence of value which the trial court could adopt as the measure of the reasonable value of the work done. We cannot disturb a finding and judgment based upon and supported by material and competent evidence in the record because of a conflict in the evidence, even though it would appear to us that the preponderance of the evidence is contrary to the conclusion reached by the trial court. As the failure of the evidence to support this finding is the sole ground relied upon by the plaintiffs for a reversal of the judgment, it follows that the portion of the judgment of which they complain must be affirmed.

[4, 5] The Callahan Construction Company strenuously urges that the finding of the trial court to the effect that the plaintiffs did not breach the contract is contrary to the evidence, and is not supported by the evidence, and asks that the judgment against it on the cross-complaint be reversed, and a new trial ordered thereon.

The trial court concluded that the failure of the plaintiffs to complete their contract "before the close down of operations in 1929" was not due to any failure of their own, but to the defective power shovel furnished them by the Callahan Construction Company, and that their failure to complete their contract within the time specified was, therefore, excused. It appears from a great preponder-

ance of the evidence that this steam shovel was not in a fit condition for the purpose for which the Callahan Construction Company rented it to the plaintiffs, and that the plaintiffs lost much time through the shovel failing to do the work which they could have expected it to perform had it been in a reasonably good condition when it was delivered to them.

Section 1955 of the Civil Code provides as follows: "One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use." In the case of Blair v. Brownstone Oil, etc., Co., 17 Cal. App. 471, 120 P. 41, 42, it was said: "By implication, at least, the court finds that this cable was a proper and necessary tool to be used in doing the work called for by the contract. Had it been supplied, plaintiff could have performed the contract. Thus construed, it appears that plaintiff was prevented from performing his contract by reason of defendant's default in furnishing proper and necessary tools."

We have concluded that the finding of the trial court to the effect that the plaintiffs did not breach their contract, and that their failure to complete it within the time specified was due to the defective power shovel rented them by the Callahan Construction Company, is amply supported by the evidence, and that their failure to so complete their work was excused by the acts of the Callahan Construction Company. It therefore follows that the portion of the judgment appealed from by the cross-complainant must be affirmed.

Judgment affirmed.

We concur: BARNARD, P. J; JENNINGS, J.

123 Cal.App. 257

PEOPLE'S DITCH CO. et al. v. FOOTHILL IRR. DIST. et al.

Civ. 296.

District Court of Appeal, Fourth District, California.

April 30, 1932.

Rehearing Denied May 26, 1932. Hearing Denied by Supreme Court June 28, 1932.

1. Costs ⇐189.

Order of court for preparation of transcript *held* condition precedent to inclusion in award of costs of fees of court reporter for preparation thereof (Code Civ. Proc. § 274).

2. Costs ⇐189.

Verbal direction of court *held* sufficient compliance with statute requiring court order for preparation of transcript as prerequisite to award of reporter's fees as costs (Code Civ. Proc. § 274).

3. Trial ⇐136(1).

Whether court ordered preparation of transcript, as respects inclusion thereof in costs, *held* question of fact (Code Civ. Proc. § 274).

4. Appeal and error ⇐1024(5).

Where court's finding that it originally ordered transcript prepared was not entirely lacking in evidentiary support, finding was not disturbed on appeal (Code Civ. Proc. § 274).

5. Courts ⇐116(1).

Court's power to cause its acts and proceedings to be correctly set forth in its records is inherent to its very existence.

6. Courts ⇐116(2).

"Clerk of court" is an assistant whose principal duty is to make correct memorial of court's orders and directions.

[Ed. Note.—For other definitions of "Clerk of Court," see Words and Phrases.]

7. Courts ⇐116(3).

Court may not, under guise of correcting clerical omission, correct judicial error.

8. Courts ⇐116(3).

Notwithstanding record did not show error on its face, court having found it gave directions for preparation of transcript could correct record to make it correspond with facts.

9. Courts ⇐116(4).

Authority of court to correct clerical error or omission in record *held* not limited by statute requiring correction in orders and judgments to be made within six months and after notice (Code Civ. Proc. § 473).

10. Costs ⇐70.

Judgment *held* final for purpose of awarding costs, notwithstanding it reserved power to determine facts as to result of defendants' proposed operations along with right to grant plaintiffs injunctive relief.

11. Costs ⇐32(3).

In equitable action, awarding costs to defendants, where plaintiffs recovered part of relief sought, *held* not error.

Appeal from Superior Court, Kings County; E. N. Rector, Judge.

Action by the People's Ditch Company and others against the Foothill Irrigation District and others. From orders correcting the court's minutes nunc pro tunc and denying plaintiffs' motion to tax costs and to strike defendants' memorandum of costs from files, plaintiffs appeal.

Affirmed.

See, also, 112 Cal. App. 273, 297 P. 71.

W. R. Bailey, of Visalia, and H. Scott Jacobs, of Hanford, for appellants.

A. E. Chandler, of San Francisco, Guy Knupp, of Porterville, R. C. Leib, of San Jose, and Sidney J. W. Sharp, of Hanford, for respondents.

JENNINGS, J.

This appeal is from two orders of the superior court of Kings county. The first of these orders is entitled "Order to Correct Minutes," made and entered on November 12, 1929, whereby the said court directed that its minutes should be corrected nunc pro tunc as of November 8, 1928, to show that the court ordered the court reporter to prepare a daily transcript of the evidence given in the case, and that the expense of preparing such transcript should be paid equally by the parties to the suit, all amounts paid by the party to whom costs should be awarded to be taxed as costs of the action. The second order from which the appeal is taken is an order whereby the court denied a motion of plaintiffs to tax costs in the action and to strike from the files of the court defendants' memorandum of costs.

The trial of the action was commenced on November 8, 1928, and on August 26, 1929, the court rendered its judgment wherein it is ordered and decreed that defendants have and recover two-thirds of their costs and disbursements incurred in the action. On August 27, 1929, defendants served upon plaintiffs and filed with the court their memorandum of costs. On August 28, 1929, plaintiffs served upon defendants and filed in the action a notice of motion to strike from the records of the action the memorandum of costs theretofore filed by defendants, and on the same day served upon defendants and filed with the court a motion to tax the costs of defendants by striking from the memorandum of costs filed by defendants various items, chief among which were items of expenses incurred by defendants by reason of the preparation of the three copies of the daily transcript by the court reporter. The motions of plaintiffs to strike the memorandum of costs filed by defendants from the records and to tax the costs of defendants by striking various items from such memorandum of costs came on for hearing on October 7, 1929, at which time counsel for defendants applied to the court to make an order nunc pro tunc as of November 8, 1928, directing the preparation of a daily transcript by the court reporter and providing that the expense of preparing such transcript should be paid equally by the parties and charged as costs of suit. Following the production of evidence with reference to what occurred in the presence of the court on November 8, 1928, the application of counsel for defendants was granted and the court made and entered its nunc pro tunc order as hereinabove stated.

It is conceded by the parties to this appeal that the statute applicable to the situation herein presented is section 274 of the Code of Civil Procedure. On November 8, 1928, that portion of the section which is pertinent to the question herein presented for determination read as follows: "In civil cases, the fees for reporting and for transcripts *ordered by the court* to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case." (Italics ours.)

[1-4] From the above-quoted language of the statute it is clear that it is a condition precedent to the inclusion in an award of costs of the fees of the court reporter for the preparation of a transcript that the court shall have ordered it to be prepared. Barkly v. Copeland, 86 Cal. 493, 25 P. 3; City of Los Angeles v. Pomeroy, 124 Cal. 597, 647, 57 P. 585; Senior v. Anderson, 130 Cal. 290, 300, 62 P. 563. It has been decided that a verbal direction by the court to the reporter to prepare a transcript is a sufficient compliance with the statutory requirement. Taylor v. McConigle, 120 Cal. 123, 52 P. 159. The record of the proceedings, which is presented in the form of a bill of exceptions, discloses that neither the court nor the reporter had any independent recollection of an order having been made by the court for the preparation of a transcript. The language of the court, in announcing his decision to allow the costs claimed by defendants as modified in certain particulars, shows that the court considered that, if counsel representing the respective parties agreed in open court that the expense of preparing the transcript should be shared equally by plaintiffs and defendants, and the court assented to the arrangement thus made without expressly directing the transcript to be prepared, such procedure constituted sufficient compliance with the statutory requirement that the transcript be "Ordered by the Court." It is at least doubtful if the view thus expressed is correct. Nevertheless, neither the court's opinion nor its reason for making the order is important. That which is important is whether the court ordered the transcript. This was a question of fact. The court found that there was such an order. In accordance with a rule of appellate procedure, than which there is none more conclusively established, if the record contains any evidence that tends to support a finding of fact made by a trial court, such finding will not be disturbed. The evidence, other than that of the reporter and the pronounced statement of the court that he possessed no distinct recollection in regard to the matter, consisted of statements made by var-

ious counsel who had appeared in the case. It was stipulated that these statements should be regarded as being made under oath, and they therefore constituted testimony in the proceeding before the court. The testimony thus given was characterized by much vagueness with respect to the fact important to be discovered, viz., whether the court directed the preparation of a transcript. As to this important fact it was, moreover, irreconcilably conflicting. Careful reading does, however, disclose the presence of some evidence pointing to the fact that the court did order a transcript to be prepared. The court's finding expressed in the nunc pro tunc order that it had originally ordered a transcript to be prepared cannot be said to be entirely lacking in evidentiary support and in accordance with the rule above stated must stand (Brush v. Pacific Electric Ry. Co., 58 Cal. App. 501, 208 P. 997).

[5-8] The contention is made that the order to correct the court's minutes was a judicial afterthought, and its effect was not therefore the correction of a mere clerical misprision. The power of a court of record to cause its acts and proceedings to be correctly set forth in its records is a power that is inherent to the very existence of the court. Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am. St. Rep. 139; King v. Emerson, 110 Cal. App. 414, 288 P. 1099, 294 P. 768. Such power is obviously necessary to the full and proper exercise by the court of those functions for which it is created. The clerk of the court is an assistant whose principal duty it is to make a correct memorial of the court's orders and directions. Whenever it is made to appear that the clerk's record does not correctly show the order or direction which was in fact made, the court's authority to cause its records to be corrected in accordance with the facts is undoubted. Kaufman v. Shain, supra. The court may not, however, under the guise of correcting a clerical omission, correct judicial error. Haynes v. Los Angeles R. R. Corp'n, 80 Cal. App. 776, 252 P. 1072. If, therefore, in this case, the court did not in fact order the reporter to prepare a transcript, its later order made under the guise of a correction of its records, whereby for the first time it recorded the existence of an order that had not been made, would amount to an attempted correction of judicial error, and such an order would be unauthorized and therefore clearly vulnerable to the direct attack made upon it by this appeal. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869. But as the court found that it had in fact ordered the preparation of the transcript, and that through inadvertence its records contained no reference to the order, authority to correct the records so that they should correspond with the facts and show the making of the order was not lacking, although, manifestly, the record did not show on its face that it was incorrect. Kaufman v. Shain, supra; Lauchere v. Lambert, 210 Cal. 274, 291 P. 412.

[9] It is also contended that the power of the court to correct its records was subject to the limitations imposed by section 473 of the Code of Civil Procedure, and that the order from which this appeal was taken, having been made without notice to the parties adversely affected thereby and more than six months after the court verbally ordered the preparation of the transcript, was void. This contention may not be sustained. Clerical errors or omissions can be corrected at any time and are in no way affected by the provisions of section 473, Code of Civil Procedure. In re Skerrett's Estate, 80 Cal. 62, 22 P. 85; Lauchere v. Lambert, supra; Haynes v. Los Angeles R. R. Corp'n, supra.

[10] A further contention made is that the memorandum of costs filed by defendants was prematurely filed, and that the court erred in refusing to grant the motion to strike it from the files and records of the case. It is pointed out that the trial court in its findings and by its judgment expressly reserved to itself the power and jurisdiction to find and determine the facts as to the result of operations proposed to be undertaken by defendants in a certain well field, designated the Conejo well field, together with the right to grant to plaintiffs such relief by way of injunction as the court might determine to be necessary to protect the water rights of plaintiffs against interference, damage, or invasion by defendants by reason of said operations. It is urged that the express reservation thus made indicates that the court's judgment was not a final determination of the rights of the parties but was in reality an interlocutory judgment and therefore under the well-established rule that costs follow only the ultimate determination of the action the filing of the memorandum of costs and the awarding of costs was premature. The contention thus made is not new. It was presented to this court on a motion made by defendants to dismiss an appeal taken from an order of the trial court denying to plaintiffs an injunction pendente lite. Pending the denial of the application for the temporary injunction and the presentation of the appeal from the order of denial, a trial was had upon the merits resulting in the rendition of the judgment in which the court made the reservation hereinabove mentioned. In support of the motion for dismissal of the appeal, defendants contended that the issues presented by the appeal had become moot by reason of the trial and judgment rendered. Plaintiffs contended, in opposition to the motion that, as the trial court had made the express reservation mentioned, the judgment rendered was not final, but was merely interlocutory. This contention of plaintiffs was not sustained, the court holding that the judgment was final as

it determined all issues raised by the pleadings under the facts as they then existed. A petition to have the cause heard in the Supreme Court was denied. It has, therefore, been conclusively determined in this very case that the judgment rendered by the court was a final judgment. People's Ditch Co. v. Foothill Irr. Dist., 103 Cal. App. 321, 284 P. 514.

[11] It is finally urged by plaintiffs that, as they were successful in recovering part of the relief sought by them, they were entitled to have costs awarded to them, and the court erred in awarding costs to defendants. Plaintiffs have heretofore presented this exact contention in their appeal from the judgment. It was decided adversely to them by this court, and a petition to have the cause heard in the Supreme Court was denied. People's Ditch Co. v. Foothill Irr. Dist., 112 Cal. App. 273, 278, 297 P. 71.

Nothing herein stated is to be construed as deciding that the herein quoted language of section 274, Code of Civil Procedure, as this section read on November 8, 1928, does not make it mandatory upon the trial court to tax as costs in the case all amounts paid by the party to whom costs are awarded for the preparation of a transcript ordered by the court. In this case the court allowed two-thirds of such amounts paid by defendants to be taxed as costs. No objection was made to such allowance by defendants, and the opinion affirming the court's order is therefore given without regard to the point suggested, viz., that the court should have allowed as costs to defendants the entire amount paid by them for the preparation of the transcript.

The orders appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 170

Ex parte STRAND.

Cr. 1658.

District Court of Appeal, First District, Division 2, California.

April 29, 1932.

1. Witnesses ⇐55.

In action by husband and wife for injuries to latter, wife may not refuse to testify for defendant under statute relating to wife's testifying against husband (Code Civ. Proc. § 1881, subd. 1).

2. Husband and wife ⇐260.

Right of action for personal injury to either husband or wife is "community property," and their interests "present, existing and equal interests." (Civ. Code, § 161a).

[Ed. Note.—For other definitions of "Community Property," see Words and Phrases.]

3. Witnesses ⇐76(3).

Statute providing that husband or wife cannot be compelled to testify against each other constitutes a privilege rather than limitation on competency of witness, and may be waived (Code Civ. Proc. § 1881, subd. 1).

4. Witnesses ⇐76(3).

Wife bringing action for injuries on behalf of community waives for community statutory privilege of not testifying (Civ. Code, § 161a, and Code Civ. Proc. § 1881, subd. 1).

5. Witnesses ⇐76(3).

Husband and wife joining as parties plaintiff in action to enforce community rights waive statutory privilege of not testifying (Code Civ. Proc. § 1881, subd. 1).

Original application for writ of habeas corpus by Paula Strand to be directed to the sheriff of the City and County of San Francisco.

Writ discharged, and petitioner remanded to custody.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for petitioner.

Leo A. Cunningham, William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent.

SPENCE, J.

Petitioner was adjudged guilty of contempt for refusing to answer the questions propounded upon the taking of her deposition, and was remanded to custody until she answered said questions. She seeks her release on habeas corpus.

The action in which the defendant sought to take petitioner's deposition was brought by Peder Strand and petitioner Paula Strand, his wife, as plaintiffs, against the Market Street Railway Company as defendant. In that action the plaintiffs sought to recover damages for personal injuries sustained by petitioner as the result of the alleged negligence of the defendant. The sole ground upon which petitioner seeks to justify her refusal to answer the questions is privilege under subdivision 1 of section 1881 of the Code of Civil Procedure. It is petitioner's contention that, as the right of action for damages for personal injuries to the wife during marriage is community property, she cannot be compelled to testify for the reason that said section provides that a wife cannot be examined "for or against her husband without his consent." In support of this conten-

tion, petitioner relies upon the recent decision of this court in Rothschild v. Superior Court, 109 Cal. App. 345, 293 P. 106, 107.

[1] The facts in the present case present the question of whether a wife, who is a party plaintiff in an action brought to recover damages for injuries sustained by her, can deprive the defendant of the benefit of her testimony by reason of the provisions of subdivision 1 of section 1881 of the Code of Civil Procedure. In our opinion she cannot, and we find nothing in Rothschild v. Superior Court, supra, which is in conflict with this conclusion. In that case we held that, where an action is brought by the husband alone to recover damages for injuries sustained by him, the defendant may not compel the wife of the plaintiff to testify, as she would then be compelled to testify "for or against her husband." In that case the wife of plainiff whose testimony was sought was not a party plaintiff; while in the present case the petitioner is a party plaintiff.

[2-5] The right of action to recover for personal injuries sustained by either husband or wife is community property, and their interests in such right of action are "present, existing and equal interests." Civ. Code, § 161a. However, under the law of this state the injured party may bring the action without joining the other. Code Civ. Proc. § 370. If an injured husband or wife sues as party plaintiff in an action to recover for his or her injuries, can it be said that the effect of section 1881 and of our community property law is to deny the defendant the right to examine the party plaintiff while said party plaintiff may exercise at will his or her right to examine the defendant? We think not. Subdivision 1 of section 1881 relates to privilege rather than to competency, and such privilege may be waived. We are not convinced that said section was intended in any case to shield a party to an action and deprive the adversary of the benefit of the testimony of such party; but, be that as it may, we are of the opinion that, as a wife is given the right to bring an action for her own injuries on behalf of the community, her act in so doing constitutes a waiver on behalf of the community of the right to invoke that section so far as her testimony is concerned. We are further of the opinion that, where the husband and wife join as parties plaintiff in such action, their voluntary act in so doing constitutes a waiver of the right to invoke that section as to the testimony of either.

We have found no authority on all fours with the present case. Apparently the precise question has never been before the courts of this state, and we know of no other state with statutes similar to our own relating to both community property and to witnesses. The question of waiver of privilege under subdivision 1 of section 1881 was discussed in Tobias v. Adams, 201 Cal. 689, 258 P. 588. There the court said at page 699 of 201 Cal., 258 P. 588, 592: "It must be held that defendants as husband and wife, by filing for record a written agreement between themselves, and by pleading it in defense to plaintiff's action, and by introducing it in evidence, put the bona fides of such paper in issue, and thereby waived expressly any privilege thrown around them by the law." Likewise, in Schwartz v. Brandon, 97 Cal. App. 30, at page 35, 275 P. 448, 451, the court said: "Brandon and his wife appeared by filing a joint answer, setting up the deed, claiming that it was bona fide and a valid transfer. Placing the deed itself in issue constituted an express waiver of the privilege of section 1881, Code of Civil Procedure." It is therefore clear that said privilege may be waived by the conduct of the parties, and that such privilege should be held to be waived whenever there are circumstances from which such waiver may be fairly inferred.

From what has been said, we conclude that the privilege under said section had been waived in the present case, and that the trial court properly directed the petitioner to answer the questions propounded.

The writ is discharged, and the petitioner is remanded to custody.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 225

SMITHSON et al. v. SPARBER et al.

Civ. 7753.

District Court of Appeal, First District, Division 1, California.

April 30, 1932.

Rehearing Denied May 28, 1932. Hearing Denied by Supreme Court June 28, 1932.

1. Brokers ⇐4.

Realty broker's statutory bond *held* to cover negligence of broker's agent, notwithstanding subsequent amendatory statute for first time specifically made bond cover acts of broker's employees (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4, as amended by St. 1929, p. 228, § 6).

2. Action ⇐50(4).

Stating action, based upon negligence of broker and broker's agent, against broker and agent and surety on broker's statutory bond in one count, and joining all three, *held* proper (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4, as amended by St. 1929, p. 228, § 6).

3. Pleading ⇐192(3), 364(5).

Complaint stating action for broker's negligence could not be attacked by demurrer be-

cause insufficient to show fraud alleged; motion to strike being proper way to reach insufficient allegations regarding fraud.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by James Smithson and another against Louis H. Sparber, doing business as Sparber & Co., and others. Judgment for defendants, and plaintiffs appeal.

Reversed with directions.

Henry Conlin, of San Francisco, for appellants.

Monroe Friedman, Howard H. Desky, of Oakland, and Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for respondents.

PER CURIAM.

This appeal was taken from a judgment entered when the plaintiffs declined to amend, upon the sustaining of demurrers to their second amended complaint. The appellants seek a $2,000 judgment against the respondents Sparber and Ward for claimed negligence in the handling of a real estate transaction, and against the respondent Globe Indemnity Company, as surety on the real estate broker's bond of Sparber.

The appellants owned property in Oakland, and Sylvester Bowen and Ida Bowen owned property in Kings county, Cal. Sparber was a licensed real estate broker in Oakland, and Ward a licensed real estate salesman in his employ. On March 25, 1926, a contract was made whereby Sparber and Ward agreed to act as appellants' agents to accomplish an exchange of the appellants' Oakland property for the Bowens' Kings county property, such exchange to be effected upon it being ascertained by the agents "that the title of said [Kings County] land would * * * be free and clear of all liens and encumbrances." The agents also agreed to have a search made by an Oakland title company, and that, if the search disclosed the title to be free and clear, then, at the time of conveyance, a policy of title insurance for $2,000 was to be procured by the agents insuring the Kings county property in appellants' favor "against all liens and encumbrances subsisting thereon at the time of such conveyance." As compensation for their services, appellants agreed that Sparber and Ward should each have a one-sixteenth interest in the Kings county property. On April 2, 1926, Sparber and Ward told appellants that the title company had found clear title vested in the Bowens, and that the title company would issue its policy accordingly. On the same day appellants executed a written transfer of their Oakland property to the Bowens and delivered it to Sparber and Ward to be escrowed with the title company, and about the same time they delivered possession of the Oakland property to the Bowens. On July 2, 1926, the Bowens executed their deed of the Kings county property, conveying a seven-eighths interest to appellants and a one-sixteenth each to Sparber and Ward, which deed was by Sparber and Ward recorded in Kings county on July 8, 1926, and the escrow dissolved. The title company then delivered to Sparber and Ward its policy showing the title vested in the new owners in the proportions mentioned, but not free and clear, for it showed, among other things, an attachment issued out of the justice's court of Oakland township in an action filed on March 29, 1926, wherein one Drinkhouse sued the Bowens for $299. On September 6, 1926, judgment was rendered in that action for $326.30 against the Bowens, and execution was issued and levied against the Kings county land theretofore attached. In due time a sheriff's sale was held at which the property was bid in by said Drinkhouse and the certificate of sale recorded on November 28, 1927. A year later the sheriff's deed was delivered to Drinkhouse and recorded. The delivery of the title policy, showing the attachment lien, to Sparber and Ward and their possession of the policy was without the appellants' knowledge, and they knew nothing of its contents until almost a year after title had passed out of them and had vested in Drinkhouse under the sheriff's deed. They learned what had happened only when attempting to pay their taxes on the land and found them to be assessed to Drinkhouse. Appellants had paid all charges of the title company for the examination of title, for the escrow, and for the premium, and "were upon the issuance and delivery of said policy as aforesaid entitled to the immediate possession thereof from said defendants Sparber and Ward."

The foregoing is a statement of the essential and material facts pleaded. Other facts, it is true, are pleaded, and some conclusions of law as well, but they are not material. From this summary, it will be seen that the action is based simply upon the claimed negligence of the broker, Sparber, and his employee, Ward, in failing to disclose to the appellants the important fact that the land they had acquired, supposedly free and clear, was not so, but was, on the contrary, subject to an attachment lien which might and indeed did crystallize into an execution, followed by a sheriff's sale, and the consequent loss to them of the property. There can be no doubt that this is the theory and gist of the action, and the appellants in urging a reversal stand upon their complaint, claiming that it states a case against the respondent Sparber for his own negligence as well as that of his salesman and employee Ward, and against the surety on Sparber's bond because

of the negligence of its principal, both on account of his own acts and those of his employee, attributable to him under settled principles of agency; further, that it states a case against Ward as a joint tort-feasor.

[1] The principal point urged by the respondent indemnity company is that its obligation as surety is only upon Sparber's bond as broker, and that it is under no obligation by reason of "any act, conduct, negligence or omission of the defendant Ward, who was a real estate salesman employed by the broker, Sparber." In other words, it is claimed that Ward's acts or omissions as Sparber's employee are not Sparber's acts or omissions within its bond. In support of this position it is pointed out that the statute as it read at the time in question was "conditioned for the faithful performance by such broker of any undertaking as a licensed real estate broker under this act" (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4), and that in 1929 it was amended (St. 1929, p. 228, § 6) to read "conditioned for the honest and faithful performance by such broker *and his salesmen and employees* of any undertaking as a licensed real estate broker *or salesman or employee of said broker*," etc. (Italics ours.) "It is thus plainly apparent," say counsel for the indemnity company, "that the legislature in the act of 1929 for the first time made the bond of the real estate broker answerable for the conduct or negligence of the salesman employed by the broker, and consequently by necessary inference, prior to that time the bond did not cover any failure of a salesman to perform his duties." As we view it, this does not follow. It is not necessarily to be inferred that, because the Legislature saw fit for some reason—perhaps out of an abundance of caution—to add more comprehensive and inclusive language to what, as we view it, was clear enough, that the very addition of that language indicates that the statute could have meant nothing of the kind before. There are, of course, cases where this argument would be perfectly valid. For instance, if the courts had read a given provision in a statute in a limited and restricted sense, or had, at least, cast some doubt upon the scope or breadth of its meaning or effect, and the Legislature had then changed the statutory language, there could be but little question that the change was made purposely to remove all doubt. But this is not such a case. No decision is called to our attention questioning, for a moment, that the word "broker," as used in the early legislation, was inclusive of any one through whom the broker worked or operated or acted. Is the inquiry not really and simply this: Did or did not the statute, as it read when Sparber and Ward contracted with appellants, include agents, servants, and employees of the "broker" when it spoke, throughout, of the "broker"? Could it have been the legislative intent that the broker's surety should not be held for an act or omission of the broker's cashier, clerk, or stenographer, when the same act, if done by the broker with his own hands, would have held the surety beyond any question? Such a meaning, if given to the statute, would be extremely narrow and quite out of keeping with settled principles of the law of agency. And the mere fact that Ward, the employee, might have had a bond up on behalf of himself makes no difference. The appellants seek to fasten liability upon the indemnity company only under Sparber's bond, upon the theory, of course, that Sparber was Ward's principal and answerable for Ward's negligence as well as for his own. We are satisfied, as already indicated, that the bond as it read at the time in question was broad enough to hold the broker, not only for his own acts, but for those of any and every person acting for or under him, pursuant to his orders or directions either as employee or otherwise, so long as an agency relation could be established. The complaint clearly alleges such relation.

In the case of Dodge v. National Surety Co., 110 Cal. App. 618, 620, 294 P. 741, the precise point was passed upon. There it was said: "It is argued that the Surety Company cannot be held liable for fraudulent acts of the brokers' employees because the bond ran to the brokers alone. The point is without merit. The bond is a 'faithful performance' bond. Bridges v. Price, 95 Cal. App. 394, 273 P. 72; Hogberg v. Landfield, 99 Cal. App. 360, 278 P. 907. The bond was conditioned that the brokers would 'faithfully perform every undertaking entered into by (them) as a licensed real estate broker under said act.' The complaint alleged, and the trial court found, that the acts complained of were done by Hughes as agent for and within the scope of his employment by the brokers. The liability of the principal for the acts of his agent in the scope of the employment is fixed by section 2330, Civil Code, and other authority does not need to be cited. The surety having undertaken to insure the faithful performance of the brokers' duties under the act, the bond included the acts of the brokers' agents who were employed, and licensed under the same act, to perform those duties."

Here, of course, there is no finding with respect to the acts of the agent, Ward, or as to the scope of his employment, but the allegations of the complaint (with which, alone, we are concerned) are ample in this behalf. It is argued by the respondents that this case is not authority contra to their position, for the reason that it does not appear that the 1929 amendment of section 9a of the act was called to the attention of the court. Presumably, of course, the court was mindful of the amendment, but, whether or no, we cannot see how any other conclusion could

have been reached. The act contains intrinsic evidence which militates against the respondents' position. As it read at the time in question, section 2 (St. 1919, p. 1252) defined a real estate broker to be a "person, copartnership or corporation," etc. Obviously a corporation can act in such matters only by and through its officers *and employees*. By the same section, a salesman is defined as "one who for a compensation is employed by a licensed broker," which shows that the law contemplated a broker acting through a salesman as well as by himself. The act, adopted originally in 1919 (Stats. 1919, p. 1252) has been amended at each succeeding session of the Legislature (Stats. 1921, p. 1294; 1923, p. 93; 1925, p. 600; 1927, pp. 481, 580, 677, 900; 1929, p. 223; and 1931, p. 1294). The 1929 session, however, saw numerous and comprehensive changes made, fourteen sections (including 9a) having been amended and four sections (9b, 9c, 9d, and 23) added. It was by the 1929 amendment that section 9a was enlarged. It is interesting to note, however, that, while the Legislature enlarged the bond provision by including the broker's "salesmen and employees" in section 9a, still, when they added 9c, dealing with the release of the surety, they speak of "future acts or defaults of *such broker*" and not (as in 9a) of "such broker and his salesmen and employees," apparently deeming the word "broker" sufficient—as we deem it sufficient—to include the broker's salesmen and employees as well without express mention. In view of the numerous provisions throughout the act, as it has always read, touching upon the salesman as an employee of the broker, and in view of the fact that a corporation has always been included in the statutory definition of broker, it is difficult to see how a surety could write a broker's bond in 1926 and before the 1929 amendment without assuming, and knowing that it assumed, responsibility in case of negligence of employees and agents of its principal, whether such principal was a corporation with a broker's license or a copartnership or, as in this case, an individual.

[2] In addition to the general ground, the indemnity company demurred upon the ground of misjoinder of parties in that it was joined with both Sparber and Ward upon a bond whereon Sparber alone was principal; also, for substantially the same reasons, that two causes of action were not separately stated. From what has been said it is apparent that we fail to see how the appellants' case could have been stated against all three defendants otherwise than in one count. The surety's liability, if any, arises only from its principal's negligence, and, if more than one count were to be employed in stating the cause of action, it would result in mere repetition. Several grounds of ambiguity are specified, the claim being that it cannot be ascertained whether the action is brought upon the negligence of Sparber or of Ward. What has been already said herein expresses our views with respect to this. There are also specifications of ambiguity raising the question whether fraud is relied upon, which will be dealt with later.

[3] The demurrer of the respondents Sparber and Ward presents the specifications of misjoinder and failure to state separately two causes of action already touched upon, and the same specifications are found upon the question of fraud. It is pointed out that it does not appear that certain statements and representations alleged in the complaint to have been made were false and fraudulent and known by Sparber and Ward to be false and fraudulent; or of what the "fraud" consisted; or how the appellants were damaged; or of what the negligence consisted. It must be conceded that the pleader, in setting forth his cause of action—doubtless in an attempt to tell the whole story—descended into unnecessary detail. This is especially true with respect to his statement of the principal acts of the parties. Instead of merely alleging the ultimate facts, the pleader has injected allegations of statements and representations, made during the negotiations, of a purely preliminary character which really add nothing to the statement of the case itself. This, however, does not warrant an attack upon the complaint upon the ground that, while it alleges negligence, it *might* also allege fraud if other allegations were added. A reading of the complaint from beginning to end indicates, as we have already said, a claimed case of negligence and nothing more. Whatever words are found in the pleading (such, for instance, as "carelessly, negligently, wilfully, wrongfully, and in fraud of the rights of these plaintiffs") going to state the pleader's conclusions may be disregarded. A motion to strike out would be the proper way to seek their elimination, and such motion, indeed, was made, but not acted upon. We have no way of telling precisely to what parts of the complaint the motion to strike was directed. Presumably, if it had been granted, some of the surplusage would have been removed.

For the reasons herein stated the judgment should be reversed, with instructions to the trial court to overrule both demurrers, and it is so ordered.

123 Cal.App. 185

TOTH v. METROPOLITAN LIFE INS. CO.

Civ. 373.

District Court of Appeal, Fourth District, California.

April 29, 1932.

1. Insurance ⇐131(1).
Oral contract of life insurance is valid and enforceable.

2. Insurance ⇐665(2).
To establish oral contract of life insurance, proof must be clear and convincing.

3. Insurance ⇐131(3).
Oral statements and promises, if any, of insurance agent, made before making of application, were merged in written application for life insurance.

4. Insurance ⇐665(2).
Evidence *held* not to clearly and convincingly show that oral contract of life insurance was entered into or that each party understood it in same light, or in regard to same subject-matter or that parties intended to contract in manner not in usual course of business.

5. Insurance ⇐129.
Life insurer had right to limit authority of soliciting agents by limiting authority to that of writing applications and submitting them to insurer.

6. Insurance ⇐129.
Insurance soliciting agent has authority only to initiate contracts and not to consummate them, and cannot bind principal by anything he may say or do during preliminary negotiations.

7. Evidence ⇐66.
Insured was presumed to have known contents of application for life insurance that he signed.

8. Insurance ⇐92.
Evidence *held* to show that soliciting agent had neither actual nor ostensible authority to make purported oral contract of life insurance.

9. Insurance ⇐93.
Life insurer is not bound by representations or purported agreements made by an unauthorized agent.

10. Appeal and error ⇐1011(1).
Finding of trial court respecting matter on which there was substantial conflict of evidence was binding on appellate court.

11. Insurance ⇐94.
Finding that life insurer received consideration and approved and ratified act of soliciting agent in orally insuring life of deceased *held* not sustained by evidence (Civ. Code, §§ 2310, 2311).

12. Principal and agent ⇐166(1).
Ratification of unauthorized acts of agent, to be binding, must be made with full knowledge of material facts (Civ. Code, §§ 2310, 2311).

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Hazel Toth against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals.

Reversed.

See, also, 297 P. 564.

Knight, Boland & Christin, of San Francisco, for appellant.

R. W. Henderson, J. O. Reavis, and Rowen Irwin, all of Bakersfield, for respondent.

THOMSON, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff upon an alleged parol contract of insurance.

The trial court included, among its findings of fact, certain findings, the substance of which is as follows: That on May 14, 1930, Andrew Toth and defendant, the said defendant acting through and by its agent and representative thereunto fully empowered and authorized by the defendant, entered into a certain oral contract whereby the defendant for a valuable consideration then and there paid to defendant by said Toth did insure and agree to insure the life of said Toth for $2,500, payable to plaintiff as beneficiary, for a period of 60 days, and to issue to said Toth its written policy of life insurance for said sum of $2,500, payable to said plaintiff as beneficiary; that defendant received said valuable consideration and approved and ratified the act of its said agent in insuring the life of said Toth, agreeing to insure his life and agreeing to issue a policy of insurance upon his life; that plaintiff has demanded of defendant the issuance of said policy in accordance with said oral contract and has demanded the payment of said sum of $2,500, but defendant has denied and still denies the existence of said contract of insurance or the existence of any contract of life insurance between said defendant and said Toth; and that defendant has not returned or tendered or offered to return said consideration, but has retained the same and applied it to its own uses.

These findings are attacked by appellant on the ground that they are not supported by the evidence, in that the evidence shows that (1) no oral or any contract was ever entered into between Andrew Toth and defendant; (2) no agent of the defendant was authorized to enter into such a contract of insurance as found by the court; and (3) no valuable or

any consideration was ever paid by Toth to the defendant.

[1, 2] With regard to appellant's first contention, it is well settled under the authorities of this state that an oral contract of insurance is valid and enforceable. American Can Co. v. Agricultural Ins. Co., 12 Cal. App. 133, 135, 106 P. 720, 721; Law v. Northern Assur. Co., 165 Cal. 394, 400, 401, 132 P. 590; Harlow v. American Equitable Assur. Co., 87 Cal. App. 28, 31, 261 P. 499; Smith v. Massachusetts Bonding, etc., Co., 71 Cal. App. 661, 666, 236 P. 176. But oral contracts relating to life insurance are seldom made and are not entered into in the ordinary course of that branch of the insurance business, it being the universal custom of life insurance companies to issue written policies specifying in detail the conditions of their liability. Hence our courts of last resort have adopted the rule that proof of such oral contracts must be clear and convincing to the effect that such contract was actually entered into, that each party understood it in the same light and in regard to the same subject-matter, and that the parties intended to contract in a manner not in the usual course of business. 14 Cal. Jur., p. 429. As expressed in the case of American Can Co. v. Agricultural Ins. Co., supra: "In fact it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterwards merged into the written contract. Hence it is at once apparent, even to the layman, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject-matter." Law v. Northern Assur. Co., supra.

With this rule in mind let us examine the evidence in the case at bar relative to the alleged oral contract of insurance. Plaintiff testified, in substance, that J. R. Thomas, a soliciting agent of defendant, talked to her husband several times, over a period of 3 or 4 months, about taking a life insurance policy with defendant company to replace a policy which decedent had been carrying in another company. The first of these conversations occurred in March or February, 1930. The next conversation was in the latter part of April, when Thomas told her husband he could give him more life insurance for less premium than was provided for in a policy then carried by decedent. Finally decedent told Thomas he would cancel the other policy and take out a policy for $2,500 with Thomas in the defendant company. On April 10, decedent made a written application to defendant through Thomas for a $2,500 policy. Plaintiff further testified that Thomas spoke to her husband many times about the matter, the last time being about 10 days before her husband died, when Thomas said to decedent, "Mr. Toth, I came after that deposit for the premium on the $2,500 life insurance policy, you know I have to have a deposit of $5.00 in order to insure the doctor's examination." Decedent told him to come back the following Wednesday, on which day, being May 14th, the examination was had and it was satisfactory for insurance. Plaintiff further testified that some time in April Thomas said to her husband, "You will have to pay me a deposit of $5.00 on the premium and I will deliver the policy and you pay the balance of the premium. As soon as you are examined by the doctor you are protected, if you don't have the money you have 60 days to pay it to me." Plaintiff further testified that Thomas told her husband that the premium was $25 semiannually, but defendants produced evidence to show that the semiannual premium was $33.30. After the doctor's examination Thomas told decedent, according to plaintiff's testimony, "I will have your policy ready for you and I will bring it to you Monday and you pay me the balance of the premium." On May 16th, two days after the doctor's examination, decedent was taken suddenly ill and died the following day. No insurance policy was ever delivered, and there is no evidence that one was ever issued. The evidence shows that J. R. Thomas was a soliciting agent; that he had no power or authority to make, alter, or discharge defendant's contracts. Thomas testified that he never told decedent he was insured in defendant company or that he would be covered by insurance, but that he did tell decedent that he was not insured until the first premium was paid in full. There is a conflict of evidence as to whether or not the $5 was paid to Thomas on account of the premium, but the evidence shows that, in any event, no greater amount than $5 was ever paid on account of the premium. Thomas testified that he never turned any of that premium over to the company.

The written application which was signed by decedent contained the following stipulations: "That no agent, medical examiner or any other person, except the officers of the company, have power on behalf of the company: (a) to make, modify or discharge any contract of insurance, (b) to bind the company by making any promises respecting any benefits under any policy issued hereunder. * * * That the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant. * * *"

[3] The evidence does not clearly indicate whether or not the statements of Thomas upon which plaintiff predicates her claim of an oral contract of insurance were made before the making of the application by decedent. If so, then the oral statements and promises, if any, would be merged in the written application for insurance. 14 Cal. Jur., p. 420; American Can Co. v. Agric. Ins. Co., supra; Bankers' Reserve Life Co. v. Yelland (C. C. A. 9th) 41 F.(2d) 684, 687. If made after the execution of the application by decedent, then the question involves the matter of the waiver or modification of provisions of a written contract by subsequent oral representation or agreement. The application provides explicitly that no insurance on the life of decedent was to be in effect until the delivery of the policy and the payment in full of the first premium, neither of which was ever made. The provisions contained in the application and quoted above show that no oral contract of insurance was contemplated by the decedent or the defendant, but that the contract of insurance was to be complete only when the policy was delivered and the first premium paid in full. The application was but a proposal for insurance which the company was free to accept or reject as it might see fit. There is no evidence to show that the company ever accepted the proposal, and the evidence shows affirmatively that the company never delivered such a policy, and that the first premium was never paid, except that there is evidence to the effect that $5 was paid on account of the premium.

[4] In the face of such facts and circumstances it cannot be said that the proof of an oral agreement of insurance in this case is either clear or convincing. Even if we accept the testimony of plaintiff without considering any conflicting statements on the part of witness Thomas, still there is not sufficient proof of an oral contract of insurance, because, under plaintiff's own testimony, Thomas said to decedent, "You will have to pay me a deposit of $5.00 on the premium and I will deliver the policy and you pay me the balance of the premium * * *"; and that after the medical examination Thomas said to decedent, "I will have your policy ready for you and I will bring it to you Monday and you pay me the balance of the premium." The testimony of the plaintiff herself indicates that defendant's agent meant that he would have to deliver the policy before the insurance became effective. There is some evidence to the effect that Thomas told decedent that, after the medical examination, he would be "protected," but there is no evidence to indicate what was intended or ununderstood by the word "protected." Applying the test prescribed by the California authorities in considering oral contracts of insurance and outlined above, the proof in the case at bar is neither clear nor convincing to the effect that such contract was actually entered into; or that each party understood it in the same light, or in regard to the same subject-matter; or that the parties intended to contract in a manner not in the usual course of business.

[5, 6] Appellant further contends that no agent of the defendant was authorized to enter into such a contract of insurance as was found by the court. The only agent of defendant with whom decedent had any dealings in regard to the purported oral contract in controversy was said J. R. Thomas. Plaintiff offered no evidence to show what authority was vested in Thomas. In answer to a request for a stipulation as to the nature of Thomas' agency, made by plaintiff's counsel, defendant's counsel stated: "The word 'agent' has wide implications, therefore I cannot go so far as to say he was an accredited agent. I will say during the time alleged in the complaint Mr. Thomas was an agent of the defendant authorized to solicit insurance and to write up an application and send it in, and other than that he had no authority." Defendant also introduced evidence, which was uncontradicted, to the effect that the only authority which Thomas had was to write the application and submit it to the company, and that neither Thomas nor any other agent of defendant employed in the Bakersfield district had any power or authority to make or enter into any agreement whatever for life insurance. It is apparent from this evidence that neither Thomas nor any other person employed by defendant in the Bakersfield district had any authority whatever to make, on behalf of defendant, an oral agreement insuring the decedent's life. Defendant had the right to thus limit the authority of its soliciting agents and such a limitation of authority has been frequently upheld in this state. Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 751, 91 P. 609, 13 L. R. A. (N. S.) 866; 14 Cal. Jur., p. 460. A mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts, but not to consummate them, and cannot bind his principal by anything he may say or do during the preliminary negotiations. 14 Cal. Jur., p. 457; Browne v. Commercial Union Assur. Co., 30 Cal. App. 547, 554, 158 P. 765; Sharman v. Continental Ins. Co., 167 Cal. 117, 124, 138 P. 708, 52 L. R. A. (N. S.) 670. The evidence in the case at bar shows without contradiction that Thomas was only a soliciting agent. He therefore had no authority to make any contract of insurance, either oral or written; and, even if we assume that he attempted to make an oral contract to insure decedent, his lack of authority so to do would prevent such purported oral contract from being valid or effective.

[7-9] Moreover, the limitation of Thomas' authority as a soliciting agent of defendant was affirmatively brought to the attention of decedent when decedent made the application for insurance, which application contained the provision that no agent or any other person, except officers of defendant company, has power to "make, modify or discharge any contract of insurance" or to bind the defendant in any way "by making any promises respecting any benefits under any policy issued hereunder"; and also the provision that defendant would incur no liability under the application until it had been received, approved, and a policy issued and delivered with a full first premium paid to and accepted by defendant. The decedent signed the application, and it is presumed that he knew its contents. Fidelity & Cas. Co. v. Fresno Flume & Irrig. Co., 161 Cal. 466, 472, 119 P. 646, 37 L. R. A. (N. S.) 322. By these provisions of the application, express notice was given to decedent that the officers of the defendant reserved the exclusive right to determine whether or not defendant would insure him, and also that Thomas had no right or authority to bind defendant by any promises or purported oral agreements. Iverson v. Metropolitan Life Ins. Co., supra. Thomas, therefore, had neither actual nor ostensible authority to make the purported oral contract relied upon by appellant, and consequently no completed contract of insurance on the life of decedent, either oral or written, was ever entered into by decedent and defendant. An insurer is not bound by representations or purported agreements made by an unauthorized agent. 14 Cal. Jur., p. 458; Fidelity & Cas. Co. v. Fresno Flume & Irrig. Co., supra.

[10-12] Appellant assails the finding of the trial court which finds that Toth and the defendant entered into an oral contract, whereby the defendant, for a valuable consideration paid by said Toth, insured and agreed to insure his life for the sum of $2,500; and defendant received said consideration and approved and ratified the act of its said agent in insuring the life of said Andrew Toth; on the ground that said finding is not supported by the evidence. There is a substantial conflict of evidence respecting the payment of the $5 on account of the premium, and for that reason this court must uphold the finding of the trial court relating to said payment. 2 Cal. Jur., p. 881; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157. But we are of the opinion that the portion of the finding to the effect that said defendant received the said consideration and approved and ratified the act of its said agent in insuring the life of said Andrew Toth is not sustained by the evidence. In support of this finding, respondent argues that, with knowledge of plaintiff's claim, defendant chose to retain said deposit of $5; that Thomas undertook on behalf of defendant to waive the limitation of his agency specified in the application; and that defendant, by entering this payment of $5 in the book in the Bakersfield office and retaining the same, waived this provision of the application. Respondent further argues that: "If Mr. Thomas acted beyond his authority in assuring Mr. Toth that he was protected, then the company was placed upon its election whether to repudiate the act of its agent or ratify it." Respondent cites in support of this contention section 2310 of the Civil Code, which is as follows: "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof"; and also section 2311 of the Civil Code, which is as follows: "Ratification of part of an indivisible transaction is a ratification of the whole." The only other authority cited by respondent in support of this point is the case of Massachusetts Bonding, etc., Co. v. Vance, 74 Okl. 261, 180 P. 693, 15 A. L. R. 981. This case, however, differs very materially from the case at bar in that, in the Oklahoma case, the company clothed the agent with ostensible authority to make an oral contract of accident insurance; the full first premium was paid; and there was no application for insurance signed by the insured, who was without any knowledge of any limitation of the agent's authority. It is also apparent from the opinion of the court that the company retained the premium with knowledge of all the material facts. We cannot agree with respondent's contention that defendant ratified an oral agreement made by defendant's agent, Thomas. The rule is well established that a ratification of unauthorized acts of an agent, in order to be effective and binding upon the principal, must have been made with full knowledge of all material facts, and that ignorance, mistake, or misapprehension of any of the essential facts or circumstances relating to the transaction claimed to have been ratified will absolve the principal from all liability by reason of any purported assent to any previously unauthorized act. 1 Cal. Jur., p. 778; Pacific Bone, etc., Co. v. Bleakmore, 81 Cal. App. 659, 667, 254 P. 618; Brown v. Rouse, 104 Cal. 672, 676, 38 P. 507; Hall v. E. W. Wells & Son, 24 Cal. App. 238, 250, 141 P. 53. The proof in the case at bar fails to show any knowledge whatever on the part of any officer of defendant company of any oral contract made with said decedent. So far as the evidence shows, the only information concerning the transaction in controversy which became known to the defendant was the execution of the application, which showed a payment of only $5 on account of an annual premium of $66.60 or a

semiannual premium of $33.30, and which also showed on its face that decedent knew and accepted the conditions recited in the application to the effect that no agent of the company could make a contract of insurance, and that no liability would be incurred by defendant until the application had been approved by the defendant, and a policy issued and delivered, and the full first premium paid to and accepted by the company, during the lifetime of the applicant. There being no proof of knowledge on the part of defendant of any of the material facts connected with the alleged oral contract, no ratification of such contract was established. Consequently the finding complained of is not supported by the evidence.

After considering all the evidence, our conclusions are (1) that no agent of defendant was authorized to enter into a contract of insurance with decedent; (2) that defendant did not ratify any purported oral contract of insurance with decedent; and (3) that no contract of insurance, oral or written, was ever entered into between decedent and defendant. Consequently, so far as the record shows, no liability was incurred by defendant.

It follows that the judgment must be, and it is hereby, reversed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App.(Supp.) 782

TAYLOR v. DATIG.

C. A. 1128.

Appellate Department, Superior Court, Los Angeles County, California.

May 12, 1932.

1. Courts ⇐169(4).

Attorney's fees provided in note sued on must be regarded as part of plaintiff's demand in determining whether court has jurisdiction.

2. Courts ⇐160.

Amendment of statute by increasing jurisdictional limit *held* not to give court jurisdiction over pending actions which, when commenced, were beyond court's jurisdiction (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838).

BISHOP, J., dissenting.

Appeal from Municipal Court of Los Angeles; James H. Pope, Judge.

Action by Leland Taylor against F. A. Datig. From a judgment for plaintiff in municipal court, defendant appeals.

Reversed and remanded, with direction.

Roger Marchetti, Le Roy Anderson, and Dana Ong, all of Los Angeles, for appellant.

Bernard G. Hiss and Edward C. Purpus, both of Los Angeles, for respondent.

SHAW, J.

[1] This is an action at law on a promissory note to recover the sum of $1,000 as principal, $100 as attorney fees, which are provided for in the note, and interest. The complaint was filed June 6, 1928. At that time the municipal court in which it was brought had no jurisdiction of actions at law where the demand, exclusive of interest, exceeded $1,000. Section 29, Municipal Court Act, St. 1925, p. 658. The attorney's fees in such a case are special damages, and must be regarded as a part of plaintiff's demand to determine the jurisdiction. De Jarnatt v. Marquez, 127 Cal. 558, 60 P. 45, 78 Am. St. Rep. 90; 27 L. R. A. (N. S.) 157, note. Hence, at the time the action was begun, the municipal court had no jurisdiction of it. Before the case was tried, the Municipal Court Act was amended by increasing the jurisdictional limit of actions at law brought in the municipal court to $2,000 (St. 1929, p. 837), so that the demand of the complaint and the judgment rendered, which was for $1,100 and interest, were at the time of trial within the jurisdiction of that court. This amending act contained nothing indicating an intention that its provisions should apply to pending litigation.

[2] The record at once presents the question whether this amendment of the Municipal Court Act operated to give the municipal court jurisdiction over pending actions which were, when commenced, beyond its jurisdiction. We think this question must be answered in the negative. As far as we can learn, there is no California case exactly in point, but the principle which we think must govern its decision has been many times declared in this state, and the converse proposition, that is, that a court which had jurisdiction of an action when commenced does not lose that jurisdiction by a subsequent change of law cutting down its jurisdiction, has been settled. Berg v. Traeger, 210 Cal. 323, 292 P. 495; Architectural Tile Co. v. Superior Court, 108 Cal. App. 369, 291 P. 586; Wheaton v. Superior Court, 108 Cal. App. 702, 292 P. 499; Jones v. Summers, 105 Cal. App. 51, 286 P. 1093; Harris v. Moore, 102 Cal. App. 413, 283 P. 76; San Francisco, etc., Rys. v. Superior Court, 172 Cal. 541, 157 P. 604. The principle on which all of these cases rest is thus declared in Berg v. Traeger,

supra: "It is equally well settled and is a fundamental rule of statutory construction that every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed." In several of the cases just cited, the courts applied this rule to the very amendment of section 29 of the Municipal Court Act which is now before us. They were, however, considering the act from a different point of view from that which we occupy; they being concerned with its effect in decreasing the jurisdiction of other courts. In Vanderbilt v. All Persons, 163 Cal. 507, 513, 126 P. 158, the question involved was the application to pending cases of a statute regarding the admissibility of evidence, and such application was refused; the court saying in discussing the question: "When a remedy is sought which is not authorized by law, a subsequent statute giving such remedy does not operate on the existing suit. (Wetzler v. Kelly & Co., 83 Ala. 443, 3 So. 747.) Retroaction is never allowed to a statute unless required by express legislative mandate or unavoidable implication. (Smith v. Lyon, 44 Conn. 178.)" In People v. Allied Architects' Ass'n, 201 Cal. 428, 437, 257 P. 511, the rule regarding retroactive construction is thus stated: "No statute or constitutional provision shall be so construed as to give it a retroactive effect, to divest individuals of rights vested previous to its passage, or to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the provision to be construed"—citing 5 Cal. Jur. 750. In State Commission in Lunacy v. Welch, 20 Cal. App. 624, 630, 129 P. 974, where the plaintiff had brought a mandamus proceeding against the county treasurer without authority of law and before a demurrer to the petition was heard a statute authorizing such a suit took effect, it was held that this statute did not apply to the pending proceeding. The court reviewed many authorities, and stated the rule as follows: "Laws are not construed as intended to have a retroactive or retrospective effect, so as to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the statute." In Takeba v. Superior Court, 43 Cal. App. 469, 474, 185 P. 406, the court declared that the amendment of section 564 of the Code of Civil Procedure authorizing the appointment of a receiver in an unlawful detainer action was not to be given a retroactive effect, and hence did not apply to a pending action. None of these cases is identical with that before us, but they clearly declare the principle which, if applied here, decides this case. We can find in them no suggestion that it should not be so applied. It has been suggested that, since the complaint here, if filed on the day on which the amendment took effect, would have been within the jurisdiction of the court, it would be a useless formality to require the plaintiff to refile his complaint in order to claim the benefit of that amendment. But we are not in a position to say that the defendant would not be harmed by such a decision. This complaint was filed more than a year before the life-giving amendment became effective. The defendant may have believed that plaintiff had abandoned his action by reason of the lack of jurisdiction, and may have so conducted himself in reliance upon that belief as to prejudice him if it proves false. We cannot know the facts, but such possibilities furnish one of the strongest reasons for the rule against retrospective construction of such statutes. See Vanderbilt v. All Persons, supra. The adoption of this suggestion would require a departure from the rule declared in the cases above cited, and many others. The same suggestion could have been made with equal force and would have been equally obvious in State Commission in Lunacy v. Welch, supra; but it was not even mentioned there.

In Maguire v. Cunningham, 64 Cal. App. 536, 553, 222 P. 838, the district court of appeal declared that a statute providing for actions to quiet title to personal property was to be given retroactive effect so as to uphold such actions previously brought; but the Supreme Court, on petition for hearing of the case there, declined to approve this part of the decision, and hence it cannot be regarded as authority on the point. Pacific Gas & Elec. Co. v. State (Cal. Sup.) 6 P.(2d) 78, is also cited as authority in favor of the application of the amendment here to pending actions, but we do not so regard it. As the Supreme Court said, they were there "confronted with an anomalous situation." The action in question was fully authorized when brought, but after the decision in the trial court, and before the case was reached on appeal, two amendments of the law had been made; the first removing the foundation of the action, and the second restoring it. The decision was that under these circumstances the appellate court should regard the action as well brought; such being the law both at the time of the decision below and of the decision on appeal. But nothing was said about the rule against retrospective construction of statutes, and we find nothing in the decision to indicate an intention to abandon that rule generally.

In other states, there is also authority for the proposition that jurisdiction of a pending action which was improperly brought is not conferred by a law enlarging the jurisdiction of the court, unless such intent is expressed in the statute. Wheatland v. Lovering, 10 Gray (Mass.) 16; Buck v. Dowley, 16 Gray (Mass.) 555; Baines v. Jemison, 86 Tex. 118, 23 S. W. 639; State v. Cloud, 146 Miss. 642, 112 So. 19; Smith v. Lyon, 44 Conn. 175, 178; Bedier v. Fuller, 116 Mich. 126, 74 N. W. 506;

Wetzler v. Kelly & Co., 83 Ala. 440, 3 So. 747. In some of these cases the question involved was not directly one of jurisdiction, but the courts made declarations which were broad enough to cover the jurisdiction. In Wheatland v. Lovering, supra, it was directly held that a statute enlarging the jurisdiction of a court "authorized subsequent actions, but gave no vitality to those commenced before the statute took effect," and the decision in Buck v. Dowley, supra, was to the same effect. In Baines v. Jemison, supra, the court held that a statute providing a new cause for change of venue did not apply to pending actions, and said: "It may be that it would be competent to so change the law as to confer local jurisdiction of a suit already pending upon the court in which it was instituted, although such court did not have jurisdiction at the time the action was brought. * * * Admitting the power of the legislature in such a case, its intention would have to be clear before the courts would give the statute such retroactive effect." In Smith v. Lyon, supra, it was held that a statute enlarging the scope of a proceeding in replevin did not operate to validate such a proceeding previously brought without statutory sanction. The court said: "All laws are to commence in the future and operate prospectively, and are to be considered as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. The rule is one of such obvious convenience and justice as to call for jealous care on the part of the court to protect and preserve it. Retroaction should never be allowed to a statute unless it is required by express command of the legislature or by an unavoidable implication arising from the necessity of adopting such a construction in order to give full effect to all its provisions." This language was quoted with approval in State Commission in Lunacy v. Welch, supra, and the case was approvingly cited on the same point in Vanderbilt v. All Persons, supra. In Wetzler v. Kelly & Co., supra, the court said: "When a suit is instituted or a defense is interposed, which is at the time unauthorized by the law, a subsequent statute giving such remedy does not operate on the existing suit, especially when it does not provide it shall so operate." This language was either quoted or cited with approval in the two California cases last mentioned. There are a few cases from other jurisdictions which state a contrary rule. The most direct holding to that effect which we have seen is Larkin v. Saffarans (C. C.) 15 F. 147, where the argument from convenience, which we have mentioned, is stressed. The case also relies very strongly on the analogy of several decisions of the United States Supreme Court holding that laws cutting down the jurisdiction of the appellate court affect pending appeals; but that rule has been repudiated in California by the cases of Berg v. Traeger, supra; Jones v. Summers, supra, and Harris v. Moore, supra. Hence, we cannot regard it as establishing a rule which should be followed in this state.

The judgment is reversed, and the cause is remanded to the municipal court, with direction to enter a judgment dismissing the action; appellant to recover costs of appeal.

McLUCAS, P. J., concurs.

BISHOP, J.

I dissent. The conclusion reached in the foregoing opinion is in accordance with that reached in a majority of our sister states. To me, however, it seems out of step with modern judicial thought, to be contrary to the dictates of justice, and to be, not only not required by the decisions of our own state, but out of harmony with their latest expressions. Because I am unable to give a rational answer to the query propounded in Larkin v. Saffarans, (cited in the majority opinion) "why shouldn't the amendment give the court jurisdiction?" and because there is no authority in this state making necessary an irrational answer, I conclude that the amendment giving the municipal court jurisdiction of an action for $1,100, gave it jurisdiction of this action for that amount.

If we take the viewpoint, once to be expected, that a case filed in a court without jurisdiction is a mere nothingness, a void, then we will find it difficult to embrace the idea that there was anything pending that could be affected. But if we see in the filing of papers a means to an end, that end the presenting of a case to a court for an adjudication, then, I submit, it is hard to see any reason why the court may proceed to judge, if those papers were filed August 15, 1929, but may not if they were filed August 13. The test of legislative intent is a hopeless one, in my opinion for we are faced, if not with an absence of intent, certainly without any expression of that intent. If we must apply this guide, let us say the Legislature intended that to happen which would most further the administration of justice. Injustice would have resulted if the amended statutes were given effect in pending cases, in Harris v. Moore (1929) 102 Cal. App. 413, 283 P. 76; Berg v. Traeger (1930) 210 Cal. 323, 292 P. 495; Jones v. Summers (1930) 105 Cal. App. 51, 286 P. 1093; Architectural Tile Co. v. Superior Court (1930) 108 Cal. App. 369, 291 P. 586, 587, and Wheaton v. Superior Court (1930) 108 Cal. App. 702, 292 P. 499, for to do so would be to deny pending actions the advantages of the machinery of justice theretofore open to them. So we find in the Architectural Tile Co. Case, "The fact that injustice may result in such cases is one of the reasons for that

rule of statutory construction to the effect that, in the absence of a clearly expressed intention to the contrary, every statute will be held to operate prospectively rather than retrospectively." But ours is a converse situation from that presented by these cases. Here an amendment opens a court theretofore closed; and it seems to me to be in furtherance of the administration of justice, which should not require futile acts, that the court should be open not only to new suits filed therein, but to those which had been filed, in error it is true, but which nevertheless were pending in it, and now fall within its jurisdiction. To this line of reasoning the majority opinion observes: "The defendant may have believed that plaintiff had abandoned his action by reason of the lack of jurisdiction and may have so conducted himself in reliance upon that belief as to prejudice him if it proves false." Such a suggestion rests upon the unwarranted assumption that a defendant has a right to believe that filing an action in the wrong court is an abandonment of it, a judicial interment, as it were. Moreover, the filing of an action in a court without jurisdiction tolls the statute of limitations. Section 355, C. C. P. Atlanta, etc., Co. v. Wilson (1904) 119 Ga. 781, 47 S. E. 366; Gaines v. City of New York (1915) 215 N. Y. 533, 109 N. E. 594, L. R. A. 1917C, page 203, Ann. Cas. 1916A, 259; Burns v. Peoples Tel. & Tel. Co. (1930) 161 Tenn. 382, 33 S.W.(2d) 76; Stevens v. Dill (1930) 142 Okl. 138, 285 P. 845; Rifner v. Lindholm (1931) 132 Kan. 434, 295 P. 670. If, then, plaintiff is not barred from pressing his cause of action, in a new if not the errant suit, how can the defendant be prejudiced by the assumption, if he makes it, that the action has been abandoned? He cannot prevent plaintiff from refiling the complaint, and if that action were taken he would find himself in the same position as with the papers remaining on file, so far as defending against it is concerned. Should he be threatened with prejudice, furthermore, he can easily protect himself by making a motion to dismiss; a remedy so readily available that he should be required to pursue it rather than be allowed to sit by and make his sitting an excuse for denying plaintiff redress. The question of jurisdiction, of course, is to be determined as an abstract matter; the fact, very apparent, that in the instant case the defendant never suspected that the court was without jurisdiction, and therefore suffered no prejudice relying upon that fact, is given no consideration.

There appear many expressions in the opinions of the courts of this state, as elsewhere, which, taken at their face value, would require the conclusion reached in the majority opinion. They are repetitions, in one form or another, of the rule appearing above in the quotation from Architectural Tile Co. v. Superior Court; some are seen in the quotations found in the majority opinion. As thus expressed, the rule is absolute: "There is no retroactive effect (i. e., effect on pending cases,) unless such intent is expressly intended." But when dealing with amendments to procedural statutes, the opinions do not follow the rule thus unequivocally expressed, but give amendments effect over pending cases, in the absence of an expressed intention that such effect should be given. Bensley v. Ellis (1870) 39 Cal. 309; Rice v. Dunlap (1928) 205 Cal. 133, 137, 270 P. 196; McClurg v. McClurg (1931) 212 Cal. 15, 297 P. 27, 28; Maguire v. Cunningham (1923) 64 Cal. App. 536, 551, 222 P. 838, et seq.; Edmunds v. Hysong (1931) 110 Cal. App. 746, 748, 294 P. 1078; Pacific Gas & Elec. Co. v. State (1931, Cal. Sup.) 6 P.(2d) 78. In view of these exceptions to the rule, one relies upon it as baldly stated, with peril. When the subject-matter affected is remedial or procedural, pending cases are subject to new law. In treating of the analogous question of ex post facto laws the court of last resort of New York would seem to classify statutes conferring jurisdiction as procedural, and therefore not objectional as ex post facto enactments. People v. Green (1911) 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912A, 885 and note; Jacobus v. Colgate (1916) 217 N. Y. 235, 111 N. E. 837, Ann. Cas. 1917E, 369. Moreover, the cases of Maguire v. Cunningham, and Pacific Gas & Elec. Co. v. State, while not to be cited as authorities on our question, for several reasons, discuss the problems they consider as though they were questions of jurisdiction, affected by amendatory statutes, and conclude that the jurisdiction conferred by the changed law applies to pending litigation. McClurg v. McClurg, contains this suggestion: "It was an order made after the statute had become effective permitting the trial court to make such orders * * * and was not therefore retroactive in character or effect." In the case at bar, there is no attempt to interpret the amended statute as validating actions taken in excess of jurisdiction before the statute became law, but only to find in it the conferring of jurisdiction in the future in an action pending when the statute took effect. So construed, it is not retroactive, within the thought of McClurg v. McClurg. In any event, I am of the opinion that to recognize the amendment as conferring jurisdiction upon the municipal court to carry on cases pending before it is not to violate any principle imbedded in the law of this state, but is to further the administration of justice.

I would therefore modify the judgment by striking therefrom the provision for a reformation of the guarantee agreement, a provision plainly beyond the court's jurisdiction, but severable from the balance of the judgment, and would affirm the judgment as modified.

Order Denying Rehearing.

McLUCAS, P. J.

Respondent's petition for a rehearing after judgment in the above-entitled cause having been filed, and said petition having been duly considered, it is now ordered that said petition be denied.

SHAW, J., concurs.

BISHOP, J.

I am of the opinion a rehearing should be granted.

BRANDON v. FARIA et al.

S. F. 13937.

Supreme Court of California.

May 13, 1932.

Rehearing Denied June 9, 1932.

Fraudulent conveyances ⇐295(1).

In quiet title action by judgment creditor who purchased, at execution sale, property conveyed by debtor to wife, findings that conveyance was fraudulent as to plaintiff and plaintiff not guilty of conspiracy to recover property for husband *held* supported, especially in view of findings and judgments in prior actions.

Evidence supported findings that husband, now divorced, had made gift conveyance to his wife without consideration when he was insolvent, and with intent to hinder, delay, and defraud his existing creditors and also his future creditors, particularly plaintiff, that subsequent conveyance by wife to children was made without consideration and that they had no interest in property, and that it was untrue that plaintiff and others had conspired to enable husband to recover the property, especially in view of findings and judgments in prior actions between same parties to effect that gift conveyance to wife was fraudulent as to creditors and that conveyance by her to children was without consideration.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Allen, Judge.

Action by A. Brandon against Frank F. Faria, also known as F. F. Faria; Adeline Faria, also known as Adaline Faria; Harold A. Faria; and Philip E. Faria. From a judgment in favor of plaintiff, the three last-named defendants appeal.

Affirmed.

O. H. Speciale and Owen D. Richardson, both of San Jose, for appellants.

E. H. Christian, of Oakland (E. S. Leslie, of Oakland, of counsel), for respondent.

PRESTON, J.

Appeal from judgment quieting the title of plaintiff to real property situate in Alameda county, Cal. Before attempting to state the facts of this case, a review will be made of prior litigation between these parties involving the property in question.

Frank F. Faria and Adeline Faria were married in 1912, defendants Harold A. and Philip E. Faria being the minor children of that marriage. In 1915 Mr. and Mrs. Faria purchased a ranch; in 1922 Mrs. Faria selected and impressed it with a homestead. In 1923 Mr. Faria was in an automobile collision and he, with others, was sued for $50,000 damages resulting from the death of one of the parties due to said accident. Some five months later, to wit, on April 4, 1924, he executed to his wife a gift deed to the ranch, which deed was immediately placed of record. Mrs. Faria thereafter instituted divorce proceedings against him and in July, 1926, she was granted an interlocutory decree of divorce upon the ground of extreme cruelty. In October, 1926, by deed of gift, she conveyed the said real property to the two minor children, reserving to herself a life estate therein.

In February, 1927, action No. 93935 was brought against Mrs. Faria, Mr. Faria, and the two children by one Brandon (this plaintiff), who alleged that on February 5, 1927, a money judgment for $432.76 had been entered in favor of his assignor and against Mr. Faria; that execution had issued thereon and had been returned wholly unsatisfied; that said deed of gift of the ranch property was without consideration and made with the intent and purpose to hinder, delay, and defraud the creditors of Mr. Faria, wherefore he prayed that the deed be declared void. Mr. Faria defaulted, became a witness for Brandon, and testified that he had conveyed the property to his wife so that it would not be lost to them as a result of the suit growing out of said automobile collision. The wife and children answered denying Mr. Faria's insolvency and the alleged fraudulent purpose of the deed. The court, however, found in accordance with the allegations of the complaint and entered judgment in favor of Brandon for the sum prayed for. Mrs. Faria had previously deposited this amount in court and the judgment was therefore satisfied on June 23, 1927.

About a week prior to said satisfaction of judgment, to wit, on June 16, 1927, said Brandon had filed another suit, No. 96338, against Mr. Faria, alleging that there was due him as assignee of certain creditors of Mr. Faria, the sum of $2,829.53, interest and costs, growing out of the principal and interest due on a $300 promissory note executed to one Christian by Frank Faria on March 19, 1927; another promissory note for $1,500 executed to said Christian by Frank Faria on February 4, 1927, and a balance of $560.78 due one Hirsch on an automobile sales contract executed by said Faria. Frank Faria defaulted and judgment was entered against him in the sum prayed for on June 28, 1927. On the same day execution was issued thereon and levied upon the said ranch property.

The said Brandon thereupon instituted execution proceedings wherein, after the ap-

pointment of three persons to appraise the property claimed as a homestead, an order was made confirming their report, setting apart to Mr. and Mrs. Faria a portion of the ranch as a homestead and permitting execution of said judgment upon the remainder. Mrs. Faria appealed from this order, alleging the said gift conveyance to her by her husband and her gift conveyance to the minor children, subject to a life estate in her. In passing upon this appeal it was held that the deed from Mr. Faria to his wife did not impair the homestead nor did the interlocutory decree of divorce or the final decree of divorce subsequently entered have that effect; that, however, as to the remainder of the property, the judgment roll in said action 93935 contained a finding that the deed thereto from Mr. Faria to Mrs. Faria, was without consideration and made with the intent to delay, hinder, and defraud the creditors of Mr. Faria; therefore, even assuming that the debt sought to be enforced was incurred after the execution of the said deed, nevertheless "the facts found above were prima facie evidence of an intent to defraud subsequent creditors (Hemenway v. Thaxter, 150 Cal. 737, 90 P. 116), which fraud respondent [Brandon] as the assignee of a creditor could assert (Kemp v. Enemark, 194 Cal. 748, 230 P. 441)"; hence the order was affirmed. Brandon v. Faria, 99 Cal. App. 594, 279 P. 192, 193.

Again, in an action by Mrs. Faria against Brandon, on appeal from an order denying her a preliminary injunction against sale by the sheriff of said property under the execution issued upon said $2,829.53 judgment, this court affirmed the order upon the following grounds: that Mrs. Faria had been secured in her homestead right; that the surplus only of the property was subjected to the payment of said judgment; that it had been duly adjudged that said deed from Mr. Faria to his wife was without consideration made when he was insolvent for the purpose of defrauding his creditors; that the deed to the minor children was without consideration; and that it was uncontradicted that the execution sale had already taken place. Faria v. Brandon, 206 Cal. 730, 276 P. 106.

This controversy was again before the District Court of Appeal in an action by Mr. Faria against Mrs. Faria and the children, wherein a judgment had been entered setting aside the deed from Mr. Faria to Mrs. Faria and the deed from Mrs. Faria to the children. Mrs. Faria and the other defendants appealed, contending that as it had been judicially determined that the husband's purpose in conveying the ranch to his wife was to defraud his creditors, he was precluded from seeking to recover it back and further contending that the evidence failed to prove that Mrs. Faria had unduly influenced her husband to make the deed to her. The court again reviewed the history of this controversy, saying: "It thus appears that twice have the courts of appellate jurisdiction recognized the decision in Brandon v. Faria (No. 93935), as being a determination of the fact that the purpose of the gift deed * * * from Faria to his wife was to hinder, delay, and defraud creditors. * * * If such was the purpose of the deed, the law will not allow Faria to recover back the property he has fraudulently conveyed, for the rule in such case is that as soon as the fraudulent purpose of the conveyance is disclosed by the evidence, the trial court will leave the parties where it finds them. 12 Cal. Jur. 1026, and cases cited." The court then further held that the evidence was legally insufficient to establish, as against the wife, a case of undue influence or actionable fraud in favor of the husband and accordingly it reversed the judgment previously entered in his favor. Faria v. Faria, 100 Cal. App. 177, 280 P. 187, 188.

We now arrive at the present action, which was instituted on October 29, 1929, by said Brandon against Mr. and Mrs. Faria, the minor children and others, seeking to quiet the title to said property obtained by him from the sheriff by reason of his purchase at the execution sale in said action 96338. Defendant Frank Faria defaulted and all other defendants were dismissed except Mrs. Faria and the children, who answered, alleging that Mr. Faria, plaintiff Brandon, and the Christian above mentioned, had entered into a conspiracy to deprive them of the said property, all in the interest of Mr. Faria. They claimed that Mr. Faria had executed the said $1,500 and $300 notes to Christian, an attorney, without any consideration other than legal services to be thereafter performed by him; that Christian had assigned the notes to Brandon and had also caused said Hirsch to assign his automobile contract claim to Brandon, thus increasing the demand against Mr. Faria, all in order to deprive defendants of the property, to permit Brandon to secure the $2,829.53 judgment in action 96338 and to bring this action, and to permit Christian to act as attorney in all these matters, aided by Mr. Faria and looking toward his interests.

This cause came to trial. The judgment rolls in actions 96338 and 93935 were admitted in evidence as well as the complaint and remittitur from the District Court of Appeal in action 96551. Faria v. Faria, 100 Cal. App. 177, 280 P. 187. Testimony was given by Christian, Hirsch, and Mrs. Faria. The complaint and decision in action 96551 showed that Mr. Faria was there represented by Mr. Christian. Mr. Christian also admitted that he represented Mr. Faria in action 97440, wherein judgment for respondent Faria was affirmed by the District Court of Appeal on July 18, 1929. Faria v. Beteencourt,

100 Cal. App. 49, 279 P. 679. He further testified that during the fall of 1926, Mr. Faria consulted him many times regarding proposed litigation; that the two notes for $1,500 and $300, respectively, were given him by Mr. Faria for legal services already rendered and to be thereafter rendered; and that he knew at said time of the execution of said gift deed to Mrs. Faria, which was claimed to be fraudulent as to creditors. Mr. Hirsch testified that he had assigned his claim, which represented a renewal in 1924 of an indebtedness incurred by Mr. Faria in 1921 to plaintiff Brandon, but that he did not know of the said alleged fraudulent gift deed until informed of it by Mr. Christian after May 8, 1924; that at the time Mr. Faria purchased the automobile from him in 1921, he gave him credit for $300 or $400 on said contract in return for two horses; that in 1924 he took a new note for the unpaid balance then due; that he received no consideration for the assignment to Brandon; that the debt was never paid and he never got the car back, but one McCord finally took it from the ranch and gave it to Mr. Faria. Mrs. Faria testified that at the time said contract was made she had told Mr. Hirsch that it was her ranch and that she did not want the automobile; that, however, it was awarded to her by the judgment in the divorce action, but Mr. Hirsch told her that she could only keep it if she gave him $200; that she said she had no money and he finally took the car away from her.

The most that can be said of the testimony in favor of defendants is that it created a conflict in the evidence. This conflict the trial court resolved in favor of plaintiff Brandon. The court found that plaintiff was the owner in fee simple and entitled to possession of the property; that as a result of the execution sale in action 96338 and after expiration of the period of redemption, to wit, on August 1, 1929, he had acquired a deed to said property from the sheriff; that Mr. Faria had made said gift deed to his wife without consideration, at a time when he was insolvent and with the intent and purpose to hinder, delay, and defraud his existing creditors, particularly Petersen Bros., to whom he owed $432.76, and also his future creditors, particularly this plaintiff. The court further found that the deed from the wife to the children was made without consideration and that these parties have no interest in the property. It also found to be untrue all the allegations with respect to the purported conspiracy to enable Mr. Faria to recover the said property. In accordance with these findings, judgment was entered for plaintiff, quieting his title to the property, and the defendants wife and children have appealed.

The above statement of facts, although lengthy, practically disposes of this appeal. Not only does the evidence clearly support the findings in every respect but the several findings and judgments in the prior actions have effectually disposed of any issues which might be raised here. Appellants claim that the judgment in action 96338 did not make the gift deed to Mrs. Faria prima facie fraudulent as to subsequent creditors and that both Christian and Hirsch were subsequent and not existing creditors. We shall not discuss this subject again. See the several pronouncements heretofore made and above reviewed; Faria v. Faria, 100 Cal. App. 177, 280 P. 187, and cases there cited; Brandon v. Faria, 99 Cal. App. 594, 279 P. 192; Faria v. Brandon, 206 Cal. 730, 276 P. 106.

The further contention of appellants is that the judgment here and the judgments in action No. 96338, which was predicated on assignment of the Christian and Hirsch debts to Brandon, were collusive and obtained in the interest of Frank Faria. Without passing upon the right of appellants, in this proceeding, to attack the judgments growing out of action No. 96338, we need only say that no convincing proof of collusion or conspiracy appears in the record before us. The evidence, although not without some conflict, nevertheless offers ample support for the findings and judgment of the court below and they will not be disturbed upon appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

215 Cal. 495

WILMES v. REITZ.

Sac. 4571.

Supreme Court of California.

May 16, 1932.

Rehearing Denied June 13, 1932.

1. Deeds ⇐211(1).

Finding that grantor, without fraud or undue influence, voluntarily executed and delivered deed while of sound mind, *held* supported.

2. Deeds ⇐68(1).

Whether trust was shown to exist *held* immaterial, as regards validity of grantor's voluntary conveyance to brother who had paid consideration for conveyance to grantor (Civ. Code, § 1040).

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Mary Wilmes, an incompetent person, by Katherine Wollwert, her guardian ad litem, against John Reitz. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. T. Belieu, of Willows, and A. C. Huston, Jr., of Woodland, for appellant.

George R. Freeman and Duard F. Geis, both of Willows, for respondent.

PRESTON, J.

Mary Wilmes, an incompetent person, through her daughter and guardian ad litem, Katherine Wollwert, brought this action to secure, on allegations of lack of consideration, failure of delivery, fraud, and undue influence, the cancellation of a certain deed to real property executed by her to defendant, her brother. Findings and judgment were made in favor of defendant. Plaintiff appealed. The only real issue in the case is that of the alleged insufficiency of the evidence to support the findings and judgment.

Respondent had been a resident of Willows for about thirty-seven years. The real property in question was located there and was known as the Burrington Apartments. Respondent had purchased it in 1920, but for personal reasons had had the title placed in the name of a cousin, Kathrine Lentz. He and Miss Lentz operated the apartment together until dissension arose between them some time during the year 1922 and he then instituted an action to compel her to reconvey his property to him. During that year also respondent went east and brought his sister (appellant) back to live with him. He had been theretofore partially supporting her. She was without property or money, except about $300, and she planned to keep house for him, in return for which he, from that time on, became her sole support. Respondent was about seventy-eight years of age and his sister was about seventy-five. She had always spoken in the Luxembourger language, understood English but poorly, and relied wholly upon her brother to take care of her. Their relationship was one of mutual affection and trust.

In 1923, the Lentz suit was settled by payment on the part of respondent of the sum of about $25,000 for the return of his property. But he profited little from the experience, for he again took title in the name of another person—this time in the name of his sister (appellant). He had Miss Lentz deed the property to her and also assign to her a mortgage which her daughter, Katherine Wollwert, had executed to secure a loan. Appellant knew that the property belonged to respondent; he explained that he was deeding it to her merely so she would have it in case he predeceased her, and she agreed and understood that she was to deed it back to him any time he wanted her to. So matters stood for several years.

Appellant was in poor health, and in February, 1930, her daughter, said Mrs. Wollwert, and the daughter's husband, came to Willows. During their visit respondent injured himself by falling from a tree and Mrs. Wollwert cared for him while he was disabled. She understood what had been done with respect to the title to said property; she also knew that respondent was fond of her; indeed, he had indicated that, if anything happened to him, he wanted her to have the apartment house and had caused appellant to make a will in her favor. However, he recovered from his illness, while appellant's health grew worse and discord entered into the relationship of the parties.

By April, 1930, the situation had altered materially. Mr. and Mrs. Wollwert went to Santa Cruz for a prolonged visit, and in June, 1930, respondent's attorney, Mr. Freeman, received a letter from a Santa Cruz attorney, written at the instance of Mrs. Wollwert, wherein she asked that Mr. Freeman send her the deed to said property which had been executed by Miss Lentz to appellant. This aroused respondent's apprehensions, and, after consulting with counsel, he decided to have his sister reconvey to him at once. He had at all times been in possession of the property, and exercised all rights of dominion and ownership over it. He had improved it, collected all rents and profits, and had paid all bills and taxes assessed against it. Even Mrs. Wollwert had in effect recognized his ownership, for she had paid the money due on her said mortgage to him, notwithstanding the fact that assignment of it had been made by Miss Lentz to her mother and not to respondent.

On June 20, 1930, respondent and Mr. Freeman called upon appellant and asked her to execute the reconveyance. Mrs. Wollwert was present and influenced her mother not to sign, saying that they wanted a day or so to think the matter over. Respondent and Mr. Freeman therefore left and did not return until June 23. They then saw appellant, but the daughter was absent, having gone that morning to an attorney's office to apply for papers of guardianship over appellant. The daughter knew of the appointment, but she had apparently failed to control her mother's action and desired to avoid meeting respondent. At the request of Mr. Freeman, appellant executed the deed without protest, handed it to him, and he thereafter had it recorded. No consideration passed from respondent to appellant for this conveyance. The daughter, having secured her guardianship papers, later commenced this action in her mother's behalf to have the transfer declared void, with the aforesaid result in the court below.

[1] The court made full and complete findings. Among other things, it found that neither at the time of execution of said deed nor at any other time did respondent make any misrepresentation to or practice any fraud upon appellant; that he did not threaten her in any way or unduly influence her to make the deed, but that at said time she was of sound mind, was competent, and fully knew and understood the nature, purpose, and effect of her act, and that she executed and delivered the document voluntarily and of her own volition.

That the evidence abundantly supports these findings and the judgment there is no doubt. Respondent, appellant, Mrs. Wollwert, Mr. Freeman, and others all gave testimony, some of it conflicting, but nevertheless indicating that the facts were substantially as above set forth. Furthermore, as stated by the trial court, although the testimony of appellant was rather contradictory, yet, considering her age and poor English, and examining it in the light of the surrounding circumstances the conclusion is justified that she was competent at the time she executed the deed; undoubtedly she was in ill health; probably she had never been mentally strong and had never had any business experience; the conflict in her attitude was apparently brought about by a conflict in her mind between her obligation to her brother and the demands and importunities of her daughter; yet, independent of the alleged efforts of respondent or his attorney, and of the admitted efforts of her daughter, to influence her, she seemed to have settled the issue herself, in her own mind, in favor of the recognition of the justice of respondent's claim. There is no proof whatsoever of fraud or misrepresentation on the part of respondent. We do not have to review the evidence more in detail. It is sufficient to say that to our mind the court below reached the only conclusion which would be proper in this case.

[2] Various points are discussed in the briefs referring to the claim that respondent failed to establish, by parol testimony or otherwise, a trust in appellant for his benefit. These issues do not properly arise upon this appeal, and they will not be discussed. Respondent paid Miss Lentz $25,000 for the property; it belonged to him, but he took title in the name of appellant upon the understanding that at his request she would convey to him. He then requested the reconveyance at a time when appellant is found to have been competent and to have known the significance of her acts. She was free either to comply with his wish and convey to him, with or without consideration, or to refuse to do so upon the ground that there was no trust, that he had given the property to her outright, or upon any other ground. Even were the property admittedly hers, she was free to make a deed of gift to him if she chose. The fact is that she did voluntarily reconvey to him without consideration.

This was a valid voluntary transfer, with all the force of an executed contract (section 1040, Civ. Code), and appellant could not thereafter avoid it by alleging respondent's failure to prove a trust in her for his benefit. We do not mean to say that the evidence is insufficient to establish a trust; we simply say that whether or not a trust is shown is immaterial. Were this an action by respondent to compel his sister to deed the property to him, then the several contentions on this subject would be in point. But this cause is being prosecuted by appellant; it is no more than an action to cancel a deed upon the ground of undue influence, fraud, lack of consideration, and failure of delivery. It having been sufficiently shown that no consideration was necessary, that there was a valid delivery, and that there was neither undue influence nor fraud, the matter is concluded, and the action of the court below must be affirmed. In other words, the only vital question, that of the sufficiency of the evidence, we have resolved in favor of respondent, as we are in thorough accord with the views of the court below.

The judgment is affirmed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; CURTIS, J.; SHENK, J.; SEAWELL, J.

215 Cal. 466

PEOPLE v. NOBLES.

Cr. 3482.

Supreme Court of California.

May 9, 1932.

Criminal law ⇐730(3).

Offer in good faith of certified, but not exemplified, judgment of prior conviction to impeach accused *held* not prejudicial error, in view of court's strict admonition to jury.

Court instructed jury that, satisfactory evidence not having been produced of a previous conviction of a felony, jury was not to draw any inference from any questions asked or evidence offered that the defendant had previously been convicted of a felony, and that for that purpose it would be jury's duty to consider that defendant has not previously been convicted of a felony.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Pat Nobles was convicted of murder in the first degree, and of attempted murder, and he appeals.

Affirmed.

W. O. Tyler, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SHENK, J.

The defendant appeals from judgments entered upon verdicts of guilty on counts charging him with the crime of murder in the first degree and of attempted murder, and verdicts that the defendant was sane at the time of the commission of the crimes. The verdict of murder in the first degree was rendered by the jury without recommendation, and sentence of death was pronounced as required by law.

Upon the trial of the issues raised by the pleas of not guilty, the defendant offered himself as a witness in his own behalf. In the course of the cross-examination of the defendant he was asked by the district attorney whether he had ever been convicted of a felony, to which he replied in the negative, and whether or not he had ever been convicted of the crime of assault to murder and served a sentence of eleven years in the state penitentiary at Huntsville, Tex., to which the same answer was given. The defendant testified that he may have admitted to one of the arresting officers that he had served such a term, but denied that there was any truth in the statement. The district attorney offered in evidence for the purposes of impeachment a copy of a judgment, sentence, mandate, and description sheet in the matter of the People of the State of Texas v. Pat Nobles, certified by the chief of the bureau of records and identification, Texas prison system, and acknowledged before a notary public in the state of Texas. The introduction of this evidence was objected to, and the objection was sustained by the court on the ground that it was not properly authenticated, the copy being certified only and not exemplified. The district attorney then withdrew the offer. Upon objection sustained to any further attempt to impeach the defendant on the foundation laid upon the cross-examination referred to, the court instructed the jury as follows: "I want to instruct the jury that satisfactory evidence not having been produced of a previous conviction of a felony, you are not to draw any inference from any questions asked or evidence offered that the defendant has previously been convicted of a felony, and for that purpose it will be your duty to consider that the defendant has not previously been convicted of a felony." Prejudicial error is urged by the defendant by reason of the foregoing proceedings.

The defendant does not question the sufficiency of the evidence to sustain the jury's verdicts. The defendant and his wife Luberta Nobles had been separated and lived apart for many months. The wife was living with her sister at 1816 East Fifty-Third street in the city of Los Angeles. There is abundant creditable testimony in the record that at about 7 o'clock on the evening of March 29, 1931, Luberta Nobles and the decedent, Vones, were engaged in conversation on the front porch of the house at the address just mentioned, when the defendant turned into the front walk and approached the front steps; that Luberta Nobles said to Vones: "Here comes my husband—you better run." That at about the same time the defendant said: "This is just where I want to catch you." Vones and the defendant's wife climbed over the porch railing and the defendant gave chase to Vones, whom he pinned down on a wood pile in the back yard of a next-door neighbor and slashed with a sharp instrument, inflicting, among other wounds, a deep cut across the throat almost from ear to ear, which severed both jugular veins and from the effects of which Vones died on the porch of the other next-door neighbor, which he succeeded in reaching. The defendant then sought out his wife at the home of another sister on the some block, chased her from the rear of the house through the front door into the street, pulled her down and was in the act of giving her several, but not fatal, cuts across the throat and elsewhere when he was stopped by a sixteen year old boy, who struck him over the head with a scantling.

There is no contention that the defendant did not commit the acts recited, but it is urged that, if the offer of the prison record, ruled as improper by the trial court, had not been made, the jury might have treated the defendant more mercifully by making a recommendation of life imprisonment in their verdict. Without going into the facts in any further detail, and considering the very strict admonition given to the jury by the trial court, it must be concluded on the record in this case that the record of the prior conviction was offered by the district attorney in good faith, and that it is not probable that the jury would have rendered any different verdict had the offer of the certified copy of the prison record in Texas not been made.

No other point is presented. The defendant was accorded a full and fair trial and was not prejudiced in any of his rights during the course of the trial.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

215 Cal. 473

BOYD v. HUNTINGTON, Director of Department of Professional and Vocational Standards.

S. F. 14463.

Supreme Court of California.

May 13, 1932.

1. Officers ⇐50.

Term of office is fixed, although not expressly so stated in statute, where such result is properly inferred from construction of statute as whole.

2. Officers ⇐50.

Word "term," when used in reference to tenure of office, means ordinarily fixed time.

3. Physicians and surgeons ⇐3.

Governor appointing member of board of dental examiners was limited in appointment to term fixed by law and naming of period beyond term was surplusage (St. 1915, p. 699, § 2).

4. Physicians and surgeons ⇐3.

Term of office of member of board of dental examiners *held* to run with office, not with incumbent (St. 1915, p. 699, § 2).

5. Physicians and surgeons ⇐3.

Where term of office of member of board of dental examiners expired August 8, 1931, appointment on November 9, 1927, was not for full term of four years, and after August 8, 1931, appointee was mere hold-over (St. 1915, p. 699, § 2).

6. Physicians and surgeons ⇐3.

Where term of member of board of dental examiners expired August 8, 1931, and successor was appointed August 13, 1931, and qualified August 18, 1931, member *held* not entitled to compensation as secretary during September (St. 1915, p. 699, §§ 2, 3).

7. Physicians and surgeons ⇐3.

Statute requiring that secretary of board of dental examiners be elected from its membership and general statute respecting election of secretaries of boards should be construed together (St. 1915, p. 699, § 3; Pol. Code, § 376i, as added by St. 1929, p. 595, and St. 1931, p. 1287, § 377i).

St. 1931, p. 1287, § 377i, re-enacting Pol. Code, § 376i, as added by St. 1929, p. 595, provides in substance that the various boards of the department of professional and vocational standards, of which the dental board is one, may elect secretaries who may or may not be members of appointing board, whereas St. 1915, p. 699, § 3, which section was carried into St. 1929, p. 1941, requires that secretary of board of dental examiners be elected from board's own membership.

8. Physicians and surgeons ⇐3.

Statute requiring that secretary of board of dental examiners be elected from membership controlled over general act permitting various boards to elect secretaries not members thereof (St. 1915, p. 699, § 3; St. 1929, p. 1941; Pol. Code, § 376i, as added by St. 1929, p. 595, and St. 1931, p. 1287, § 377i).

9. Statutes ⇐225.

Statute must be construed in connection with whole system of which it forms a part.

10. Statutes ⇐158.

Repeals by implication are not favored.

11. Statutes ⇐159.

Statute does not repeal prior acts on same subject, absent words to that effect, unless there is irreconcilable repugnancy or unless new law is evidently intended to supersede all prior acts.

12. Statutes ⇐225.

All statutes on same subject-matter should be harmonized if reasonably possible.

13. Statutes ⇐162.

General statute will not repeal special statute by implication unless clearly manifesting Legislature intended repeal.

In Bank.

Mandamus proceeding by Bert Boyd against Carlos W. Huntington, as Director of the Department of Professional and Vocational Standards.

Writ denied.

Annette Abbott Adams, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Anthony J. Kennedy, of Sacramento, amicus curiæ.

PER CURIAM.

This is a proceeding in mandamus to compel the payment to petitioner by respondent, director of the department of professional and vocational standards, of the sum of $300 alleged to be due him as secretary of the board of dental examiners for the month of September, 1931.

It appears from the record that petitioner was appointed a member of the board by the Governor of the state November 9, 1927; his commission stating he was appointed for the term prescribed by law, vice E. J. Wylie, term expired. He qualified as such member and was thereafter elected secretary of the board December 16, 1930. On August 13, 1931, the Governor appointed A. Zimmerman a member of the board, his commission reading "vice Bert Boyd, term expired." Thereafter Zimmerman qualified on August 18, 1931. The salary of the secretary of the board is $300

per month as fixed by such board pursuant to section 3 of the Dental Practice Act (St. 1915, pp. 698, 699), which also provides that the secretary shall be a member of the board.

Petitioner claims that, as he was appointed November 9, 1927, for a term of four years, the attempted appointment on August 13, 1931, of Zimmerman in his place and stead was void, as his term of office would not expire until November 9, 1931. Petitioner further contends that by section 377i of the Political Code (as added by St. 1931, p. 1285) the secretary need not be a member of the board, and, as he has not been removed as secretary, he is entitled to his salary for the month of September. Respondent by his answer and return contends that the term of office of a member of the board of dental examiners is four years and runs with the office, and not from the date of appointment of the member; that the term of the office held by petitioner expired August 8, 1931, and thereafter his tenure was at the pleasure of the Governor; that the appointment of Zimmerman in his place as a member on August 13, 1931, was legal, and, upon the latter's qualifying on August 18, 1931, petitioner ceased to be a member; that section 3 of the Dental Practice Act, which requires the secretary to be a member of the board, controls the general provision of the Political Code, section 377i, and, when petitioner ceased to be a member of the board, he also ceased to be secretary thereof and was not therefore entitled to any salary as such for the month of September, 1931, or thereafter. In support of his claim, petitioner argues that, as no particular date for the beginning or ending of the term of any member of said board was fixed by statute at the time of his appointment, the term being fixed for a given period of time only, such terms ran with, or were attached to the members of the board and did not run with and were not attached to the office. The main question here involved, therefore, is whether under the Dental Act an appointee to the board of dental examiners is invested with a full term of four years from the time of his appointment without reference to the period of incumbency of his predecessors, or does the act prescribe that the term of office of dental examiner is a fixed term of four years; such term having specific fixed dates of beginning and ending so that the term begins and ends at coresponding dates of four years? In other words, does the term run with the incumbent or with the office? A solution of the question compels an examination of the statutes governing the dental board. By section 2 of the Act of March 23, 1901 (St. 1901, p. 564), the board of dental examiners thereby created was to consist of seven members with the terms of four years each, except that two of the members of the board first appointed under that act were to hold their terms of office for a term of one year, two for a term of two years, two for a term of three years, and one for a term of four years and until their successors were duly appointed and qualified. By section 25 thereof it was provided that the act should take effect September 1, 1901. The plain intent of the Legislature as evidenced by the provisions above recited was that the terms of office should rotate so that after the appointment of the first board the terms would not all commence or expire at the same time; and upon the expiration of each of said terms there would commence a new term of four years each, which would thereafter, in regular order, terminate, respectively, upon the expiration of four years from their commencement, thus maintaining rotation in the terms. Under that act the Governor appointed seven members and assigned terms to them, respectively, their commissions being dated May 28, 1901, though their terms did not commence to run until the act took effect, September 1st of that year. Thereafter a new and complete Dental Practice Act was enacted May 21, 1915 (St. 1915, p. 698), which went into effect August 8, 1915. By section 16 of that act all acts and parts of acts in conflict therewith were repealed, and thereby the act of 1901 was superseded. By section 2 of that act, a board of dental examiners to consist of seven practicing dentists was thereby created, the members thereof to be appointed by the Governor, the terms of such members to be four years and until their successors were duly appointed and qualified. In that section it was further provided that: "Their terms of office shall be so classified that the terms of not more than two members shall expire in any one year. The present members of the board of dental examiners of California appointed under the provisions of the laws of this state in force at the time that this law takes effect shall continue to serve and act as members of the said board, but under the provisions of this act, during their respective terms or until their successors are appointed and qualified. Vacancies occurring in the board of dental examiners shall be filled by appointment by the governor, within thirty days after such vacancy occurs."

It thus appears upon the effective date of the last act mentioned there were created seven new terms, each of which would ordinarily be of four years' duration, but, by reason of the provision for classification and the provision for the continuance in service of the incumbents appointed under the prior act, there was to be an end to at least one and not more than two of these first seven terms in each of the first four years immediately following the effective date of the statute. The effective date being August 8, 1915, at least one and not more than two terms would expire on August 8, 1916, and be succeeded by a corresponding number of full terms of four years. The same would be true on August 8, 1917, 1918, and 1919, on which dates one or

two terms would expire and be succeeded by a corresponding number of full terms.

After the act became effective, the Governor made appointments to the office at different periods and the appointees served for terms varying in duration. On December 14, 1922, the Governor appointed all seven incumbents members of the board for a term of four years "vice self, term expired." At this time the appointees were holding over. Subsequent to these appointments and after entries of the same had been made by the secretary of state in his books to the effect that the term of each of said appointees was for four years and would expire on the same date, viz. December 14, 1926, the secretary of the dental board inquired of the Attorney General as to what were the terms of the then members of the board. In answer thereto an opinion was received by such officer which reviewed the appointments to the various terms from the passage of the act and the length of term each appointee was entitled to serve. Since that opinion was received, all appointments have been made in accordance with the views therein expressed, and all entries in the books of the secretary of state, as appear from an exhibit attached to the briefs relative to appointments made subsequent thereto, show the definite period of the term. Therein the various members are identified with their respective officers, and the expiration dates given. Considering the conclusion we have reached in this case, we do not consider the construction put upon the act by the state officers is important, as we are of the opinion that the doctrine of contemporaneous construction need not be invoked to arrive at the true intent of the Legislature as to the duration of the term. We will therefore not review the schedule referred to.

Petitioner, in support of his contention that the term runs with the officer and not the office, cites us to the cases of People v. Langdon, 8 Cal. 1; People v. Nickel, 9 Cal. App. 783, 100 P. 1075, and other cases hereinafter referred to.

[1] The cases cited declare the law to be that, where there is no beginning or termination date provided for a definite term, the terms run with the incumbent. As stated by respondent, however, the Nickel Case implies that the converse is also true; that is, if a particular date is established for either the beginning or ending of the term, then the term runs with the office and not the officer, for it is there said that when the terms of commencement and termination of the term of an office as well as its duration are definitely fixed and provision is made for filling vacancies without any provision as to the duration of authority, such person is entitled to serve for the unexpired term. See, also, 23 Am. & Eng. Ency. of Law (2d Ed.) 418. Whether a public officer has a fixed term of office can be determined only by reference to the law creating the office. But a term of office may be fixed by law, although not so stated in express terms by the statute, where such a result is properly inferred from the construction of the statute as a whole. 46 C. J., p. 946. So, while no particular date for the beginning or ending of the term of any member of the board in question was definitely fixed by the statute, it does not follow that the term was fixed at a given period of time only.

[2] The word "term," when used in reference to the tenure of office, means ordinarily a fixed and definite time. Statutes creating public offices usually but not always prescribe the limits of the terms provided for, fixing the dates at which they shall begin and end. Where a term for which an officer is to hold is fixed by law, the appointing power cannot enlarge or diminish it by issuing a commission in which a greater or less term is named.

[3] The Governor who appointed petitioner was limited in his appointment to the duration of the term fixed by law, and the naming of any period beyond such term is to be regarded as surplusage. 46 C. J., p. 965. Since the term of an office is distinct from the tenure of an officer, the "term of office" is not affected by a holding over of an incumbent beyond the expiration of the term for which he was appointed, and a holding over does not change the length of the term, but merely shortens the term of the successor. Assuming, therefore, that the term to which petitioner was appointed began and ended on August 8, his appointment on November 9, 1927, was but for an unexpired term.

[4-6] The law is well established that a term begins not necessarily from the date of the appointment, but from the time fixed by the lawmakers for it to begin. People ex rel. Mason v. McClave, 99 N. Y. 83, 1 N. E. 235. Nor is it necessary that such a statutory provision expressly fix a date for the beginning or ending of a term. It is sufficient if the statute shows by its provisions that the term shall run with the office. Such a result may properly be inferred from the construction of the statute as a whole. 46 C. J. p. 946; Simpson v. Willard, 14 S. C. 191; Bruce v. Matlock, 86 Ark. 555, 111 S. W. 990. The statute here in question does fix the date of the commencement of the terms as August 8, 1915, the effective date of the act, and the rotation in office or classification provided for therein in our opinion definitely fixes and establishes the end thereof.

The classification or provision for rotation in office in the statutory declaration that not more than the terms of two members shall expire in any one year has for its purpose the fixing of the term, and it cannot be given except by a holding that the beginning and expiration dates of the terms are so fixed and that all terms run with the office. A contrary

holding would result in a destruction of any effect of the provision.

As above stated, the time which a person holds over beyond his term of office is so much of an encroachment of the term of his successor. As the term to which petitioner was appointed expired August 8, 1931, his belated appointment on November 9, 1927, was not therefore for a full term of four years, and on and after August 8, 1931, petitioner was a mere hold-over and subject to removal.

Counsel for petitioner has cited us to numerous cases which she claims support her contention that the term ran with petitioner and not with the office. A discussion of those cases would unduly enlarge this opinion and answer no useful purpose. Suffice it to say, the effect of a provision for rotation in office is not involved in any except one of them. It seems clear to us that the classification contained in the acts is a legislative declaration to have the term run with the office and not with the officer, and such classification or rotation definitely fixes the dates of the beginning and ending of the terms.

From what we have said it follows that the date of the beginning and ending of petitioner's term was August 8, and his successor was properly appointed on August 13, 1931. From August 8th and until Zimmerman qualified, petitioner was a mere hold-over. Having been properly removed he ceased to be a member of the board and likewise ceased to be its secretary, and he is therefore not entitled to the claimed compensation.

[7-12] Nor do we think this conclusion is in any manner altered or changed by section 377i of the Political Code. A disposition of this contention requires a brief review of the statutory provisions relating to the subject. Section 3 of the Dental Act requires that the secretary of the board shall be elected from its membership. St. 1915, p. 698. The original act of 1901 contained a similar provision. In 1929 the Legislature, in amending the Political Code, passed an act which provided that the various boards of the department of professional and vocational standards, of which the dental board was one, might elect secretaries who might or might not be members of the appointing board. Section 376i, Pol. Code, St. 1929, p. 595. At the same session of the Legislature the Dental Act was amended in certain particulars, and section 3 thereof, requiring the secretary of the board to be a member thereof, was again carried into the act. St. 1929, p. 1941. This act was passed subsequent to the act amending the Political Code above referred to, and there is nothing contained therein which referred to such prior act. In 1931 (St. 1931, p. 1285) the Legislature, for the purposes of codification, repealed certain provisions relating to professional and vocational standards, among which was section 376i of the Political Code, and it re-enacted this same section, it being numbered as 377i. It seems to us manifest by reenacting the provision in 1931 it was never intended in any manner to affect the provision of the Dental Act requiring its secretary to be a member of the board. Both sections may and should be construed together. The statutes creating the various boards brought into the department of professional and vocational standards and making provision for a secretary thereof are different; some requiring that the secretary be a member of the particular board appointing him, others providing that the secretary may or may not be a member. The section invoked by petitioner is a mere legislative recognition that a distinction exists which should be observed in the qualifications for the office of secretary under the various acts, and it was not designed to change or alter the provisions of the different acts with reference to the qualifications of the different secretaries. This conclusion is in keeping with the rules of statutory construction.

Every statute must be construed in connection with the whole system of which it forms a part and in the light of previous statutes upon the subject. Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject in the absence of words to that effect unless there is an irreconcilable repugnancy between them or unless the new law is evidently intended to supersede all prior acts relating to the legislation and to comprise in itself the sole and complete system of legislation upon the subject. So every new statute should be construed in connection with those already existing in relation to the same subject-matter, and all should be made to harmonize and stand together if that can be done by any fair and reasonable interpretation.

[13] So construed, we are of the opinion that the statute invoked was never intended to affect the provision of the Dental Act requiring that its secretary be a member of the board. It is a principle that a general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that the Legislature contemplated and intended a repeal. 1 Lewis' Sutherland, Stat. Const., § 274.

From what we have said, it follows that the writ should be, and it is hereby, denied.

215 Cal. 454

HOFFMAN v. SOUTHERN PAC. CO. et al.

Sac. 4546.

Supreme Court of California.

April 27, 1932.

1. Appeal and error ⇐1097(3).

Where substantial difference exists on second appeal, in evidence to which principle of law is applied, or weight or sufficiency of evidence is involved, rule of law of case is inapplicable.

2. Appeal and error ⇐1097(1).

Rule of law of case is based on principle that appellate court may not ordinarily modify its own judgment except on rehearing.

3. Appeal and error ⇐1099(7).

Trial court's finding will not be disturbed, under rule of law of case, where evidence is substantially conflicting on disputed issues.

4. Appeal and error ⇐1097(1).

On successive appeals, determination of issues previously decided on substantially same evidence is controlling.

5. Appeal and error ⇐1002.

Implied finding of jury, where evidence was conflicting, is controlling on appeal.

6. Appeal and error ⇐1053(3).

Plaintiff's examination of engineer regarding slackening of speed of train at highway crossing, though excessive speed was not in issue, *held* not prejudicial error, in view of instructions.

In action for personal injuries sustained in crossing collision between plaintiff's automobile and train, negligence was predicated on engineer's failure to ring bell or blow whistle of engine before reaching crossing, as required by Civ. Code, § 486. Plaintiff, during examination of engineer, asked him if he did not approach crossing without slackening speed of train. Jury, however, was repeatedly and clearly informed in charge of court that judgment against the defendant could not be predicated on the excessive speed, if any, of the train.

7. Railroads ⇐327(7).

Automobile driver, if vision of track is unobstructed for reasonable distance, and hearing is not impaired by extraneous conditions, need not actually stop before crossing.

8. Railroads ⇐327(7).

Automobile driver, if view and ability to hear approaching train would not be improved by actually stopping, need not stop before crossing railroad tracks.

9. Trial ⇐234(4).

In action for injuries sustained in crossing collision between automobile and train, alleged formula instruction on circumstances necessary to warrant recovery *held* not fatally defective.

Alleged formula instruction complained of in substance authorized judgment for the plaintiff, if proximate cause of action was operation of train in negligent and careless manner as alleged and at a dangerous and excessive rate of speed without warning of its approach, provided that plaintiff used due care in approaching crossing and was without fault himself. Instruction further stated that ordinary care depended on circumstances of each particular case, and was such care as reasonably prudent man would have exercised under the same circumstances.

10. Damages ⇐132(3).

$50,000 for triangular fracture of frontal bone of skull *held* excessive, and was reduced to $25,000.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. A. Hoffman against the Southern Pacific Company and another. Judgment for the plaintiff, and the defendants appeal.

Modified, and as modified, affirmed.

Superseding opinion in 5 P.(2d) 44.

Arthur L. Levinsky, Gilbert L. Jones, and Levinsky & Jones, all of Stockton, Devlin & Devlin & Diepenbrock and W. H. Devlin, all of Sacramento, and Louis Oneal and William F. James, both of San Jose (W. R. Dunn, of Sacramento, of counsel), for appellants.

F. M. Ostrander, of Merced, and Philip M. Carey and W. F. Ostrander, both of Oakland for respondent.

PER CURIAM.

A hearing was granted in this case in order that we might more fully consider the contention of appellants that the award of damages was excessive. Upon such consideration, we adopt that part of the opinion of the District Court of Appeal, 5 P.(2d) 44, which deals with the other issues involved in the action, as follows:

The defendant has appealed from a judgment which was entered upon the rendering of a verdict for damages for personal injuries which were sustained as the result of a railroad crossing collision which occurred between defendant's passenger train and the plaintiff's automobile. At the time of the accident, the plaintiff was engaged in driving his machine, through a dense fog, over a country crossing, when it was struck by the locomotive engine, and he was seriously injured.

This case has been twice before this court on appeals from previous judgments which

were rendered in the same cause. 84 Cal. App. 337, 258 P. 397; 101 Cal. App. 218, 281 P. 681. We have carefully compared the evidence which is contained in the present record with the facts which are recited in the former opinion of this court as they appear in the last appeal reported in Hoffman v. Southern Pac. Co., 101 Cal. App. 218, 281 P. 681, and find them to be in substantial accord. It is therefore unnecessary to restate the facts of this case. Except for the giving and refusing of certain instructions, together with the alleged prejudicial misconduct of counsel and the court, which will be hereafter considered, the judgment in this case is founded upon substantially the same facts and instructions respecting the law of the case which were disposed of in the opinion last cited.

[1-4] The respondent invokes the application of the doctrine of the "law of the case." This doctrine generally presupposes error in the determination of principles of law with relation to ascertained facts. Where there is a substantial difference in the evidence to which the principle of law is applied, or the weight or sufficiency of the evidence is involved, the rule may not be invoked. Allen v. Bryant, 155 Cal. 256, 100 P. 704. The reason assigned for the enforcement of the rule of the law of the case is that an appellate court may not ordinarily modify its own judgment except upon a rehearing of the same cause. 4 C. J. 1096, § 3075; Sharon v. Sharon, 79 Cal. 633, 654, 22 P. 26, 131. The findings of a trial court will not be disturbed on appeal, under the rule of the law of the case, where there is a substantial conflict of evidence upon the disputed issues. Sharon v. Sharon, 79 Cal. 633, 655, 22 P. 26, 131. It is, however, true that in successive appeals the determination of all issues which were formerly decided upon substantially the same evidence will be controlling on the court as the settled law of the case. 2 Cal. Jur. 944, § 555; 4 C. J. 1093, § 3075; 2 R. C. L. 223, § 187; United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 712, 284 P. 922. Assuming that the evidence in the present record is substantially the same as our recitation thereof in the previous opinion, upon all material issues, we therefore adopt that opinion as the law of this case.

The judgment in this case was reversed upon the last appeal for the giving of an erroneous instruction which authorized the jury to render a verdict for the plaintiff based solely upon the theory of defendant's negligent operation of its passenger train over a crossing in an open country district, at an excessive rate of speed. The record was devoid of evidence of excessive speed. At the present trial that erroneous instruction was not given. The question of excessive speed of the railroad train is not here involved.

[5] The theory upon which this case was finally tried is that the defendant was negligent in failing to ring the bell or blow the whistle of the locomotive engine before reaching the crossing where the accident occurred, as required by section 486 of the Civil Code. Upon this issue there is a sharp conflict of evidence. The implied finding of the jury that the defendant failed to comply with this statute is therefore controlling on appeal.

A conflict of evidence also exists respecting the alleged contributory negligence of the plaintiff in failing to stop his automobile or engine before he attempted to cross the railroad track. We are unable to hold, as a matter of law, that the plaintiff was guilty of contributory negligence in that regard. This feature of the evidence was fully reviewed in the former opinion of this court. We have no desire to modify that opinion.

[6] The plaintiff is charged with prejudicial error in the examination of defendant's engineer by asking him if he did not approach the crossing without slackening the speed of the train and without regard to the foggy condition which existed. The complaint alleged "that said train was being operated carelessly and negligently, at an excessive and dangerous rate of speed, without warning of its approach." This court held that under the circumstances of this case the mere rapid rate of speed of a train traveling through an open country, unobstructed by physical objects, did not constitute negligence, in spite of the presence of fog. It is true the negligence of the defendant, upon which the judgment is predicated in the present case, is the failure to ring the bell or blow the whistle of the locomotive engine before reaching the crossing, as provided by section 486 of the Civil Code. The jury was repeatedly and clearly informed in the charge of the court that a judgment against the defendant could not be predicated upon excessive speed of the train. Upon this point the jury was admonished in the following language: "I instruct you that you cannot award any damages to the plaintiff for any injuries claimed by him to have been sustained as a result of the collision between his automobile and the train, unless you find from the evidence in the case that such injuries are the proximate result of the alleged negligence of the defendant in operating the train of the defendant Southern Pacific Corporation without giving warning of its approach by ringing of a bell or blowing of a whistle as provided by law." At the request of the defendant, the following instructions were also given to the jury upon this subject: "I instruct you that there was no law or ordinance controlling the rate of speed of this train at the time of the accident, and, in the absence of any law or ordinance regulating the speed of the train, a rate of over sixty miles per hour was not of itself negligence." And: "You are further instructed that the rapid speed of a train traveling

through an open country unobstructed by physical objects, regardless of the presence of fog, will not amount to negligence where the train gives reasonable warning of its approach." In view of these instructions, it does not seem possible the jury could have been influenced by the mere propounding of the challenged questions above referred to. These questions were not prejudicial.

[7-9] The appellant charges as erroneous the giving of an instruction at the request of the plaintiff, on the ground that it belongs to the condemned class which comes under the term "formula instructions." It is claimed this instruction is fatally defective because it charges the jury that a judgment may be awarded the plaintiff if the proximate cause of the accident was the operation of the train "in a negligent and careless manner as alleged in plaintiff's complaint, at a dangerous and excessive rate of speed without warning of its approach," provided the jury also found that the plaintiff used due care in approaching the crossing and "was without fault himself." This instruction then asserted that "ordinary car depends upon the circumstances of each particular case, and is such care as a reasonably prudent man would have exercised under the same circumstances." The appellant claims this instruction is erroneous because it fails to inform the jury that it was necessary for the plaintiff to "stop, look and listen" before attempting to cross the railroad track.

This instruction was not erroneous. It is not always necessary for one to actually stop before attempting to cross a railroad track. Where one's vision of the track in the direction from which an approaching train may be expected is unobstructed for a reasonable distance, and his hearing is not impaired by extraneous noise or conditions, it is not necessarily requisite for one to actually stop before crossing a railroad track. Where one's view of the track and ability to hear an approaching train would not be improved by actually stopping at the crossing, it is not imperative that he should do so. Under the circumstances of the present case, we are of the opinion the question of the plaintiff's contributory negligence in failing to stop his machine before crossing the track was a problem for the determination of the jury. The jury was elsewhere fully and clearly instructed in that regard. Nor was this challenged instruction fatally defective because of the omission of any essential element. In the case of Barham v. Widing, 210 Cal. 206, 217, 291 P. 173, 178, wherein a similar alleged "formula instruction" was under consideration, the Supreme Court said: "It is inconceivable that any jury could have been misled by the mere omission" of the condition complained of, in view of the clear and correct exposition of the law which was given in the charge to the jury. All of the essential elements of the other instructions which are challenged were passed upon and approved by this court on the former appeal in this case.

We observe no prejudicial misconduct on the part of either the court or counsel for the plaintiff in the trial of the case. The record indicates that the defendant was accorded a fair and an impartial trial.

[10] With respect to the question of excessive damages, we think that the evidence cannot support the verdict for $50,000. It is true that the plaintiff received a serious injury to his skull, and that a substantial award is justifiable. However, in the first trial, the verdict was for something over $16,000, and in second, about $21,000. Additional evidence offered at the third trial might justify a larger sum, but the discrepancy is so great as to be entirely unwarranted. We are of the opinion that the sum of $25,000 would be reasonable. The judgment is therefore modified by reducing the amount thereof to the sum of $25,000, and as so modified, is affirmed.

215 Cal. 500

Ex parte HALCK.

Cr. 3493.

Supreme Court of California.

May 16, 1932.

1. Statutes ⇐114(1).

Title of 1931 Act amending Personal Property Brokers' Act *held* not insufficient, although not naming corporation commissioner as executive authority to administer act (St. 1931, p. 558; Const. art. 4, § 24).

Title of act, reading "An act to amend sections 2, 3 and 4 of, and to add sections 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 to, an act entitled 'An act to define personal property brokers and regulate their charges and business,' approved April 16, 1909, as amended, relating to charges of personal property brokers, and the licensing of such brokers," authorizes the regulation of charges and business of all personal property brokers, and the body of the act does no more than this, and, while the act must be administered by some executive authority, it is not necessary that the corporation commissioner be named as such authority in the title; a topical index of the contents of the act is not required, a reasonably accurate reference to the subject covered by the legislation being all that is necessary.

2. Statutes ⇐109.

Title of act need not contain topical index of contents of act; reasonably accurate

reference to subject covered by legislation being sufficient (Const. art. 4, § 24).

3. Pawnbrokers and money lenders ⇐2.

Personal Property Brokers' Act *held* not invalid as conferring arbitrary discretion on corporation commissioner (St. 1909, p. 969, § 10, as added by St. 1931, p. 560, § 7).

St. 1909, p. 969, § 10, as added by St. 1931, p. 560, § 7, providing that the commissioner shall, if he finds that the character of the applicant for a license is such as to warrant belief that the business proposed to be conducted will be operated honestly, fairly, and efficiently within the purposes of the act, thereupon issue a license, means no more than that the commissioner may decline to license an applicant if, on the showing made, there is reasonable ground for a different conclusion, and, if the commissioner acts arbitrarily to the prejudice of an applicant, his act may be controlled by the courts.

4. Pawnbrokers and money lenders ⇐2.

Personal Property Brokers' Act *held* valid as against contention that regulations imposed thereby are prohibitive (St. 1909, p. 969, §§ 8, 10, 13, 15, as added by St. 1931, pp. 559–562, §§ 5, 7, 10, 12).

5. Constitutional law ⇐62.

Delegation by Personal Property Brokers' Act of authority to corporation commissioner to administer act *held* not to invalidate act (St. 1931, p. 558; St. 1917, p. 673, as amended).

Regulation of personal property brokers is not wholly foreign to the subject covered by the Corporate Securities Act (St. 1917, p. 673, as amended), and there is nothing forbidding the amendment of this act to cover personal property brokers, so that the Legislature was clothed with power, in its discretion, to add duties imposed by Personal Property Brokers' Act (St. 1931, p. 558) to a public officer or board already in existence by special independent enactment.

6. Constitutional law ⇐205(5).
Statutes ⇐72.

Statute allowing certain group of personal property brokers to charge higher interest on loans of $300 or less *held* not discriminatory (St. 1931, p. 558, §§ 1, 2; Const. art. 1, §§ 11, 21).

That St. 1931, p. 558, §§ 1, 2, authorizes certain group of personal property brokers to charge 3½ per cent. per month on loans of $300 or less, whereas other personal property brokers of the general class are denied this privilege, does not violate Const. art. 1, § 11, declaring that all laws of a general nature shall have a uniform operation, nor section 21, forbidding the granting of special privileges or immunities, since Personal Property Brokers' Act (St. 1931, p. 558) purports to regulate all classes of brokers on the same terms and conditions, and any member of either class may join the other, and the license fee is not the price of the privilege to charge the 3½ per cent. interest rate.

In Bank.

Application of George L. Halck for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Julian D. Cohn, Louis E. Goodman, Goldman & Altman, Louis H. Brownstone, Willard L. Ellis, and Arnold C. Lackenbach, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

Leo A. Cunningham, of San Francisco, for sheriff.

PRESTON, J.

Petitioner, a personal property broker, engaged in the business of loaning or advancing money in sums exceeding $300, and taking as security therefor a chattel mortgage, bill of sale, or other obligation or contract involving the forfeiture of rights in or to automobiles and other motor vehicles, the use or possession of which is retained by the borrower, was convicted in the municipal court of the crime of misdemeanor, to wit, violation of section 7 of the Personal Property Brokers' Act of this state (St. 1931, pp. 558, 559), because of his failure to apply for and secure a license from the commissioner of corporations of this state as thereby required. Section 435 of the Penal Code makes the infraction of a statute of this type a misdemeanor. He now seeks release through this habeas corpus proceeding.

The title of said act of 1931 is as follows: "An act to amend sections 2, 3 and 4 of, and to add sections 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 to, an act entitled 'An act to define personal property brokers and regulate their charges and business,' approved April 16, 1909, as amended, relating to charges of personal property brokers, and the licensing of such brokers." This legislation, as the title implies, engrafts new provisions upon the statute of 1909 (St. 1909, p. 969) as amended in 1911 (St. 1911, p. 978). How much of this former statute remains, by reason of the enactment of what is commonly known as the Usury Law (St. 1919, p. lxxxiii), is a debatable question, but concededly section 1 of the old act, which defines a personal property broker, remains unchanged, and that is sufficient for the purposes of this case, as will hereinafter appear. Petitioner, however, is only interested in an adjudication that the sections added in 1931,

7 to 16, inclusive, are unconstitutional and void.

This new legislation of 1931 may be characterized as having a twofold object: First, to require all personal property brokers, as defined in section 1 of the act of 1909, to obtain a license and submit to rather stringent regulation by the corporation commissioner; and, second, to permit a certain group of this class to charge upon loans of $300 and less a greater rate of interest than the legal rate, to wit: A rate of 3½ per cent. per month, which shall be in lieu of all other charges by the lender such as "insuring or examining the security or property," "drawing, executing or filing of papers," or any other services. A brief description of this legislation may not be amiss.

The Personal Property Brokers Act of 1909, supra, as amended in 1911, supra, was revamped, first, by allowing section 1 thereof to remain unchanged, as above noted; next, by taking sections 2 and 3, which fixed the charges of all such brokers at 2 per cent. per month (which interest was to cover also all fees and charges properly payable by the borrower), and excepting from the general class a group of lenders of sums in the amount of $300 or less, allowing them to charge 3½ per cent. per month, without mentioning what the remainder of the class might charge for their loans, thus leaving them without regulation or else under the Usury Law. Section 4, which affords a remedy to the borrower for overcharges by the lender, was recast, but whether or not it applies to all brokers seems doubtful. Sections 5 and 6 were allowed to remain as originally enacted. There was then engrafted upon this old legislation new sections, numbered from 7 to 16, inclusive, designed to place all personal property brokers of the class defined in section 1 under the supervision of the corporation commissioner, requiring them to procure a license, to pay certain fees for investigation, to pay an annual license charge, and to post a fidelity or indemnity bond, and also to submit to certain rather drastic inquisitorial supervision. It is against these latter sections that this petitioner directs his attacks.

[1, 2] His first objection is that the title is insufficient under article 4, section 24, of the Constitution. We see no merit in this position. The title authorizes the regulation of the charges and business of all personal property brokers. The body of the act plainly does no more than this. The act must be administered by some executive authority and it is not necessary that the corporation commissioner be named as such authority in the title. A topical index of the contents of the act is no trequired; it is only a reasonably accurate reference to the subject covered by the legislation that is necessary. Some of the main cases declaring this rule are: McClure v. Riley, 198 Cal. 23, 243 P. 429; In re Estate of Wellings, 192 Cal. 506, 221 P. 628; Heron v. Riley, 209 Cal. 507, 289 P. 160.

[3] Petitioner's next claim is that the act confers upon the corporation commissioner "arbitrary and unguided discretion." In this behalf the following language of section 10 is complained of: "Upon the filing of such application and the approval of such bond and the payment of such fees, the commissioner shall, if he finds that the financial responsibility, experience, character and general fitness of the applicant * * * are such as to command the confidence of the community and to warrant belief that the business proposed to be conducted will be operated honestly, fairly and efficiently within the purposes of this act, the commissioner shall thereupon issue and deliver a license. * * *"

This means no more than that the commissioner may decline to license a person or entity if, on the showing made, there is a reasonable ground for the conclusion that the applicant would not operate his business honestly, fairly, or efficiently. This confers no arbitrary power. If the commissioner acts to the prejudice of an applicant, capriciously, arbitrarily, or solely without basis of right, his act may be supervised and controlled by the courts. The language complained of means no more than similar language construed in the following cases: Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; People v. Globe Grain & Mill Co., 211 Cal. 121, 294 P. 3; Hall v. Geiger-Jones 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643.

[4] The next assault is founded upon the assertion that the regulation is so severe as to be prohibitive. The basis for this claim is the above provision, together with the provisions of section 8, which require payment of an annual license fee of $250 and the further payment of $100 as a preliminary fee for investigation, and the provisions of section 13, authorizing a charge of $15 per day by the commissioner or $10 per day by a deputy or other employee of the commissioner, for the time such officer shall necessarily be absent from his office for the purpose of examination, audit, or investigation. The power to make further regulations is also conferred by section 15 of the act, which reads as follows: "The commissioner shall establish such rules and regulations as he may deem reasonable or necessary for the execution of the provisions of this act."

These provisions are indeed very stringent, but, in the absence of facts of which we may take judicial notice, showing such regulation to be unwarranted and arbitrary to the point of denial of a constitutional right, we are forced to assume that the Legislature made the proper investigation and ascertained facts

justifying these provisions. Personal property brokers seem generally to be the subject of rather severe regulation in practically every jurisdiction of the country; the policy also seems to be, as here, to require this class of our citizens to defray the expense of this regulation.

[5] The contention is also made that it is beyond the power of the corporation commissioner to receive authority from the Legislature to administer this legislation. We see no basis for this contention. The regulation of personal property brokers is not wholly foreign to the subject covered by the Corporate Securities Act (St. 1917, p. 673, as amended). Besides, nothing is pointed out that would forbid the amendment of this act to cover personal property brokers. It must follow then that the Legislature is clothed with power, in its discretion, to add these duties to a public officer or board already in existence by special independent enactment. And, where so lawfully added, the power of such officer or board to adopt reasonable regulations for its enforcement is a necessary corollary. In re Potter, 164 Cal. 735, 130 P. 721; People v. Kuder, 93 Cal. App. 42, 269 P. 198, 630.

[6] The next contention is that these provisions are unconstitutional in that they discriminate and are not uniform in their operation. Article 1, §§ 11 and 21, Const. This contention is predicated largely upon the fact that sections 2 and 3 of the act, as amended in 1931 (St. 1931, p. 558, §§ 1, 2) authorize a certain group or division of personal property brokers to charge 3½ per cent. per month on sums loaned of $300 or less, whereas other personal property brokers of the general class are denied this privilege. In this respect, this court has already held as follows: "Section 11 of article 1 of the Constitution declares that 'all laws of a general nature shall have a uniform operation.' Section 21 of the article forbids the granting of special privileges or immunities to any citizen or class of citizens, which, upon the same terms, shall not be given to all. Under the rules now well established in this state, we think it is clear that this statute does not controvert these provisions. It is not a violation thereof for the Legislature to enact laws applying to persons throughout the state, but only to those of a specified class, provided the distinctions which mark the class are those which reasonably arise out of the nature of the things composing it and distinguish them from others not embraced within it in such a manner that the peculiar legislation is not arbitrary or unreasonable." Stephan, 170 Cal. 48, 50, 148 P. 196, Ann. Cas. 1916E, 617.

Therefore, if it be admitted that personal property brokers are a proper class for legislative regulation, it must follow that petitioner here is not in a position to complain, even though said sections are discriminatory in their operation. If these sections are void, then all personal property brokers are in the same class, and the regulations complained of would operate alike upon brokers lending in sums of $300 or under, and, if said sections are valid and constitute a lawful segregation from the major class, then it must follow that petitioner is uninjured, for he may elect without restraint or additional outlay to come under the favored provisions by extending his business to cover loans of $300 or less. The act purports to regulate all classes of brokers on the same terms and conditions, and any member of either class may at will, and without burden, join the other. The smaller loan broker may be favored, but, if so, it is not at the expense or to the injury of the larger class. The license fee is not the price of the privilege to charge the 3½ per cent. interest rate; this privilege is sought to be founded upon economic reasons.

We have disposed of the principal points raised by petitioner, and, finding each of them to be without merit, the writ is discharged, and the petitioner is remanded to custody.

We concur: SHENK, J.; WASTE, C. J.; CURTIS, J.

215 Cal. 469

McCLAIN v. WIRSCHING et al.

S. F. 14540.

Supreme Court of California.

May 11, 1932.

Municipal corporations ⇐302(1).

Improvement ordinance, not approved by mayor or passed over his veto before assessment act became effective, *held* not "finally adopted" within exception (St. 1931, p. 1372, §§ 1, 13; St. 1911, p. 730, as amended; Los Angeles City Charter, c. 3, §§ 26, 29–31).

[Ed. Note.—For other definitions of "Adopt; Adoption," see Words and Phrases.]

In Bank.

Application by J. L. McClain for a writ of mandate to Carl B. Wirsching and others, as members of and constituting the Board of Public Works of the City of Los Angeles.

Peremptory writ denied.

Brown & Brown, of Los Angeles, for petitioner.

Arthur M. Ellis and Woodward M. Taylor, both of Los Angeles, for respondents.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and William H. Neal, Asst. City Atty., all of Los Angeles, amici curiæ.

SHENK, J.

This is an application for a writ of mandate to compel the respondents, as the board of public works of the city of Los Angeles, to execute a contract for the construction of certain street improvements awarded by the city council of said city to the petitioner herein.

On August 14, 1931, there became effective the act designated as the "special assessment investigation, limitation and majority protest act of 1931." St. 1931, p. 1372.

Section 1 of that act provides: "Before any ordinance or resolution of intention or other initial action prescribed by any law of this state may be taken by the legislative body of any county, city and county, or city in this state, for the construction of any public improvement and/or the acquisition of any property for public use, where the cost of such construction or acquisition is to be paid in whole or in part by special assessments or through special assessment taxes upon lands, proceedings shall be taken as required by this act."

Section 13 of the act provides: "This act shall not apply to any proceeding in which an ordinance or resolution of intention has been finally adopted before the date this act becomes effective."

On August 13, 1931, the city council of the city of Los Angeles unanimously passed an ordinance of intention to do the street work and improvements described therein and providing that the cost thereof be paid by special assessment against the property in the assessment district, and elected to proceed in accordance with the provisions of the "Improvement Act of 1911." St. 1911, p. 730, as amended. This ordinance of intention was approved and signed by the mayor of the city of Los Angeles on August 14, 1931. The ordinance was thereafter duly published as required by the city charter. Proceedings in accordance with the requirements of the "Special Assessment Investigation, Limitation and Majority Protest Act of 1931" were not taken. The petition for the writ is presented showing the foregoing facts and the further fact that the respondents have refused to execute the contract awarded to the petitioner on the sole ground that the provisions of said act of 1931 had not been complied with by the city council prior to the adoption of said ordinance. A demurrer to the petition presents but one question, viz., whether the proceedings taken by the city council up to and including August 13, 1931, were effective to bring them within the exception provided by section 13 of the act of 1931.

This question presents for consideration the meaning of the words "finally adopted" as used in the exception provided by said section 13. The petitioner contends that the only possible interpretation to be placed upon the words is that which ascribes to them the final action or determination only of the legislative body of the municipality conducting the proceedings, and that they do not refer to acts of any other person or body necessary to give effect to the ordinance. The petitioner refers to section 26 of article 3 of the city charter which provides that "no ordinance shall be passed finally on the day it is introduced, but the same shall be laid over for one week, unless approved by unanimous vote of all members of the council present * * *"; and section 29, which requires that every ordinance, before it becomes effective, be signed by the city clerk or other authorized person and be presented to the mayor for his approval, etc.

The respondents on the other hand argue that sections 29, 30, and 31 of article 3 of the city charter compel an interpretation that "final adoption" requires approval of the mayor or the passage of the enactment over the mayor's veto. Section 29 provides for reconsideration and passage over the mayor's veto by a two-thirds vote. Section 30 provides that, if the ordinance be not returned by the mayor within ten days after presentation to him, "it shall become as effective and be as valid as if the mayor had approved and signed it."

Section 31 reads: "All ordinances finally adopted under the provisions of this charter shall be published in the English language by at least one insertion in some daily newspaper printed and published in the city of Los Angeles, or by posting for at least ten days in three public places in said city, and until and without such publication or posting no ordinance shall be valid or take effect."

Obviously the purpose of the Legislature by section 13 of the act of 1931 was to except from the provisions of that act such proceedings as had progressed to a certain point of effectiveness, and it designated that point as the time when an ordinance or resolution has become "finally adopted." The city elected to proceed under general law in the matter of the improvement proceeding and must be deemed bound by said section 13. The city also elected to proceed by an ordinance of intention. The city charter must govern in the matter of the adoption of said ordinance. Under the charter the ordinance as a legislative act is only in the process of adoption until it is approved by the mayor, or is passed over his veto, or takes effect without his approval by lapse of time. Until one of these three events occurs, the adoption of the ordinance is not an accomplished fact. None of them occurred before the statute became

effective, and the exception provided for in section 13 thereof does not apply to said ordinance.

The respondents were justified in refusing to execute the contract.

The peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

123 Cal.App. 467

PERKINS et al. v. WINDER et al.

Civ. 770.

District Court of Appeal, Fourth District, California.

May 13, 1932.

Rehearing Denied June 6, 1932. Hearing Denied by Supreme Court July 11, 1932.

1. Venue ⇨4.

Whether action is local or transitory can be determined only from complaint and judgment which might be entered on default.

2. Venue ⇨2.

Parties have no inherent right to have trial of any particular action tried in any particular forum (Code Civ. Proc. §§ 392–395).

This is so, since the proper place of trial for all actions is prescribed by statute, and the venue of any particular action must be determined by the statute applicable thereto.

3. Venue ⇨5(1).

Standing alone, proper place of trial of cause of action alleging defendants' malicious recordation of attachment depreciated value of plaintiffs' property would be where property was situated (Code Civ. Proc. § 392).

4. Venue ⇨5(5).

Damages resulting from delay in completing loan caused by defendants' alleged malicious recordation of attachment *held* not "injury to real property" which would make action local (Code Civ. Proc. § 392).

[Ed. Note.—For other definitions of "Injury to Property," see Words and Phrases.]

5. Venue ⇨5(5).

Cost of suit instituted to remove cloud caused by defendants' alleged malicious recordation of attachment *held* not "injury to real property" which would make action local (Code Civ. Proc. § 392).

6. Venue ⇨16½.

Where local and transitory actions were joined, proper place of trial *held* county of defendants' residence (Code Civ. Proc. §§ 392, 395).

Proper place of trial of cause of action alleging that defendants' malicious recordation of attachment depreciated value of plaintiffs' property was in county of defendants' residence, since it was joined with transitory causes of action wherein plaintiffs sought to recover damages for delay in completing a loan and cost of removing title cloud caused by the alleged malicious recordation of the attachment.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by N. G. Perkins and another against A. Heber Winder and another. From an order granting defendants' motion for change of venue, plaintiffs appeal.

Affirmed.

G. L. Aynesworth, of Fresno, for appellants.

Sarau & Thompson, of Riverside, for respondents.

SCOVEL, Justice pro tem.

The complaint in this action was filed in Kings county and contains three causes of action. In the first cause of action it is alleged that on November 19, 1929, the plaintiffs became the owners of certain real property in Kings county; that prior thereto, and for a long period of time, one Cora Van Aernam Peters had been the owner of this property; that she was the person from whom plaintiffs had acquired it, and that all of these facts were known to the defendants; that on January 31, 1930, the defendants and the First National Bank of Riverside caused an action to be filed in Riverside county by said bank against William L. Peters and Cora Van Aernam Peters, his wife. In this action, at the request of defendants and the bank, a writ of attachment was issued in the sum of $5,600, directed and delivered to the sheriff of Kings county, with instructions in writing to levy upon and attach all of the above-mentioned real property; that on February 10, 1930, the sheriff of Kings county levied upon and attached the real property and recorded in the office of the county recorder of Kings county a copy of the writ, together with a notice that the real property had been attached; that the defendants and the First National Bank of Riverside knew at the time that Cora Van Aernam Peters had no interest in the property; that the giving of the instructions to the sheriff of Kings county and the recordation of the attachment was done maliciously and for the purpose and with the intention of annoying and harassing and oppressing plaintiffs, injuring their title, and hindering and embarrassing their enjoyment, use, mortgage, sale, or disposition of the property; that thereafter judgment was duly rendered in favor of the First National Bank of Riverside and against Mr. and Mrs. Peters for the sum of $6,316.07. It is further alleged that, immediately after the

writ of attachment had been levied, plaintiffs notified defendants and the bank that title to this property had passed to the plaintiffs on November 19, 1929, and that Mr. and Mrs. Peters had no interest therein; that plaintiffs were negotiating a loan to be secured by the property, and that the loan could not be secured until the writ of attachment was released; that defendants and the bank refused to release the attachment, and on April 14, 1930, recorded a duly certified copy of the abstract of the judgment against Mr. and Mrs. Peters in the office of the county recorder of Kings county. It is further alleged that all of the foregoing acts on the part of the defendants were done without probable cause, and that the levy of the attachment depreciated and destroyed the value of the property in the sum of $10,000.

The second cause of action alleges that, at the time the writ of attachment was issued and levied upon the real property, plaintiffs had been negotiating for and had obtained an agreement from one Ethel Guiberson for a loan of $50,000 which was to be evidenced by a promissory note secured by a deed of trust upon the real property. This loan was to be made as soon as a certificate of title could be obtained; the plaintiffs agreeing to pay interest at 7 per cent. per annum on the loan from the date of the agreement. It is further alleged that, by reason of the levy of the attachment, a certificate of title could not be obtained except by plaintiffs indemnifying a title company in the penal sum of $6,400 against all loss or damage which it might sustain by the issuing of such a certificate of title; that plaintiffs thereupon did procure an undertaking indemnifying the title company from such loss and damage in said penal sum, and thereupon a certificate of title was issued; that plaintiffs were unable to procure the undertaking for a period of six weeks; and that during this time they were compelled to pay the interest on the loan, which interest amounted to the sum of $437.50.

In the third cause of action it is alleged that, by reason of the refusal of the defendants and the First National Bank of Riverside to release the attachment and the abstract of judgment above referred to, the plaintiffs were compelled to quiet their title against the purported lien of said attachment, and that the cost thereof amounted to $362.85, $350 being for attorney's fees and $12.85 for court costs. The prayer of the complaint is for $10,800.35 damages and $5,000 exemplary damages.

Defendants were duly served with summons and complaint. Each appeared and filed a separate demurrer and notice of motion for change of venue upon the ground that they were residents of Riverside county, together with a demand for change of place of trial supported by affidavits of merit and residence. These motions were granted and the action ordered transferred from the county of Kings to the county of Riverside for trial. From this order the plaintiffs have appealed.

[1] As the basis for their appeal, appellants contend that the complaint is for slander of title and wholly local, and that therefore the county of Kings, wherein the property is located, is the proper jurisdiction for the trial of the action. In response thereto respondents contend that the action is not one for slander of title, but for malicious use of process; that it is therefore a transitory action and properly triable in the county of their residence. For reasons hereinafter set forth we do not deem it necessary in this proceeding to determine what the form of the action may be. Whether an action is local or transitory cannot be determined by the form of the action, but only from the averments of the complaint and the character of judgment which might be entered upon a default. Work v. Associated A. Growers, 76 Cal. App. 708, 245 P. 790.

[2] Parties have no inherent right to have the trial of any particular kind of action tried in any particular forum. The proper place of trial for all actions is prescribed by statute, and the venue for any particular action must be determined by the statute applicable thereto. Generally speaking, a defendant has the right under section 395 of the Code of Civil Procedure to have an action tried in the county wherein he resides. This right is qualified by sections 392, 393, and 394 of the same Code; sections 393 and 394 not being involved in this appeal.

Section 392 of the Code of Civil Procedure provides in part as follows: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code: 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property; * * * 3. For the foreclosure of all liens and mortgages on real property."

It will be noted that in the instant case no relief is prayed for affecting the title to plaintiffs' property. In fact, the third cause of action shows that title to plaintiffs' property in Kings county had been cleared and the lien of the attachment removed prior to the institution of this action. Plaintiff can only hold the action in Kings county, therefore, if it be for an injury to the real property, within subdivision 1 of section 392 of the Code of Civil Procedure; the action otherwise being removable to Riverside county upon defendants' demands.

[3-5] The first cause of action alleges that the acts of the defendants resulted in depre-

ciating the value of plaintiffs' property. If the first cause of action were standing alone, the proper place of trial would necessarily be in Kings county where the property is situated. The second cause of action does not allege that the acts of the defendants injured the real property in any manner. It merely alleges that, by reason of the acts of the defendants, plaintiffs were delayed in completing a loan, and were thereby compelled to pay additional interest. Even if it be assumed that the acts of the defendants in clouding the title would of necessity injuriously affect the title and thereby injure the property by depreciating its value, no recovery is asked for any such purported injury to the property or the title. This is also true of the third cause of action. The only damage complained of is the cost of the suit instituted to remove the cloud caused by defendants' acts. Obviously the injury and damage complained of in the second and third causes of action are not "injuries to real property." The case is one, therefore, where plaintiffs have joined a local action, to wit, an action for damages occasioned by injuries to real property with transitory actions, to wit, actions for damages otherwise sustained.

Appellants rely largely upon Coley v. Hecker, 206 Cal. 22, 272 P. 1045. In this action it is alleged that an abstract of judgment recovered in the city and county of San Francisco had been filed in San Joaquin county after an appeal from the judgment had been perfected and a stay bond thereon filed; that the abstract of judgment was filed maliciously and for the purpose of slandering the title to all lands owned by the plaintiff in San Joaquin county and with the knowledge that the judgment was inoperative by reason of the filing of the stay bond; and, that the recordation of the abstract of judgment decreased the value of plaintiff's real property in San Joaquin county in the sum of $26,000. The prayer asked that the title to plaintiff's property be quieted, and that damages, punitive and exemplary, be awarded in the sum of $25,000. It will be noted that no recovery for actual damages for injury to the real property was prayed for. The defendants in the action, residents of San Francisco, moved for a change of venue from San Joaquin county, where the action was commenced, to the city and county of San Francisco on the ground of residence. The motion was denied. It was claimed on appeal that a real and personal action, to wit, an action to quiet title to real property and a personal action for slander of title, had been joined, and that respondent thereby lost all his right to hold the case in the county where the real property was located. The court held that the filing of the abstract of judgment was a slander upon the title of respondent's real property; that by filing the abstract the judgment became a lien upon the real property and obviously injured the property by decreasing its value and rendering it less marketable; that the essence of the action was to remove the lien of the judgment, and that the venue under section 392 of the Code of Civil Procedure was therefore necessarily in the county in which the real property affected was situated; that the exemplary damages there asked were but incidental to the primary object of the action, to wit, to remove the cloud upon the title wrongfully cast by the filing of the abstract. We do not construe Coley v. Hecker as holding that an action for slander of title must be tried in the county where the real property is situated when the action does not seek to remove the cloud cast by the slander, or to recover damages for injury to the real property occasioned thereby.

[6] Where local and transitory actions are joined, the proper place for the trial is in the county where the defendants reside; the venue being determined by section 395 of the Code of Civil Procedure. 25 Cal. Jur. 858; Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381; Warner v. Warner, 100 Cal. 11, 34 P. 523; Terry v. Rivergarden Farms Co., 29 Cal. App. 59, 154 P. 476.

Defendants were therefore entitled to demand that this action be transferred to Riverside county, the county of their residence, and the motion for change of venue was properly granted.

No question is involved as to splitting of causes of action or the right of plaintiffs to recover any of the various elements of damage alleged, and upon these matters we express no opinion.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

MOFFATT v. LEWIS et ux.

Civ. 8191.

District Court of Appeal, First District, Division 1, California.

May 5, 1932.

Rehearing Denied June 4, 1932. Hearing Denied by Supreme Court July 2, 1932.

1. **Judgment** ⇐23.

Statements from bench are not evidence in case, and do not adjudicate issue until reduced to an order, decree, or judgment.

2. **Judgment** ⇐715(2).

Findings or judgment in case involving promissory note executed by deceased *held* not prior adjudication of issue of deceased's competency to execute and deliver deed.

3. **Witnesses** ⇐331½.

Truth of facts substantiating or refuting issues in case may not be proved by impeaching evidence.

4. **Deeds** ⇐68(1½).

Grantor, to be of "sound mind," must have capacity enough to comprehend and understand nature and effect of business he is doing.

[Ed. Note.—For other definitions of "Sound Mind," see Words and Phrases.]

5. **Deeds** ⇐68(2).

On issue of grantor's competency to make deed, trial court properly disregarded testimony of hallucinations, peculiarities, and eccentricities if, in business affairs and in particular transaction involved, grantor was mentally strong.

6. **Deeds** ⇐17(3).

In absence of proof of fraud, love and affection is sufficient consideration for deed from mother to son.

7. **Deeds** ⇐196(3).

Age, physical and mental infirmity, and slight evidence of coercion is sufficient to place burden on donee of conveyance inter vivos to prove undue influence was not used.

8. **Gifts** ⇐47(3).

Where parent is aged and enfeebled, and child acts as authorized agent in business transactions, there exists fiduciary and confidential relationship which makes gifts from parent to child constructively fraudulent.

9. **Deeds** ⇐211(4).

Evidence warranted court's finding of no undue influence, where mother deeded property to son.

10. **Appeal and error** ⇐1011(1).

Where there was substantial conflict in evidence, finding of trial court was final.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Proceeding by Thomas Denton Moffatt, special administrator of the estate of Hattie T. Lewis, deceased, against William Arthur Lewis and wife. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frank T. Deasy and Hugh K. McKevitt, both of San Francisco, for appellant.

James E. Colston, of San Francisco, for respondents.

WARD, Justice pro tem.

This is a proceeding instituted by plaintiff, special administrator of the estate of Hattie T. Lewis, deceased, to cancel, rescind, set aside, and annul certain deeds conveying real estate from Hattie T. Lewis, deceased, to William Arthur Lewis, her son. The court found in favor of defendants, and plaintiff appealed. It is appellant's contention that the grantor was incompetent to execute the deeds, that there was a want of consideration, and that the deeds were procured through undue influence.

The deceased was a widow who had been twice married. Plaintiff and his brother, Murry Monte Moffatt, are the issue of the first marriage. William Arthur Lewis is the only child by the second marriage. At the time of her death, on January 25, 1926, Hattie T. Lewis was approximately eighty-six years of age. About a year and a half prior to her death, the deeds in question were executed and delivery made to H. L. Van Winkle, as escrow trustee, to hold, with instructions to deliver the deeds to William A. Lewis upon the death of Hattie T. Lewis. Two and one-half months prior to her death, the escrow delivery was canceled by a written tripartite agreement signed by the escrow trustee, the grantor and the grantee, and the deeds given by manual delivery to the son, William A. Lewis. The wife of William A. Lewis was named as a defendant in this proceeding, but occupies a minor position in this litigation, so we will refer to William A. Lewis as defendant Lewis, unless otherwise indicated.

[1-3] To intelligently consider the evidence in this case, it is first necessary to establish the evidentiary standing and value of certain instruments designated in the reporter's transcript as Exhibit E, a transcript of the testimony in the case of Alpin v. Lewis (a suit upon a promissory note); Exhibit F, the pleadings, findings, and judgment in the same case; Exhibit G, the purported remarks of the trial judge prior to rendering judgment in that case; and Exhibit N, an unverified document designated as "Amendments to Answer." So far as we have been able to ascertain from an examination of the sixteen hundred page transcript in this proceeding, there is no order permitting all of these doc-

uments to be marked as exhibits, but, assuming that they were admitted, we are at a loss to know upon what theory the transcription of the remarks of the trial judge in another action, foreign to this case, advising an amendment to the pleadings, could be anything but hearsay evidence. Statements from the bench are not evidence in the case, and do not adjudicate an issue until reduced to an order, decree, or judgment. The findings or the judgment in the promissory note case are not a prior adjudication of the issue of competency of Hattie T. Lewis to execute and deliver deeds conveying real estate to her son. The amendment to the answer in Alpin v. Lewis is unverified. It does not purport to be a statement of the deceased, and at the time of its filing defendant Lewis was not aware of its contents. Neither the plaintiff nor the defendant in this proceeding was a party officially or personally in that case. The transcript of evidence might be of evidentiary value in this proceeding as impeaching testimony. It is only upon this theory that we can consider any of the herein designated exhibits. In reaching this conclusion, we find support from the attorney for the appellant who stated during the trial that this evidence was offered by way of impeachment.

The truth of facts substantiating or refuting the issues in a case may not be proved by impeaching evidence. Such evidence may be considered for only a limited purpose, namely, testing the credibility of a witness, and must be discarded for any other purpose except as an admission against interest which is not involved in this case. The main contention in appellant's brief is that defendant Lewis "procured one court to adjudicate that his mother was totally and utterly incompetent to execute a promissory note to a third party and the other court to adjudicate that 16 days later she was perfectly competent to transfer all this property to him to the exclusion of his half brothers." Under the facts as they appear in this case, and under the rules of evidence, this contention cannot be approved. However, the making of the promissory note, the decedent's conduct in connection therewith, all of the surrounding circumstances, and her statements, manner, and appearance upon the trial, as appear from the testimony given by witnesses upon this proceeding, will be all duly considered.

[4, 5] There is certain evidence in this case, introduced by appellant, which is not directly denied. There is evidence that the deceased talked to pictures and attempted to show the pictures the view of the city from her window; evidence that she used an excessive amount of clothing, and took great delight in bedecking and adorning her headgear, etc. Many witnesses testified that she appeared irrational. Other witnesses testified that she appeared rational and that they did not observe the excessive clothing, etc. There is evidence to show that she was physically enfeebled; that her peculiarities and childishness were noticeable, but that she was able to direct her business affairs intelligently except when harassed, annoyed, or put in fear, as in the incident of signing the promissory note for the Alpins. According to all of the witnesses testifying in this proceeding to that transaction, Mrs. Lewis had held a stormy session with a party who claimed that Mrs. Lewis owed her money. This interview resulted in a temporary physical collapse and mental strain which caused her to sign the note.

Four months after the execution of the deeds to defendant Lewis, Hattie T. Lewis gave a deed to a portion of the property included in the escrow conveyances to her son by the first marriage, the plaintiff herein. Appellant contends that this shows, not only incompetency, but a lack of intention to make an absolute delivery to defendant Lewis. The witness, Josie Jacobi, testified, in relation to this matter, that Mrs. Lewis had said to her: "Josie, Denton made me give him that deed. * * * I was afraid of Denton, and that is why I gave it to him." It may be therefore inferred that when in fear the deceased could be unduly influenced. No such condition of annoyance or fear appears upon the date of the execution of the escrow deeds. Her sagacity to seek information and advice and then use her own judgment in the direction of her business affairs, despite her eccentricities and peculiarities in manner and dress, etc., is excellent proof that she was competent to determine the proper disposition of her worldly goods. The test is, Was she qualified mentally to calmly and fully realize the purpose and effect of her act in deeding this property to defendant Lewis?

On the day of the interview with her attorney, and subsequently upon the date of the execution of the deeds, the grantor was not harassed or annoyed, and there is not one bit of evidence to indicate that the grantor did not have a firm grasp of the whole situation, with a perfect understanding of the effect of the transfer. She was not in fear and her mind was clear. There is nothing in the record to indicate that she did not have the ability to accept or reject the advice of her attorney. "As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing." Pulaski County v. Hill, 97 Ark. 450, 457, 134 S. W. 973, 975; Estate of De Laveaga, 165 Cal. 607, 618, 133 P. 307. Accordingly, upon the issue of competency, the trial court was justified in disregarding the testi-

mony of hallucinations, peculiarities, and eccentricities, if he concluded that in business affairs, and in particular this transaction, the grantor was mentally strong.

Prior to the execution of the conveyances, the grantor interviewed H. L. Van Winkle, her business advisor. She explained that she desired to make some disposition of her property. Mr. Van Winkle referred her to an attorney whom she had previously met. Defendant Lewis accompanied his mother to the attorney's office. The attorney stated in substance that he wished to talk to the mother privately, whereupon defendant Lewis left the office and Van Winkle remained in an adjoining room. The execution of the instruments of conveyance were made five days after this interview. Defendant Lewis did not know what course had been followed, and Van Winkle only knew that upon the death of the mother he was to deliver the instruments to defendant Lewis. The record does not disclose the information sought or the advice given in the interview between the grantor and the attorney. When respondent attempted to elicit this testimony from the attorney, the court sustained appellant's objection that the conversation was a confidential communication between attorney and client. Respondent was prohibited by the action of appellant from offering evidence bearing upon the question whether or not the grantor was competent to understand what she did; that she executed the conveyances without pressure or solicitation; that the contents were fully explained to her; and that she understood the nature, purport, effect, and consequences of the execution of the conveyances. There is testimony from the attorney, however, that the deeds were drawn at the request of the grantor; that she was not nervous; that there was nothing unusual in her appearance; and that she appeared to be rational. The grantor selected her attorney through her business advisor. Defendant Lewis had nothing to do with the selection, though he subsequently paid the attorney for his services.

[6] Appellant contends that no valuable or other consideration supported the transfer. The deeds recited love and affection. It is true such transactions are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void upon proof of confidential relation. Soberanes v. Soberanes, 97 Cal. 140–145, 31 P. 910. In this case there is evidence to show that the donee was the favorite child. He assisted his mother financially, at various times cared for her physically, and gave her that attention so appreciated by the aging. In the absence of proof of fraud, love and affection is a sufficient consideration. Crow v. Crow, 168 Cal. 607, 143 P. 689; Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am. St. Rep. 43; Becker v. Schwerdtle, 6 Cal. App. 462, 92 P. 398; Silveria v. Alexander, 25 Cal. App. 506–509, 144 P. 303. "* * * A gift from parent to child is certainly not presumed to be invalid." 2 Pomeroy's Equity Juris (4th Ed.) § 962.

[7-9] The question of what constitutes sufficient proof of undue influence depends upon the facts and circumstances of each particular case. The age, physical and mental infirmity, and slight evidence of coercion is sufficient to place the burden upon the donee of a conveyance inter vivos. The dependency of the parent upon the child and the authority the child exercises over the parent are also proper matters for consideration. In this case there is no proof of actual pressure or influence exercised by the defendant Lewis upon his mother to execute these conveyances. Unless fraud may be presumed from the age, etc., of the grantor, the claim of undue influence may be dismissed without further comment. The grantor placed great reliance upon the grantee, but controlled and directed her business affairs. The grantee exercised no authority over the grantor. The grantor controlled her own financial interests, and the grantee followed directions.

Where a parent is aged and enfeebled, and the child acts as an authorized agent for the parent in business transactions, there exists a fiduciary and confidential relationship between the parent and the agent child. All gifts, contracts, and benefits from the parent to the child are generally deemed constructively fraudulent and void. Appellant seeks to convince this court that such an agency existed in this case. The evidence discloses that there was a safe deposit box in the joint names of the grantor and grantee. When the mother, who for a period of time did not have a checking account in a bank, was unable to visit the box, the defendant Lewis, under her direction, would take money from the box and pay the mother's bills, taxes, household expenses, etc. Defendant Lewis often collected rents. So did the other brothers. The grantee at one time, in conjunction with Van Winkle, negotiated a loan upon a life insurance policy and with part of the proceeds paid the mother's bills. He employed experts to examine her mining property, etc. Assuming that a confidential relationship existed between this mother and son, and that it was incumbent upon the defendant Lewis to prove that undue influence was not used, still the trial court could have found substantial evidence in the record from all of the circumstances surrounding this transaction that undue influence was not used. Defendant Lewis did not know the nature of the instruments contained in the package delivered to Van Winkle until a later date. This evidence stands uncontradicted. Defendant Lewis told one of the brothers that the mother was

to visit an attorney to make disposition of her property, and this brother subsequently discussed the matter with the members of the household of which plaintiff was a part. There is nothing in the record to indicate that the grantor was forced, persuaded, or even solicited to visit the attorney, or to execute the conveyances. The mother had an opportunity between the five days intervening from the date of the interview with the attorney and the date of execution of the conveyances to discuss this matter with the other brothers and they in turn with her. The half-brothers could have made any independent investigation they desired. Appellant cites Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289, 291. In that case the court said: "The circumstances under which the transfer of the property was made to the defendant were, upon their face, such as to create suspicion as to the good faith of the transaction." The test is the good faith of the party receiving the benefits of such a conveyance. In this case the court found that the defendants did not take advantage of the grantor, and that the deeds were executed as the free and voluntary act of Hattie T. Lewis.

Appellant cites Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. In the present case the grantor parted with the deeds by delivery to the escrow trustee. In the Williams Case the deeds were kept in the grantor's safe, and the court said: "The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." Williams v. Kidd, supra, at page 639 of 170 Cal., 151 P. 1, 3, Ann. Cas. 1916E, 703.

In November, 1925, the escrow trustee became ill. The grantor heard of his critical condition, and requested the grantee to get the deeds immediately. This resulted in the signing of a tripartite agreement of cancellation of the escrow contract and the delivery of the deeds to defendant Lewis in the presence of two disinterested witnesses. There seemed to be some confusion in the mind of defendant Lewis as to when the deeds were delivered and by whom, but the disinterested witnesses were emphatic that it was the grantor who requested the deeds; that she was rational and knew what she was doing when she delivered the deeds to defendant Lewis.

In Bury v. Young, 98 Cal. 446, 449, 33 P. 338, 339, 35 Am. St. Rep. 186, the court said: "If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed, or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor, the holder in such case being a trustee for the grantee."

In this case, Van Winkle was a trustee for defendant Lewis. The cancellation of the escrow delivery was but another proof of the absolute intent on the part of the grantor to relinquish all of her right and title to the property to the grantee.

[10] Many citations have been submitted by appellant correctly enunciating legal principles, but they do not fit the facts of this case. The determination of the questions involved are primarily questions of fact. Upon the issues raised by the pleadings, there is a substantial conflict in the evidence. The finding of the trial court is therefore final.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 443

STANDARD ACC. INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8375.

District Court of Appeal, First District, Division 2, California.

May 12, 1932.

Rehearing Denied June 11, 1932. Hearing Denied by Supreme Court July 7, 1932.

1. Master and servant ⇐400.

Where employee was acting within scope of employment with two employers at time of death, widow *held* entitled to proceed under Compensation Act against either or both.

2. Master and servant ⇐416.

Where employee was acting within scope of employment with two employers at time of death, joint and several award for widow for full death benefit based upon total earnings *held* proper under Compensation Act.

3. Master and servant ⇐417(9).

That Industrial Commission never acquired jurisdiction over one employer *held* not to entitle insurance carrier for other employer of deceased to annulment of joint and several award against both.

Proceeding under the Workmen's Compensation Act by Edna L. Burden, claimant, for the death of her husband, opposed by the William Powell Company and another, employers, and the Standard Accident Insurance Company, insurance carrier. To annul an award of the Industrial Accident Commission in favor of claimant, insurance carrier brings certiorari.

Award affirmed.

Myrick & Deering and Scott, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

SPENCE, J.

Petitioner seeks the annulment of an award made by the Industrial Accident Commission in favor of Edna L. Burden, the widow of the deceased employee.

Petitioner is the insurance carrier for the General Machinery & Supply Company. The deceased was a salesman and had entered into separate contracts of employment with the above-named company and the William Powell Company. These two companies paid salaries to the deceased of $100 per month and $400 per month, respectively. Deceased made a trip to the southern part of the state and was killed while driving his automobile near Bakersfield. It is conceded that at the time of his death he was acting within the scope of his employment for both companies. The commission so found, and made its award in favor of Edna L. Burden "against the William Powell Company and Standard Accident Insurance Co., jointly and severally."

[1, 2] Petitioner contends that the award is unreasonable and contrary to law. It is petitioner's claim that the award should have been apportioned in the ratio that the earnings received from each employer bore to deceased's total earnings from both employers. In our opinion this contention is without merit. It is conceded by petitioner that, if the injury had occurred while the deceased was in the employ of both employers, but while the deceased was acting solely within the scope of the employment of petitioner's assured, an award against petitioner alone for the full death benefit based upon the total earnings from both employers would have been proper. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390. Should the applicant lose the right to an award against petitioner for the full death benefit by reason of the fact that the deceased was acting within the scope of his employment with both employers at the time of his death? We think not. Under these circumstances we are of the opinion that the applicant was entitled to proceed against one or the other or both, and, having proceeded against both, a joint and several award for the full death benefit based upon the total earnings was proper. We find no authority directly in point, but the views expressed find support in San Francisco-Oakland Terminal Railways v. Industrial Accident Commission, 180 Cal. 121, 179 P. 386. Petitioner cites Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 210 P. 820, and Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 202 Cal. 688, 262 P. 309, 58 A. L. R. 1392, in which cases the commission apportioned the awards and said awards were affirmed. In neither of these cases, however, did the applicant seek to review the award, and the Supreme Court did not pass upon the question of whether the award should have been apportioned or should have been a joint and several award for the full amount.

[3] Petitioner further contends that the commission acted in excess of its power as it had no jurisdiction over the William Powell Company. Petitioner states that said company, which is a foreign corporation, did not appear before the commission, and that no service was had upon it other than notice by mail addressed to it in Cincinnati, Ohio. Assuming, without deciding, that the commission never acquired jurisdiction over the William Powell Company and that the award as to that company might be annulled upon its application, we are nevertheless of the opinion that petitioner herein, as the insurance carrier for the other employer of the deceased, is not entitled to an annulment of the

award upon that ground. As above indicated, the applicant was entitled to an award against petitioner for the full amount of the death benefit, and petitioner may not complain because of the alleged failure to acquire jurisdiction over the other employer.

The award is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 495

SHAMLIAN et al. v. MINARDI.

Civ. 728.

District Court of Appeal, Fourth District, California.

May 16, 1932.

Rehearing Denied June 15, 1932. Hearing Denied by Supreme Court July 14, 1932.

1. Automobiles ⇐244(11).

Finding of negligence of truck in respect to collision at intersection with automobile approaching from right *held* supported by evidence (St. 1923, p. 560, § 131(a) as amended by St. 1925, p. 412, § 15).

2. Automobiles ⇐244(43).

Evidence sustained finding that deceased driver of automobile colliding with truck at intersection was not guilty of contributory negligence (St. 1923, p. 560, § 131(a), as amended by St. 1925, p. 412, § 15).

3. Appeal and error ⇐1011(1).

Appellate court is not at liberty to disregard findings of trial court on conflicting evidence.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Earl Shamlian and others, minors, by Ozanna S. Shamlian, their guardian ad litem, and another, against T. A. Minardi. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles (A. P. G. Steffes, of Los Angeles, of counsel), for appellant.

Farnsworth, Burke & Maddox, of Visalia, Gallaher & Ozias, of Fresno, and James K. Abercrombie, of Berkeley, for respondents.

SCOVEL, Justice pro tem.

On December 14, 1926, a collision occurred at an intersection of public highways in Fresno county between a truck driven by defendant and appellant, T. A. Minardi, and a model T Ford automobile driven by A. T. Shamlian. Shamlian was driving north on a paved highway, and Minardi was driving east on a dirt road intersecting the highway. Shamlian was killed as a result of the collision, and this action was brought by his heirs at law for damages occasioned by his death. Judgment was entered in favor of plaintiffs in the lower court, and from this judgment defendant appeals. The trial court found that appellant negligently and recklessly drove and operated his truck on approaching and driving into the intersection of the road and highway, and that by reason thereof his truck collided with the automobile of decedent, thereby causing his death. Appellant attacks this finding of the trial court as not supported by the evidence.

Section 131 of the California Vehicle Act, as amended in 1925 (St. 1925, p. 412), subdivision (a), which was in effect at the date of the collision, provided as follows: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed."

Therefore deceased, being on appellant's right, was entitled to the right of way through the intersection if the two vehicles approached the intersection at approximately the same time and if deceased was traveling at a lawful rate of speed. Ozanna S. Shamlian, wife of decedent and a passenger in his automobile at the time of the collision, testified as follows:

"Q. Did you notice anything about the speed of the car (referring to the Ford) as you came up close to this intersection? A. He was slowing it down. * * *

"Q. Mrs. Shamlian, you have testified that the car was slowing down as you approached and got close to this intersection. State what, in your best recollection, was the speed of that car that you were in, as it went into and started across that intersecting road? What was the speed you were traveling at? A. 15 miles."

Appellant, Minardi, testified regarding the speed of his truck as follows:

"Q. And you say you were going 12 to 15 miles an hour? A. Just about between 12 and 15 miles an hour. I didn't have my eyes right down on the speedometer all the time.

"Q. That is your best recollection? A. Yes, sir.

"Q. And at that rate of speed, approximately, you came on directly east into the intersection and onto the pavement? A. Yes, sir."

In regard to the point within the intersection where the collision occurred, appellant testified that the front wheels of the truck were about three or four feet past the center of the intersection immediately before the collision and that the left end of the bumper of the truck struck the left rear wheel of the

Ford. Defendant's Exhibit A, a map delineating the street and road at and near the point of collision, shows the intersection to be almost a perfect square. In order for the left end of the bumper of the truck to have struck the left rear wheel of the Ford, the Ford must of necessity have crossed the path of the truck prior to the collision.

[1] The word "approximately," as used in the cited section of the California Vehicle Act, has been defined in Hoffman v. McNamara, 102 Cal. App. 280, 285, 282 P. 990, 991, as "about or nearly; it is the opposite of precisely or exactly. A vehicle may approach an intersection at 'approximately the same time' as another if it approaches slightly before or slightly after the other." Both vehicles traveling at approximately the same rate of speed and colliding near the center of the intersection, it is quite evident that both cars approached the intersection at approximately the same time, within the foregoing definition. The Ford being driven by decedent at a lawful rate of speed therefore had the right of way, and it was negligence for appellant to attempt to proceed through the intersection. Swartz v. Feddershon, 92 Cal. App. 285, 268 P. 430; Howard v. Worthington, 50 Cal. App. 556, 195 P. 709.

[2] The foregoing quotation of the evidence also disposes of appellant's contention that decedent was guilty of contributory negligence. Approaching the intersection from appellant's right and at a speed not exceeding 15 miles an hour, decedent had the right of way, and was entitled to proceed on through the intersection.

Appellant strenuously insists that excessive speed on the part of the deceased is shown by the testimony that the Ford, after the collision, traveled a distance of 129 feet and turned over thereafter. Such an inference is perhaps not unreasonable. It is also quite possible, however, that the deceased, seeing a collision inevitable, pulled down the gas lever on the Ford in order to avoid a collision; that additional power was thereby given the Ford, increasing its speed immediately after the accident and permitting it to travel the distance traversed before striking the bank and turning over. The trial court apparently took this view, and under the circumstances we are not inclined to disturb its finding.

[3] We are not unmindful that certain witnesses produced by appellant testified as to excessive speed on the part of deceased. Witness Balkovic testified that appellant was traveling about 15 miles an hour, and that when his truck was 39 feet from the center of the intersection decedent's Ford was at the 15-mile sign to the south. Defendant's Exhibit A shows this sign to be 250 feet from the center of the intersection. A slight mathematical calculation would thereby fix the speed of decedent's Ford at 90 miles per hour. Witness Law testified that at the time of the collision he was approximately 1,000 feet south of the intersection, that appellant's truck entered the intersection at 15 miles an hour and that deceased's Ford was traveling at approximately 35 miles an hour when entering the intersection. Whether or not witness Balkovic's testimony was more than a guess, and the weight to be given the testimony of witness Law, whose view of the scene was from a distance of 1,000 feet to the south thereof, were matters entirely for the trial court. The most that can be said is that the testimony of appellant and his witnesses created a conflict in the evidence, and, the trial court having resolved the conflict in favor of respondents, we are not at liberty to disregard its findings, even though a contrary finding might also have found some support in the evidence.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

123 Cal.App. 482

PEOPLE v. BORRA.

Cr. 1204.

District Court of Appeal, Third District, California.

May 14, 1932.

1. Robbery ⇐6, 7.

It is not necessary that robbery be accomplished by means of both force and fear, either one being sufficient (Pen. Code, § 211).

2. Robbery ⇐24(5).

In robbery prosecution, evidence *held* to show robbery was accomplished by means of fear (Pen. Code, § 211).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Joe Borra was convicted of robbery in the second degree, and he appeals.

Affirmed.

Ray T. Coughlin, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of robbery of

the second degree and has appealed from the judgment which was entered in accordance therewith. The robbery is alleged to have been accomplished by means of force and fear.

The appellant asserts the judgment is not supported by the evidence for the reason that the record discloses an absence of proof of either force or fear in the perpetration of the crime. The contention is without merit. There is ample evidence the robbery was accomplished by means which caused fear on the part of the owner of the property.

Mr. Ikar owns and operates a grocery business on Twelfth street in Sacramento. About 11 o'clock in the forenoon of August 20, 1931, the defendant entered his store. The right hand of the defendant was thrust into his coat pocket in such a manner as to indicate that he held a concealed revolver. The defendant was promptly recognized by Mr. Ikar as the same individual who had held him up and robbed him at the same store a few days previously. The merchant testified: "I started to go out and pull the awning down, and this Joe Borra walked right in the store and pointed at me like that (indicating), and stuck me in the side—ribs, and told me to get back, back of the counter, which I did." The robber then demanded that the cash register be opened. He took the entire contents, consisting of only $7. He then hastened away. On cross-examination the witness testified:

"Well, as I explained * * * he walked up to me and stuck the gun on me and made me walk back. * * *

"Q. You say you had seen him before? A. Yes, sir.

"Q. And you say that he had held you up before? A. Yes, sir.

"Q. And you reported that hold-up to the police, didn't you? A. Yes, sir. * * *

"Q. And you are sure that that is the same man that held you up in August, are you? A. Yes sir, absolutely."

Following a colloquy concerning the first robbery, Ikar testified regarding his fear of bodily harm, as follows:

"Q. Were you frightened? A. I was frightened, yes.

"Q. Were you frightened the second time? A. No, I wasn't frightened the second time.

"Q. Why did you give up your money? A. * * * Why, he stuck the gun on me and told me to open the cash register. How could I—— * * *

"Q. You testified he had his hand like this? (Indicating) A. Yes, how do I know—

"Q. Yes. And you were frightened then, too, were you? A. No, I wasn't so frightened like I was the first.

"Q. But you gave up your money? A. Yes."

Section 211 of the Penal Code provides: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

[1] It is not necessary that the robbery be accomplished by means of both force and fear. Procuring the property by means of either force or fear is sufficient to comply with the requirements of the statute. In 54 Cal. Jur. 1067, § 173, it is said: "Where intimidation is relied upon, it must be established by proof of conduct, words, or circumstances reasonably calculated to produce fear. But it is not necessary that there be proof of actual fear, as fear may be presumed where there is just cause for it."

Under a statute defining robbery in the exact language which is employed in the California law, it was held in Ross v. State, 31 Okl. Cr. 143, 237 P. 469, the necessary element of fear in the accomplishment of robbery was amply proved by evidence that two men entered a bank armed with guns which were in plain view, and demanded the delivery to them of the money from the bank, although the lady who had sole charge of the bank testified she was not afraid of the robbers so long as she fulfilled their commands. In the case of Wissinger v. State, 39 Okl. Cr. 324, 264 P. 631, the element of fear in the accomplishment of robbery was held to have been sufficiently established. In that case a robber entered a gas station and procured the money from the cash register by pointing a gun at the owner and demanding the money, although the party in charge of the station testified he was not afraid of injury.

[2] In the present case there is ample evidence of fear on the part of the owner of the store in spite of the fact that he stated he was not frightened on the occasion of the second robbery as much as he was the first time. He did testify that the robber "stuck the gun" on him, and demanded that he open up the cash register. He admitted that he acquiesced in this demand very promptly. And he gave up the cash. Prompt compliance with the commands of an armed person, who by words or demonstration threatens bodily harm for failure to do so, furnishes some evidence of fear. The very prompt relinquishing of the money in the cash register is also evidence of fear. Men do not ordinarily give up their hard-earned cash to a stranger who threatens them with a gun, except for fear of bodily injury in the event of a refusal to do so. In spite of the bravado of the merchant in declaring that he was not much afraid, we are inclined to believe he meant he was not afraid of receiving bodily harm so

long as he complied with the demands of the robber. His speedy compliance with these demands is proof of that fact. The evidence is sufficient in this case to show that the robbery was accomplished by means of fear.

The judgment and the order are affirmed.

I concur: PLUMMER, Acting P. J.

123 Cal.App. 403

PEOPLE v. RANNEY.

Cr. 1189.

District Court of Appeal, Third District, California.

May 10, 1932.

Rehearing Denied May 25, 1932. Hearing Denied by Supreme Court June 9, 1932.

1. Criminal law ⇐878(1).

Jury *held* required to pass upon each count of indictment independently of the other counts (Pen. Code, § 954).

2. Criminal law ⇐878(4).

Verdict of conviction of two of seven counts charging grand theft *held* not invalid because of verdict of acquittal as to remaining counts (Pen. Code, § 954).

Verdict of conviction under two counts charging grand theft was not invalid because each count in indictment was based upon allegations of separate and distinct appropriations of funds and disposition of one count had no bearing upon verdict with respect to the other counts, regardless of what evidence may have been, and Pen. Code, § 954, provides that verdict of acquittal of one or more accounts shall not be deemed or held to be acquittal of any other counts.

3. Larceny ⇐3(3).

Directors' promise to pay assistant manager commission for selling stock furnished no defense for his appropriating corporation's funds without directors' consent.

4. Criminal law ⇐829(4).

In grand theft prosecution, refusing instruction regarding defendant's right to retain moneys of corporation as commission for sale of stock *held* not prejudicial because essential elements were contained in instruction given (Pen. Code, § 511).

Refused instruction was in substance that, if directors of corporation or any or either of them agreed that defendant should receive commission on sale of stock from funds of corporation and that taking of money by defendant was in part payment of such commission, defendant committed no offense, and instruction given was that if defendant appropriated property owned by corporation, and by said corporation intrusted to defendant, and defendant laid claim to property so appropriated, such claim of title, if preferred in good faith, was sufficient defense, even though untenable, if made openly and avowedly.

5. Larceny ⇐3(3).

Assistant manager had no right to help himself to funds of corporation, even to pay an acknowledged debt to him (Pen. Code, § 511).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

W. S. J. Ranney was convicted of grand theft, and he appeals.

Affirmed.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of grand theft on two counts of an indictment. He also confessed two former convictions of other felonies with which he was charged. The jury acquitted him of five separate counts of similar charges of grand theft which were included in the indictment. The indictment originally contained twenty-one separate counts of grand theft. At a former trial the defendant was convicted of the seven counts which are involved in this appeal. The remaining fourteen counts were then dismissed. On appeal the judgment of conviction which was entered at the former trial was reversed for the giving of an erroneous instruction to the jury. People v. Ranney (Cal. Sup.) 1 P.(2d) 423. A retrial of the seven remaining counts resulted as above stated. From this last judgment of conviction on counts 15 and 17 of the indictment, this appeal was perfected.

The defendant was employed as the assistant manager and auditor of the Harris Manufacturing Company of Stockton. In September, 1927, he procured the issuing of a check, by the authorized agent of the company, for $1,500, and appropriated the money to his own use. On account of this transaction he was charged in the fifteenth count of the indictment, with grand theft of that amount.

About the same time the last-mentioned transaction occurred, by means of a subterfuge, the defendant procured one Hollenbeck to draw, in the name of the appellant, his check for the sum of $1,800, in payment of a claim due to the Harris Manufacturing Com-

pany. Ranney then cashed the check and appropriated this sum of money to his own use. On account of this transaction, he was charged in the seventeenth count of the indictment with grand theft of that amount. The other five counts upon which the defendant was acquitted, were for similar transactions. The defendant admitted his appropriation of a total sum in excess of $14,000, in the transactions involved in the seven counts which the last jury considered. The defendant contended that he took each of these sums of money with the consent of three named directors as payment for 15 per cent. as commissions which they had agreed to give him for the sale of capital stock of the Harris Manufacturing Company of the aggregate value of $83,500. This stock belonged to individual stockholders, but it was contended that it was sold for the benefit of the company to relieve it from financial embarrassment. The defendant testified that these three directors authorized him to take his commissions from the funds of the company, but advised him to take them in such a manner as to prevent another director, whose name is Henry, from acquiring knowledge of the appropriations. At the trial each of the directors denied they had agreed to pay the defendant any commissions for selling the capital stock, or that they authorized him to take any money from the funds of the company for that purpose.

[1, 2] The appellant contends that the verdict of guilty as to counts 15 and 17 of the indictment is inconsistent with the verdict of acquittal as to the remaining five counts, because the evidence regarding the intent or good faith with which the defendant appropriated the various sums of money applied alike to each of the seven counts which are involved in this trial. It is therefore claimed the verdict of guilty is void and the judgment of conviction was erroneously entered. The appellant also asserts the court erred in giving and refusing certain instructions to the jury.

There is no merit in the contention that the verdict of conviction of the fifteenth and seventeenth counts is void because it is inconsistent with the acquittal of the defendant upon the remaining five counts of the indictment. It may be conceded that the jury was inconsistent in convicting the defendant upon these two counts and acquitting him upon the remaining five counts of the indictment. It may be true that a reconciliation of these opposing verdicts should have required the conviction of the defendant upon all seven of the counts. The motive which prompted the jury to acquit the defendant upon five counts of the indictment is not before this court on appeal. The only question which is presented to this court in that regard is whether there is sufficient evidence to sustain the verdict of guilty with respect to the fifteenth and seventeenth counts. It is not contended the evidence is insufficient to support this verdict of guilty. It is merely asserted that verdict is void because it is inconsistent with the other verdict of acquittal as to the remaining counts. It will be recalled that each of the directors contradicted the defendant's claim that they had authorized him to take any money from the funds of the company in payment of commissions claimed to have been earned. Each count contained in the indictment was based upon allegations of separate and distinct appropriations of funds. The jury was required to pass upon each count with which the defendant was charged, independently of the other counts. The disposition of one count had no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant. That section provides for the charging of "two or more different offenses of the same class of crimes or offenses, under separate counts." That section, as amended in 1927, then provides that, "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein. It follows that the verdict of conviction of the fifteenth and seventeenth counts in the present case is not invalid. There are no authorities to the contrary in other jurisdictions where a statute exists similar to the California law above quoted.

[3-5] A refusal to give to the jury the following instruction which was offered in behalf of the defendant is assigned as erroneous. That instruction reads in part: "If you believe from the evidence in this case that prior to the taking of said money by the defendant W. S. J. Ranney he did in fact sell $83,500.00 worth of the preferred stock of The Harris Manufacturing Company and that for his services in connection with the sale of said stock the Directors of said Company, *or any or either of them*, promised and agreed that he should receive from the funds of said Company a commission of fifteen per cent of the sale price of said stock * * * and that the taking of said sum of money by the defendant was in part payment of said commission and said advances, or if you have any reasonable doubt regarding any of said facts, then I instruct you that the defendant W. S. J. Ranney committed no offense in taking said money and it will be your duty to

find him not guilty as charged in the fifteenth count of the indictment."

A similar instruction applicable to the seventeenth count was also offered by the defendant and refused.

We are of the opinion the defendant was not prejudiced by a refusal to give the jury the foregoing instructions: First, because it furnishes no defense for an appropriation of the funds of the company without the consent of the directors; second, because the jury was instructed in the language of section 511 of the Penal Code on all the essential elements which were contained in the foregoing refused charge. It will be observed that the jury was instructed in the foregoing charge that if it believed Ranney actually sold preferred stock of the company worth $83,500, for which sale the directors of the company or any of them agreed "that he should receive from the funds of said company a commission of fifteen per cent of the sale price of the stock," and "that the taking of said sum of money *by the defendant* was in part payment of said commission," you should find the defendant not guilty. This language amounts to a mere acknowledgment of a debt due to the defendant as commissions for selling the stock, and a promise that the commissions would be paid by the directors from the funds of the company. It contains no authorization for the defendant to help himself to the company's funds. The defendant would have no lawful right to misappropriate funds of the company which were in his possession to pay an acknowledged debt which was due to him, even if the directors had promised him that *they* would pay him out of that fund. Moreover, there is no evidence to indicate that the directors had any authority to authorize the payment of such commissions from the funds of the company. The stock belonged to private stockholders. The proposed instruction advised the jury that it should acquit the defendant *if any one of the directors* agreed that he should receive his commissions from the funds of the company. The element of good faith on his part in believing he had a right to take the money is not mentioned in the instructions. The uncontradicted evidence is that at least one of the directors did not make any such promise to the defendant. The defendant testified that other directors told him he must appropriate the funds without the knowedge of the director, Henry. A promise of Henry to see that the defendant was paid his commissions from the funds of the company, as suggested by the proposed instruction, would therefore be in direct conflict with the uncontradicted evidence and the admission of the defendant. The instruction was therefore properly refused.

The principle of law contained in the foregoing refused instruction upon which the defendant relies as a defense was given to the jury in the following charge: "If you find from the evidence adduced in this case in support of any count of the indictment now under consideration that the defendant appropriated property owned by The Harris Manufacturing Company, and by said company intrusted to said defendant, and the defendant laid claim to the property so appropriated, such claim of title, if preferred in good faith, is a sufficient defense, even though the claim is untenable, but the appropriation, in order to be a defense, must have been made openly and avowedly."

The jury was here told that if the defendant in good faith openly appropriated money in his possession belonging to the company, with an avowed claim of title thereto, in payment of a promised debt, it would be a good defense to the charge of grand theft. This instruction is in accordance with the provisions of section 511 of the Penal Code, which provides: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him."

This last-quoted instruction was as favorable to the defendant as he was entitled to. The claim of the defendant in the present case that he had a right to pay his own debt out of the funds of the company seems to come directly within the prohibition of the latter portion of the section last quoted. The defendant had money in his possession which he claims belonged to the company, and which he sought to retain to pay a demand for commissions which he asserts were due to him from the company. He had no right to help himself to the funds of the company, even to pay an acknowledged debt. The latter portion of section 511, supra, declares that the provision of that section "does not excuse the unlawful retention of the property of another *to offset or pay demands held against him.*"

There is a clear distinction between the facts of the present case and those which were involved in the case of People v. Crane, 34 Cal. App. 760, 168 P. 1055, relied upon by the appellant. In the case last cited the money which the defendant was charged with embezzling was alleged to have been paid to him by the owner for attorney's fees and costs in a divorce suit. If that claim were true, of course, it belonged to the defendant. The issue in that case was the purpose with which the money was paid to the defendant. Under such circumstances, of course, it would be error to refuse to instruct the jury that if the money was paid to the defendant to cover his attorney's fees and costs, he would not be guilty of embezzlement.

In the present case no such claim is made. In this case the money reached the hands of the defendant to be used for the benefit of the company pursuant to its directions. According to the language of the instructions complained of, the defendant appropriated the money belonging to the company, to satisfy his own claim, merely because certain directors told him they would pay the debt from the funds of the company. The case of People v. Crane, supra, and other similar cases relied upon by appellant, are not authority in support of defendant's claim of error in giving or refusing instructions in the present case. There was no prejudicial error in giving or refusing instructions in this case. Nor does there appear to have been a miscarriage of justice.

The judgment and the orders are affirmed.

We concur: PRESTON, P. J; PLUMMER, J.

123 Cal.App. 387

SPANGENBERG v. SPANGENBERG.

Civ. 7243.

District Court of Appeal, First District, Division 1, California.

May 10, 1932.

1. Venue ⇐63.

Where plaintiff was represented by counsel at hearing on motion to change place of trial, irregularity in form of notice of motion *held* waived.

2. Venue ⇐66.

Law prescribes no statutory form of affidavit of merits.

3. Venue ⇐66.

Affidavit of merits reciting that defendant had fully and fairly stated facts of case to his attorney and is advised by attorney and he verily believes that he has valid defense to action on merits *held* sufficient for motion to change place of trial.

4. Venue ⇐4.

Action to bring to account trustee charged with dereliction in administration of express trusts is transitory and triable in county of defendant's residence (Code Civ. Proc. § 395).

5. Venue ⇐6.

Conversion is not "injury to person or property" as used in statute authorizing action in county where injury occurred; such phrase being limited to physical or corporeal injury (Code Civ. Proc. § 395).

[Ed. Note.—For other definitions of "Injury to Person and Property," see Words and Phrases.]

6. Venue ⇐11.

Executor is not "public officer" within meaning of statute relating to place of trial of actions against public officer (Code Civ. Proc. § 393, subd. 2).

[Ed. Note.—For other definitions of "Officer," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Lavina Spangenberg, an incompetent person, by Rudolph Spangenberg, guardian of the estate of said incompetent, against Fernando Spangenberg. From an order granting change of place of trial, plaintiff appeals.

Affirmed.

George F. Witter, of Oakland, for appellant.

Carl Westerfeld, of San Francisco, for respondent.

JOHNSON, Justice pro tem.

This is an appeal by plaintiff from an order granting change of place of trial from the city and county of San Francisco, where the action was begun, to the county of Los Angeles, the place of residence of the defendant.

Some technical objections to the moving papers are made by plaintiff, but the irregularities mentioned are of little moment.

[1] The notice of motion, instead of naming a definite date for the hearing, stated that the defendant would move the court for the desired order "at a date and time to be fixed by the Clerk." This notice bears date of June 4, 1929; and on June 7th the attorney for the defendant informed the attorney for the plaintiff by letter that the matter had been placed on the motion calendar for hearing on June 10, 1929, at 10 o'clock. The hearing appears to have been continued to June 17th, at which time plaintiff's attorney was present, and filed an affidavit of plaintiff's guardian in opposition to the motion. After hearing from both parties, the court took the matter under submission, and on July 5th granted the motion. Since plaintiff was represented by counsel at the hearing and contested the application on the merits, no prejudice was suffered, and any irregularity in the form of notice was waived. 18 Cal. Jur. 652.

There is criticism also of the defendant's affidavit of merits, which recited that defendant had "fully and fairly stated all of

the facts of this case to his counsel, Carl Westerfeld, Esq., attorney at law, duly admitted to practice in all the courts of the State of California, and that affiant has been and is advised by his said attorney and he verily believes that he has a good, legal and valid defense to said action on the merits."

It is charged that the affidavit was cunningly devised to convey an impression, without stating as a fact, that it was defendant's attorney who had advised defendant that he had a good defense on the merits, and that defendant's belief in a meritorious defense might have been predicated on nonprofessional advice.

[2, 3] This criticism is rather too astute. The typewriter, as commonly operated, has made punctuation of legal papers a lost art; but if the words, "and he verily believes," were embraced within commas, it would clearly appear that not only was the affiant declaring that he believed that he had a good defense on the merits, but that he had been so advised by his attorney. The law prescribes no statutory form of affidavit; and in New York an affidavit has been held to be sufficient, notwithstanding omission to state that the advice of counsel was given after the statement of facts by the client. Brown v. Seys, 2 How. Prac. (N. Y.) 276. In that case the affidavit did not differ substantially from the one under attack here; and our conclusion is that an adequate foundation was laid for defendant's motion.

Plaintiff contends further that the nature of the action makes San Francisco the proper place for trial, irrespective of defendant's residence.

The plaintiff, Lavina Spangenberg, has been an inmate of the State Hospital at Agnews since 1895; and, being mentally incompetent, she is represented in the action by one of her brothers as guardian of her estate. The defendant is another brother; and the complaint, which is in two counts, seeks the recovery of money or property representing trust funds alleged to have been received by the defendant for the benefit of plaintiff, and to have been appropriated to the defendant's own use.

The first count alleges that, by virtue of the provisions of a will executed by the mother of the parties, who died in San Francisco in 1898, a fund of $390 came into the possession of the defendant as trustee, to be invested for the care, maintenance, and benefit of plaintiff. It is further charged that the defendant has refused to render any account of his trust, and has so used the money to his own advantage that he has accumulated therewith valuable property to plaintiff's damage in the sum of at least $2,000.

The second count alleges that in 1902 the father of the parties caused the sum of $1,000 to be placed in the hands of defendant in trust for plaintiff, to be invested and managed for her maintenance, support and benefit, and further avers that this fund has likewise been appropriated by defendant to his own use, to such effect that he has accumulated therewith valuable property to plaintiff's damage in the sum of at least $8,000.

The prayer of the complaint is that defendant be required to render an account of the trusts alleged, and that plaintiff have judgment for at least $10,000.

The plaintiff contends that San Francisco is the proper place for trial of the cause alleged in the first count, upon the ground that in the mother's will defendant was named as executor and also as trustee for plaintiff, and that, the property having been in San Francisco and there received by defendant, the rules governing jurisdiction in matters of probate should control. There is, however, nothing in the record to show where the property in question was either located or received; and in the affidavit filed by plaintiff's guardian in opposition to the motion for change of venue, it is averred that, while the will of the mother was read to the other children by the defendant, it was never admitted to probate.

[4] There is nothing in the record to show that any probate proceeding is pending; and neither count of the complaint in any way initiates a proceeding in rem. The action as a whole is merely one to bring to account a defendant charged with dereliction in the administration of certain express trusts. Such actions are transitory, and under section 395, Code of Civil Procedure, are triable in the county of the defendant's residence. Golden Cross Min., etc., Co. v. Spiers, 115 Cal. 247, 250, 47 P. 108; Nason v. Feldhusen, 34 Cal. App. 789, 795, 168 P. 1162; More v. Superior Court, 64 Cal. 345, 28 P. 117.

[5] Plaintiff advances the further contention, however, that the defendant is charged in both counts with conversion of trust property, and that under section 395 the action is to be treated as one for injury to property, and therefore triable at plaintiff's election in the county where injury occurred. Apparently plaintiff misconceives the applicability of the clause invoked. The words "injury to person or property" are limited to physical or corporeal injury (25 Cal. Jur. 869); and conversion is not that sort of injury. Mason v. Buck, 99 Cal. App. 219, 221, 278 P. 461.

[6] An additional ground urged for reversal of the order is that as defendant was named as executor in the mother's will, the plaintiff is entitled to have the case tried against defendant as a public officer under subdivision 2 of section 393, Code of Civil Procedure. But executors are not public officers within the meaning of that section, and they have no official residence. Thomp-

son v. Wood, 115 Cal. 301, 47 P. 50. Moreover, the affidavit of plaintiff's guardian stated that the will had never been admitted to probate.

The residence of the defendant being admittedly in the county of Los Angeles, it is his right under section 395 to have the action tried there.

The order changing the place of trial is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 427

WEEK v. LUTHY CO. et al.

Civ. 8395.

District Court of Appeal, First District, Division 2, California.

May 11, 1932.

Rehearing Denied June 10, 1932. Hearing Denied by Supreme Court July 8, 1932.

1. Set-off and counterclaim ⊂=57.

Where stockholder used his claim against corporation to offset actions to enforce stockholder's liability, his claim against corporation was reduced pro tanto (Civ. Code, §§ 3512, 3521).

2. Judgment ⊂=584.

Stockholder who used claim against corporation as offset in actions to enforce stockholder's liability *held* not barred from bringing action against corporation for residue (Civ. Code, §§ 3512, 3521).

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action by E. R. Week against the Luthy Company and another. From judgment for plaintiff, G. W. Brainard, as trustee of the Luthy Company, appeals.

Reversed.

Arthur L. Shannon, William J. Hayes, and Grant H. Wren, all of San Francisco, for appellant.

Robert L. McWilliams, of San Francisco, and Fred B. Morrill, of Spokane, Wash., for respondent.

SPENCE, J.

Plaintiff was both a creditor and a stockholder of the Luthy Company, a California corporation. Said corporation had financial difficulties and assigned its assets to defendant G. W. Brainard, as trustee. This action was brought to establish the amount of plaintiff's claim as a creditor of the corporation and to have it decreed that the defendant trustee pay over to plaintiff his proportionate share of the assets assigned to the trustee by the corporation. From a judgment in favor of plaintiff for the full amount of his claim, the defendant trustee appeals.

There is no dispute as to the amount of respondent's claim except so far as it may be affected by certain litigation in the courts of the state of Washington in which certain creditors of the corporation sought to enforce their rights as creditors under the law of the state of California against respondent as a stockholder in the corporation. Respondent, by way of defense in those cases, sought to offset the larger indebtedness of the corporation to him. The trial court in Washington denied respondent the right of set-off, but upon appeal the judgment was reversed in each of the cases, "with directions to the superior court to dismiss the action." McCann Co. v. Week, 139 Wash. 183, 246 P. 292; Id., 141 Wash. 702, 251 P. 858; Cordes v. Week, 139 Wash. 695, 246 P. 295.

[1, 2] It is appellant's contention that respondent's claim against the corporation has been fully satisfied by the previous litigation, and that respondent is precluded thereby from any recovery in this action. The sole question considered by the Supreme Court of the state of Washington was that of the right of a creditor stockholder to offset his claim as a creditor of the corporation in an action brought against him by other creditors to enforce his liability as a stockholder. That court was divided on the question, but the offsets were allowed. Much is said in the briefs herein with respect to the views expressed in the majority opinions in those cases, but with the correctness of those views we are not here concerned. We may assume that a stockholder, who is also a creditor, should not be allowed to offset his claim as a creditor of the corporation in an action brought against him by other creditors to enforce his liability as a stockholder, and we may further assume that the corporation or its assignee should not be allowed to offset the liability of a stockholder to the other creditors in an action brought by such stockholder, who is also a creditor to enforce his creditor's claim. The fact remains, however, that respondent has heretofore successfully urged his claim as a creditor of the corporation by way of offset in the actions brought by the other creditors seeking to enforce his liability as a stockholder and has received the benefit of the decisions of the courts of Washington which sustained his then contentions which were contrary to the above assumptions. Should he now be permitted to assert his creditor's claim in full against the assignee of the corporation and be permitted to share in the assets of the corporation in the hands of such assignee to the full extent

which the amount of his original claim would have entitled him? In our opinion he should not. In the previous litigation in which he escaped liability his claim against the corporation has been at least partly satisfied at his own request by offsetting a portion thereof against his liability as a stockholder. He should no longer be permitted to assert it in full. It would be prejudicial to the other creditors to allow him to change his purpose of satisfying his liability as a stockholder out of his creditor's claim, and he cannot do so. Civ. Code, § 3512. Having accepted the benefits of the offsets allowed by the courts of the state of Washington, he can no longer treat his creditor's claim used for that purpose as wholly unsatisfied. Civ. Code, § 3521.

From what has been said, we conclude that the trial court erred in not reducing respondent's claim herein to the extent that said claim had been used by respondent as an offset in the previous litigation. On the other hand, we find no merit in appellant's contention that respondent is precluded as a result of that litigation from asserting his claim even to the extent of the difference between the total amount thereof and the amount of the offsets previously allowed him.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 452

HAWTHORNE v. GUNN et al.

Civ. 422.

District Court of Appeal, Fourth District, California.

May 12, 1932.

1. Automobiles ⇐245(88).

Girl sitting on man's lap beside two others on front seat of automobile struck by another car *held* not contributorily negligent as matter of law.

2. Negligence ⇐82.

To establish contributory negligence, it must appear that plaintiff's negligence contributed to injuries.

3. Automobiles ⇐224(7).

Girl sitting on man's lap on front seat of automobile did not assume risk of negligence in operating car colliding therewith.

4. Automobiles ⇐245(90).

Girl's negligence in sitting on man's lap on front seat of automobile struck by another car *held* not contributing cause of her injury as matter of law.

Appeal from Superior Court, San Diego County; F. M. Jamison, Judge.

Action by Grace Hawthorne against Charles M. Gunn and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harrison G. Sloane, of San Diego, for appellants.

Fred A. Steiner, of San Diego, for respondent.

BARNARD, P. J.

This is an action for damages for injuries suffered in an automobile collision. As the car in which the plaintiff was riding as a guest entered an intersection and turned to the right, it was struck by a car owned and operated by the defendants, and pushed against a bank that lay along the right curb. The plaintiff was thrown forward, suffering the injuries complained of. The car in which plaintiff was riding was a five-passenger car, although at the time there were three people in the back seat and four in the front, three sitting upon the seat itself while the plaintiff was seated upon the lap of a young man who was sitting at the right-hand side of the front seat. The action was tried by the court without a jury, the court finding that the plaintiff was not negligent in riding in the position or manner mentioned; that the driver of that automobile was not negligent in his operation of the car; and that the plaintiff was injured solely by reason of the negligence of the defendants. Judgment was entered for the plaintiff, from which this appeal is taken.

[1] The appellants concede that the evidence supports the finding of negligence on their part, and the sole point raised is that the respondent was guilty of contributory negligence, as a matter of law.

It is argued that it conclusively appears that the respondent was guilty of negligence per se in thus riding as the fourth occupant of the front seat, and "that in a matter of such extreme variation from the seating accommodations of an automobile, and the very obvious results thereof, there is no need for drawing inferences of fact, but an inference of law obtains, against which the finding of fact of the lower court cannot prevail." Appellants rely entirely upon the case of McMahon v. Hamilton, 204 Cal. 228, 267 P. 546, and certain language therein used in which, as an additional reason in support of the judgment, the court discusses the question of contributory negligence on the part of the plaintiff in the action. As stated by the court, the position on a motorcycle assumed by the plaintiff in that action was hazardous even in the ordinary operation of the vehicle.

It was then stated that the plaintiff must be deemed to have assumed the responsibility for any injury to which such dangerous position presumably contributed. Of course, all presumptions were in favor of the judgment. This case is not by any means authority for the proposition that it is negligence per se for a passenger in an automobile to sit in an unusual position or one at variance with the usual seating accommodations of the vehicle. In the case of Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396, 399, it was said: "If plaintiff was imprudent in seating herself as she did, then, while she may be deemed to have assumed all the risks of danger ordinarily incident to such position of peril, she did not assume the risk of danger created by the negligence of defendant's drivers in their operation of the trucks. * * * In other words, though she assumed all the risks ordinarily incident to the position in which she seated herself on the truck, whether it was known to her to be dangerous or not—such risks, for example, as might be due to the ordinary and usual swaying of the truck or its ordinary and usual movements—still she did not forfeit her right to exact from defendant and his servants the same care to which she would have been entitled had she taken the safest seat on the vehicle."

Conceding that under some circumstances the voluntary action of a young lady in sitting upon the lap of a young man might establish a prima facie case of contributory negligence, it cannot be held, as a matter of law, that this result obtained here. It cannot be said that such a position is necessarily hazardous in the ordinary operation of a vehicle. Whether or not a reasonable person would assume such a position depends upon many conditions of time, place, and circumstance. Whether or not the respondent was negligent in so riding at the time of this collision is a question of fact and not of law.

[2-4] Even if the respondent could be held to have been negligent per se, the further question arises as to whether such negligence was the proximate cause of the accident. To establish contributory negligence as a defense, it must not only appear that the plaintiff was negligent, but that such negligence was a contributing cause of the injuries received. Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132; Blodget v. Preston (Cal. App.) 5 P.(2d) 25. The appellants argue that the fact that none of the other occupants of the same car were injured conclusively proves that it was respondent's exposed position which alone made the negligence of appellants of any effect, so far as she was concerned. Not only did the respondent not assume the risk of negligence upon the part of the appellants, but, in the light of common experience, such a conclusion cannot be drawn from the fact stated. Frequently, and it may almost be said that usually, one or more of the occupants of an automobile are killed or injured in an accident while others are uninjured, when all the passengers are seated in the usual way. Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred. Fishman v. Silva (Cal. App.) 2 P. (2d) 473. So far as the record here shows, the trial court might reasonably conclude that the sole proximate cause of respondent's injury was the negligence of the appellants, and that the respondent would not have escaped injury had she been seated upon the seat of the automobile when the collision occurred. It can neither be said as a matter of law that respondent was negligent nor that her negligence, if any, was a contributing cause of her injury. Both are questions of fact fully disposed of by the findings of the trial court.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; SCOVEL, Justice pro tem.

123 Cal.App. 438

MARTINELLI v. HOGREFE et al.

Civ. 7198.

District Court of Appeal, First District, Division 1, California.

May 12, 1932.

1. Vendor and purchaser ⇨334(4).

After breach by nonpayment, vendors' notice that, unless payment was forthcoming, purchaser's rights would be considered ended, *held* not rescission notice, thereby precluding purchaser's recovery of deposit.

It appeared that purchaser deposited $500 at time of executing contract for purchase of realty in question, which provided that balance of purchase price should be paid within designated time, and that, if purchaser failed to comply with conditions, his rights were to cease, and vendors were to have five days within which to elect whether to retain $500 deposit as liquidated and agreed damages or to sue for specific performance. Purchaser having failed to pay balance, vendors notified him that, unless he made payment on following day, deposit would be considered as liquidation of damage, and any rights of purchaser would be "considered at an end." Purchaser contended that, in view of such notice, he was

entitled to recover deposit, because his breach of contract was followed by a mutual abandonment and rescission.

2. Vendor and purchaser ⇐335.

Vendors could retain deposit, notwithstanding contract designated deposit as liquidated damages, and no damages resulted from default.

On breach by a purchaser, vendor is not compelled to take affirmative action, and, instead of seeking specific performance or bringing action at law for actual damages, he may remain inactive, resting on the contract, and retain to his own use the moneys paid by purchaser.

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action by J. Martinelli against H. C. Hogrefe and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Albert Picard, of San Francisco, for appellant.

W. D. Brown, of San Francisco, for respondents.

JOHNSON, Justice pro tem.

This is an action to recover the sum of $500 based upon a complaint for money had and received in connection with a transaction for the purchase of real estate by plaintiff from the defendants. Plaintiff appeals from a judgment in favor of the defendants.

On July 11, 1925, the parties entered into a written agreement whereby plaintiff agreed to buy from defendants certain real property situated at the northeast corner of Francisco and Polk streets in San Francisco. Of the agreed purchase price of $17,500, $500 was paid at the time of the contract; and it was provided that plaintiff should have 20 days for examination of title and report of any objections, and that, if no objections were reported within the time designated, the balance of the purchase price should be paid at the expiration of such time to the City Title Insurance Company for account of the defendants, and the defendants should thereupon deliver at the office of the title company a duly executed deed of grant. Time was declared to be of the essence of the contract; and, in case of failure of the plaintiff to comply with any conditions to be performed on his part, all his rights were to cease, and the defendants were to be released from all further obligation, with the right either to retain the deposit of $500 "as liquidated and agreed damages," or at their election to institute action for specific performance of the contract. The defendants were to have five days within which to make their election after the date of termination of the time allowed the plaintiff for completion of the contract.

In describing the property, the contract made mention that the property was subject to an easement for a driveway of a designated width, and that the Francisco street frontage was "subject to set back." On July 29, the plaintiff reported to defendants an objection to a "permanent right of way" for the driveway, and an objection also that some other lot owner on Francisco street was erecting a building without observing any "set back" regulation. No mention is made in the briefs of these objections, nor does any reliance appear to have been placed on them at the trial. We regard them, therfore, as inconsequential.

In the absence of any substantial objection, plaintiff was under obligation to pay the balance of the purchase price by July 31; but, though the defendants deposited their deed with the City Title Insurance Company on that day, together with appropriate instructions for delivery to plaintiff on payment by him pursuant to the contract, plaintiff wholly failed to perform his undertaking. Accordingly, on August 4, defendants notified plaintiff in writing that, unless he should make payment of the agreed balance by August 5. plaintiff's deposit of $500 would be "considered as a liquidation of the damage sustained," and that the deed deposited on July 31 would be withdrawn, and any rights of plaintiff to purchase would be "considered at an end." Instead of proceeding further with the purchase, plaintiff instituted this action on August 12 to recover the deposit of $500 on the theory that by their notice the defendants had rescinded the contract.

The trial court found that the defendants had fully complied with the obligations on their part, and that plaintiff had refused to perform and was therefore not entitled to any recovery.

[1] The contention of plaintiff on the appeal is that his breach of the contract was followed by a mutual abandonment and rescission of the contract, and furthermore that no damage was shown to have been sustained by the defendant on account of plaintiff's breach. In support of his contentions, plaintiff draws upon language used in Drew v. Pedlar, 87 Cal. 443, 25 P. 749, 22 Am. St. Rep. 257, and other cases, where a mutual abandonment on rescission was held to have been proved or admitted, or where there was failure of performance on both sides. Here we have a case where the evidence showed, and the court found, that the plaintiff alone was in default; and the notice to plaintiff that, unless he should make payment by August 5, his right would be "considered at an end," was but a declaration that the defendants would hold to the terms of the agreement.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

The illuminating exposition of the subject in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, established in this state a new landmark, pointing the way of deliverance from the confusion worse confounded of earlier decisions dealing with sales of realty. The main opinion, speaking of the decision in Drew v. Pedlar, supra, said that, if its rule were confined to cases where the vendor had rescinded after the vendee's breach, misunderstanding would not arise; but that its misleading feature came from the fact that a tender, made by the vendee long after his default, had been refused, and that the answer had failed to deny allegations in the complaint pleading mutual abandonment and rescission. In view of the evidence and the findings in the present case, a parade of Drew v. Pedlar and its companions in outworn gear does but raise here a cloud of dust.

[2] Stress is laid in appellant's brief on the language of the contract, stating that in case of plaintiff's default, his rights would cease and his deposit would be retained "as liquidated and agreed damages." And evidence was produced by plaintiff at the trial that there had been no diminution in the value of the property, and hence no damage from plaintiff's failure to perform. But, as was said in the Glock Case (page 13 of 123 Cal., 55 P. 713, 717, 43 L. R. A. 199, 69 Am. St. Rep. 17), a covenant for liquidated damages is of no consequence in such contracts, "where the liquidated damages are expressed as the moneys paid by the vendee; for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated as liquidated damages or not." See, also, Hyman v. Harbor View Land Co., 46 Cal. App. 98, 108, 188 P. 828.

Upon the breach of a vendee, the vendor is not compelled to take affirmative action. He may indeed seek specific performance; or, if actual damages have been sustained, he may bring an action at law therefor. On the other hand, he may remain inactive, resting on the contract, and retain to his own use the moneys paid by the vendee. Glock v. Howard & Wilson Colony Co., supra, 123 Cal. page 10, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. That is precisely what the defendants elected to do. They notified the plaintiff that, if he should not fulfill his agreement by August 5, his right to purchase would be "considered at an end." Far from exhibiting an intention to abandon or rescind the contract, this was an unequivocal declaration of an election to abide by the contract and retain the deposit. List v. Moore, 20 Cal. App. 616, 129 P. 962.

In Winter v. Kitto, 100 Cal. App. 302, 310, 279 P. 1024, 1025, a rescission was held not to have resulted from a notice to the vendee stating that the vendor elected "'to cancel said contract pursuant to the terms thereof,'" and adding that the contract "'is hereby canceled and is absolutely void and of no effect.'"

And in Hyman v. Harbor View Land Co., 46 Cal. App. 98, 107, 188 P. 828, 829, where the vendor notified a delinquent vendee that the contract between them was "rescinded for breach of conditions," it was held that in view of the terms of the contract and previous communications between the parties, the notice was not to be construed as a technical rescission, but merely as a declaration that the rights of the vendee under the contract were terminated.

In like manner in the notice given to plaintiff, the defendants informed him that, in case of his failure to comply with the terms of his contract to purchase, plaintiff's rights would be "considered at an end." This was tantamount to a notification that a breach on plaintiff's part would be at his peril and would result in forfeiture of his deposit in accordance with the contract. We should have to wrest language from its clear meaning to convert this notice of termination into a notice of rescission restoring the parties to the status quo ante. Newell v. Stone Co., 181 Cal. 385, 388, 184 P. 659, 9 A. L. R. 993; Bozeman v. Curtis, 108 Cal. App. 648, 291 P. 870; Pinkerton v. Morton, 63 Cal. App. 471, 473, 218 P. 770.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 289

PEOPLE v. STANLEY et al.

Cr. 1206.

District Court of Appeal, Third District, California.

May 2, 1932.

Criminal law ⇐1182.

Where no brief was filed and no appearance was made for appellant for oral argument, conviction for burglary *held* affirmed under statute (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Charles Stanley and George Harris were convicted of burglary, and the last-named defendant appeals.

Affirmed.

George I. Lewis, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the Superior Court of Sacramento county of a felony, to wit, burglary.

The transcript on appeal was filed in this court March 11, 1932. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 2, 1932. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

123 Cal.App. 290

PEOPLE v. STANLEY et al.

Cr. 1207.

District Court of Appeal, Third District, California.

May 2, 1932.

Criminal law ⇐1182.

There being no brief nor appearance for oral argument on behalf of appellant, judgment of conviction of burglary *held* affirmed under statute (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Charles Stanley and another were convicted of burglary, and defendant named appeals.

Affirmed.

George I. Lewis, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the Superior Court of Sacramento county of a felony, to wit, burglary.

The transcript on appeal was filed in this court March 16, 1932. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 2, 1932. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

123 Cal.App. 430

JNO. L. WITNEY, Inc., v. SIERRA RY. CO. OF CALIFORNIA.

Civ. 4395.

District Court of Appeal, Third District, California.

May 11, 1932.

Rehearing Denied June 10, 1932. Hearing Denied by Supreme Court July 8, 1932.

1. Trial ⇐165.

On motion for nonsuit, evidence and all inferences fairly deducible therefrom must be viewed most favorably to plaintiff.

2. Railroads ⇐484(3).

Evidence as to whether fire that damaged plaintiff's warehouse was caused by negligence of railroad's employees *held* for jury.

3. Railroads ⇐480(4).

Burden was on plaintiff to prove that fire that damaged its warehouse was caused by negligence of railroad's employees.

4. Railroads ⇐482(2).

That fire was caused by negligence of railroad's employees may be proved wholly by circumstantial evidence.

5. Negligence ⇐134(4).

In arriving at origin of fire, jury may make all reasonable deductions from facts shown by evidence.

6. Trial ⇐139(1).

To justify submission of any question of fact to jury, proof must be sufficient to raise more than conjecture or surmise that fact is as alleged.

7. Trial ⇐142.

Evidence sufficient to go to jury must be such that rational mind can reasonably draw therefrom conclusion that alleged fact exists.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by John L. Witney, Inc., against Sierra Railway Company of California. From judgment for plaintiff, defendant appeals.

Affirmed.

Dunne, Dunne & Cook, of San Francisco, and Rowan Hardin, of Sonora, for appellant.

Edwin L. Forster, of Sonora, and Franklin T. Poore, of San Francisco, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This is an action for damages resulting from a fire which was set out by defendant's employees on its right of way, and which fire, it is claimed by respondent, destroyed its warehouse and contents.

At the conclusion of plaintiff's evidence defendant moved for a nonsuit, and, after

the taking of evidence had been completed, it moved for a directed verdict. Both motions were denied. The jury returned a verdict in favor of plaintiff for damages in the sum of $4,762. Defendant filed a motion for a new trial, and the same was denied upon plaintiff's agreement to remit the sum of $772.26 from the amount so found by the jury, and judgment was thereupon rendered for plaintiff in the sum of $3,989.74 for its actual damages. From this judgment defendant appeals. Respondent also appealed from the order of the court denying its motion to treble the damages, but upon its application its appeal has been dismissed.

One of the main contentions of appellant for a reversal is that the evidence produced by respondent failed to prove a sufficient case for the jury.

The evidence upon the part of respondent, in substance, was as follows: That on the afternoon of July 16, 1930, the employees of appellant were engaged in burning grass and rubbish along the right of way of its railroad in the town of Jamestown; that a short distance from this right of way, where this grass and rubbish were being burned, was a warehouse owned by the Buffalo Brewing Company, and near this building was the warehouse owned by respondent; that the grass and rubbish were very dry, and the grass and weeds were of a heavy growth; that in front of the brewery warehouse there was a wooden platform, some four feet wide, which had been used in unloading freight from said railway; that near this platform in 1924 and 1925 was an icehouse, and about that date it was accidentally knocked down and the sawdust used in its construction was scattered on the ground about the building. There had been no cleaning of the débris around this brewery warehouse for years, and the sawdust had remained on the ground partly under the building and for about four feet from the building toward the railroad track, and the weeds and grass had grown up through it and it had so remained up to the time of the fire; that a spur track extended from the main line of appellant's railway in front of the brewery warehouse; that between noon and 1 o'clock p. m., on the 17th of July, 1930, the brewery building caught fire and was burned, and the fire from this building was communicated to respondent's warehouse, which, with its contents, was also burned.

Edward A. Minners, a witness for respondent, testified that he was a state ranger and had been such for a period of four years, that his duties as such included fire protection; that he was familiar with conditions around the brewery warehouse; that before the fire he had observed inflammable material, grass, old trash and sawdust near the brewery warehouse which had been there for a number of years; that on July 17th he was notified of the existence of the fire, and when he arrived the brewery warehouse was pretty well burned down and respondent's warehouse was burning. He testified as follows: "I went to where the fire had started, with these two insurance men, and saw that there was no guard had been scraped clean to the earth where the fire had been burning the day before clear up to the building. Also took my hand and scraped down in the sawdust that had been wet by the water, and found dry sawdust still burning underneath. This was four or five inches deep, sawdust lying there." He further stated that a fireguard was a trail scraped clean to the earth where there is inflammable material, that it should be from one to four feet wide; that he made an examination to ascertain whether any fireguard had been made about the building and found none had been made.

He further stated that a fire in sawdust should be thoroughly soaked with water; if this is not done it will smoulder for days; that this sawdust was wet only for a depth of two inches and was on fire below this point.

C. D. Mulock, a witness for respondent, testified that he had observed the conditions around the burning warehouse previous to the fire; that the grass around the front of said building was very dry and some foot and a half high, and there was sawdust in front of said building extending toward the vicinity of the right of way; that this sawdust was deposited there by an accident some years previous which destroyed the warehouse at the south end of the platform in front of said building; that this sawdust was from two to four inches thick; that after the fire he examined the ground in front of the brewery building, and found this same sawdust partly burned. He also saw some sawdust north of the platform which came from a small ice house north of said platform, which was destroyed by the fire which burned the brewery.

Raymond Chapelli, a witness for respondent, testified that he heard the fire alarm, and that he saw the fire burning the brewery warehouse; that when he first saw it the fire was starting from the platform in front of said building.

John Davis, a witness for respondent, testified that he had charge of the brewery warehouse, that it set back some ten or twelve feet from the track; that he lived near and visited it every day; that he was returning home on the morning of the 17th of July, 1930, about 1 o'clock, and in passing near the brewery warehouse he noticed that the right of way of appellant's railroad track had been burned; that he smelled fire, but could not locate it; that there was sawdust on the ground in front of this warehouse before the fire and the same sawdust was there the next day after the fire; that at the time of the fire the witness had certain property stored

in the brewery warehouse, consisting of an old orchestrion, eight cases of mineral water, a set of harness, and some tools.

[1] Appellant contends that the trial court should have granted his motions for nonsuit and for a directed verdict. It is well established principle that in passing upon a motion for a nonsuit the evidence and every inference that may be fairly deducible from it must be received in the light most favorable to plaintiff's case. Crandall v. Schnouser, 207 Cal. 772, 279 P. 778; Ogden v. United Bank, etc., Co., 206 Cal. 571, 275 P. 430.

[2] Taking into consideration the facts that the burning of this right of way occurred in the middle of the summer season, that it took place near the wooden warehouse, that there was an accumulation of inflammable material consisting of dry grass and weeds and rubbish and sawdust which had remained on the ground undisturbed for several years, that this accumulated débris was partly under the said warehouse and extended from there to the vicinity of said right of way; that no precautions were taken to prevent the spread of said fire to said warehouse by the construction of a fireguard; that the burning of said right of way extended to within a short distance of said warehouse, where there was an accumulation of inflammable material including sawdust; that the fire, when first seen, was burning the platform and part of the warehouse next to the burned right of way; that on the 17th of July, 1930, the state ranger's inspection of the burned premises disclosed that the sawdust which had formed part of the débris in front of the warehouse before the fire was still burning, together with the inferences that could legitimately be drawn therefrom, were sufficient to make a prima facie case for respondent.

We are of the opinion that there was no error in denying the motions for a nonsuit or for an instructed verdict.

Appellant maintains that there is no evidence that the fire which burned off the right of way was communicated to the warehouses.

In Kennedy v. Minarets & Western Ry. Co., 90 Cal. App. 563–574, 266 P. 353, 358, the court said that, while it is true there is no direct evidence as to the origin of the fire, the trial court had the right to make any logical reasonable deductions, which the admitted facts or undisputed testimony permitted.

The case of McDermott v. S. F. & N. P. R. Co., 68 Cal. 34, 8 P. 519, was an action to recover damages for a loss by fire caused by the negligence of defendant. In that case the court used the following language: "The testimony given in this case to prove negligence was circumstantial, and it was the province of the jury to determine the facts, and all proper inferences from them, establishing the negligence alleged. [Citing authorities.] * * * The verdict of the jury on such evidence should not be set aside, unless when, in the judgment of reasonable men, no such deduction as that expressed in the verdict could be properly drawn from the facts in evidence."

In the case of Kennedy v. Minarets & Western Ry. Co., supra, the court quoted with approval the following language used in the case of Cobb v. Twitchell, 91 Fla. 539, 108 So. 186, 45 A. L. R. 865: "Upon the state of facts before us and in the absence of mitigating circumstances, a jury might reasonably conclude that the defendant or his servants did not observe reasonable prudence and ordinary care under the circumstances in that they were not sufficiently thorough in extinguishing the original fire, or that the fireguard constructed by them, in its dimensions or manner of construction, was not adequate or suitable under the circumstances."

[3-7] The burden of proof is upon respondent to prove that the fire which destroyed his warehouse was caused by appellant, and also that it was due to the negligence of appellant's employees. This proof may be wholly circumstantial, and in arriving at their verdict the jury have the right to call to their aid all deductions which can reasonably be made from the facts proved. Viera v. Atchison, etc., R. Co., 10 Cal. App. 267, 101 P. 690; Paiva v. Cal. Door Co., 75 Cal. App. 323, 242 P. 887; Round Tree v. Mt. Hood R. Co., 86 Or. 147, 168 P. 61. But, in order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational well-constructed mind can reasonably draw from it the conclusion that the fact exists, and, where the evidence is not sufficient to justify such inference, the court may properly refuse to submit the question to the jury. O'Connor v. Mennie, 169 Cal. 217, 146 P. 674; Estate of Luckenbach, 205 Cal. 292, 270 P. 961.

However, we are of the opinion that, from the facts proven by respondent, inference could reasonably be deduced by the jury that in burning the right of way of appellant's railway the fire came in contact with the inflammable material that existed in front of the brewery warehouse and was communicated to the sawdust which had been deposited there several years before that time; that appellant's employees did not sufficiently saturate this sawdust with water to completely extinguish the fire that smouldered therein, and that in consequence it continued to burn until on the following afternoon when the fire was communicated to the brewery warehouse.

Under the circumstances which existed there, common prudence would have called for the construction of a fireguard to have prevented the spread of the fire. The evi-

dence is conflicting as to whether or not there was any fireguard. Respondent's testimony is to the effect that there was no fireguard, and we must therefore resolve this conflict in favor of respondent.

Appellant claims that the court erred in giving instructions for respondent and refusing instructions for appellant.

We have carefully examined the instructions given and refused by the court and are satisfied that the law applicable to the facts of the case was fully and fairly given to the jury in its instructions.

Practically all of appellant's instructions refused by the court were covered by the instructions given.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 323

SUTTER INV. CO. v. KEELING et al.

Civ. 8188.

District Court of Appeal, First District, Division 1, California.

May 6, 1932.

1. Stipulations ⇐14(10).

Agreed statement of facts, reciting that defendant claims title to stock by purchase, etc., and finding following identical language, construed as claim of title based upon fact of purchase, as against contention of undetermined claim.

2. Stipulations ⇐14(10).

Agreed statements of facts are encouraged and are to be given interpretation which will serve purpose intended.

3. Corporations ⇐149.

As between transferee of unregistered stock and subsequent purchaser in good faith and without notice at execution sale, purchaser *held* entitled to stock.

4. Execution ⇐247.

That judgment creditor of record owner of stock failed to notify prior transferee of execution sale *held* not to warrant setting aside sale of stock to judgment creditor who had neither actual nor constructive notice of transfer.

5. Execution ⇐250.

Adequacy of execution sale price must be determined by real value of property sold, regardless of what purchaser might have known.

6. Execution ⇐250.

That judgment creditor purchased stock worth $1,400 for $5 at execution sale *held* not to warrant setting sale aside, where stock was at time pledged to full value and no fraud existed.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Sutter Investment Company against H. Vincent Keeling and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

Charles N. Douglas, of San Francisco, for appellant.

Dozier & Kimball, of San Francisco, for respondent.

PARKER, Justice pro tem.

This action is to determine adverse claims in and to certain shares of stock of the Market Street Railway Company, and for such ancillary relief as may be meet after adjusting the ownership. The case was tried upon an agreed statement of facts. Judgment went for plaintiff, and defendant Keeling presents this appeal.

A summary of the facts follows:

Lea Bleakmore was the owner of certain shares of stock of the Market Street Railway Company. These shares had been pledged to the Wells Fargo Bank as security for the repayment of an obligation of Bleakmore to the said bank. However, the pledgee had given no notice to the Market Street Railway Company of the pledge nor of the fact that the holder had in any manner negotiated or impaired his holdings. There was nothing on the books or records of the Market Street Railway Company to indicate anything but the absolute ownership of Bleakmore. This was the situation on July 1, 1924. On that date the plaintiff herein commenced an action in the superior court of the state of California, in and for the city and county of San Francisco, against Bleakmore to recover a sum of money alleged as due. On August 4, 1924, a writ of attachment was duly issued and thereafter levied, as a result of which the stock in question was attached. Thereafter, on September 23, 1924, plaintiff recovered judgment against Bleakmore, and thereupon execution issued. Levy was duly made, and on October 14, 1924, after notice given as required by law, the sheriff sold all of the stock standing of record upon the books of the Market Street Railway Company in the name of Lea Bleakmore to plaintiff. At the sheriff's sale, the plaintiff bid and paid for said stock the sum of $5, the plaintiff being the highest and best bidder for said stock at said sale.

The foregoing discloses plaintiff's claim to the stock. The facts stated are more or less sketched for the reason that no question is presented on the validity of any of the proceedings leading up to and including the sheriff's sale.

It was alleged, and not denied, that at all times the stock was and now is of the reasonable market value of $1,400. Defendant and appellant Keeling claims the stock by reason of the following facts: While the stock was pledged with the Wells Fargo Bank, Keeling purchased the same from Bleakmore in good faith and for a valuable consideration, but no transfer was ever made on the books of the corporation from Bleakmore to appellant, nor was any of the stock reissued to Keeling. Keeling at no time gave notice of his purchase to the pledgee, to the Market Street Railway Company, or to plaintiff. The sale and transfer from Bleakmore to Keeling was made prior to July 1, 1924, which was the date of the commencement of the action by plaintiff against Bleakmore, out of which came the execution. No notice of levy either of attachment or execution was ever given to appellant, nor was any notice given to the pledgee. Subsequent to the sheriff's sale the stock was redeemed from the pledgee and the certificates delivered by the pledgee to appellant. The fact is agreed, and the finding is in accord therewith, that at the time of the sale of said shares of stock by the sheriff and the purchase thereof by the plaintiff, the said plaintiff was acting in good faith and without notice that the outstanding certificates or any of them had at any time been pledged or had been sold or assigned to appellant.

There is some controversy concerning the scope of the agreed statement of facts, and the finding adopting the same. The statement of facts with reference to the rights of defendant Keeling reads as follows: That the defendant Keeling claims title to said shares of stock by reason of having purchased from said defendant Lea Bleakmore (subsequent to the pledge of the same with Wells Fargo Nevada National Bank of San Francisco, and prior to July 1, 1924), in good faith and for a valuable consideration, etc. The trial court's finding follows the identical language, namely, that Keeling claims title to said shares of stock, etc. Respondent urges that there is no agreement or finding that Keeling was ever the owner of the stock, and that from the record it is apparent that appellant has only an undetermined claim.

[1, 2] We place no such narrow construction on the language quoted. Appellant had been called upon to assert his claim and he did assert, and it was agreed and found that he did make a claim, based upon certain facts. It cannot be construed as a mere claim that he had purchased from Bleakmore; it is a claim of title based upon the fact of such purchase. In other words, we construe the statement and finding as determinative of the facts out of which the claim of title arises, and upon which such claim is asserted. Indeed, this is the theory of the entire case and the obvious theory of the court below. Agreed statements of facts are encouraged and are not to be considered as traps for the unwary, but are to be given an interpretation which will serve the purpose intended.

The question presented on this appeal involves the rights of the holder of unregistered stock as against a purchaser at an execution sale. The subject is exhaustively discussed in the case of National Bank, etc., v. Western Pacific Ry. Co., 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391. The rule there announced is that unregistered transfers of stock are nevertheless valid as against all the world, except subsequent purchasers in good faith, without notice. And it was conceded upon the authority of Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600, that a purchaser under an execution sale, without notice of transfer, would take the stock free from the claims of the transferee. In Security, etc., Bank v. Imperial W. Co. No. 1, 183 Cal. 488, 494, 192 P. 22, 24, the rule is again announced as follows: "One who purchases at execution sale shares of stock of a corporation, * * * in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if at the time of the purchase he acts in good faith and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor."

[3] The agreed fact and the finding based thereon in the instant case is, as noted hereinbefore, namely, that the plaintiff at the time of levy of writ of attachment, at the time of the levy of the writ of execution and at the time of the sale of said shares of stock by the sheriff and the purchase thereof by plaintiff, was acting in good faith and without notice. Plaintiff, as the purchaser at the execution sale under its judgment, without notice of the previous assignment, took the stock discharged of appellant's claim. American, T. & B. Co. v. Union S. Co., 43 Cal. App. 126, 184 P. 508. We hold, therefore, that plaintiff purchased the shares of stock in question free from appellant's claims under his assignment. To hold otherwise would be to ignore every authority upon the question.

[4] However, contends appellant, the price paid for the shares of stock at the execution sale was grossly inadequate, in that the value of the stock was $1,400 and the sale price but $5. The record before us discloses no claim of fraud in the sale, nor in the proceedings leading up to it. The sale was in all respects fair, and the undisputed fact is that plaintiff

was the highest and best bidder. There is not a suggestion of unfairness surrounding the transaction, other than the failure to give notice to appellant. In view of the stipulated fact of plaintiff's lack of knowledge of appellant's claim, and no source of information available and no fact claimed to charge plaintiff with constructive notice, we must ignore the argument on lack of notice to appellant. "* * * Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage." Rauer v. Hertweck, 175 Cal. 278, 165 P. 946, 948; Bock v. Losekamp, 179 Cal. 674, 179 P. 516; Baldwin v. Brown, 193 Cal. 345, 224 P. 462, 464.

In the last-cited case, it was contended that the fact that the creditor was the purchaser at his own sale and therefore had cause to know the true value of the property was additional evidence sufficient, when coupled with gross inadequacy of sale price, to invalidate the sale. The court says: "But unless the appellant could show by either reason or authority that the creditor must be held to a different rule of duty than that applicable to other bidders for property offered at public sale, this circumstance can be of no avail to the appellant since it adds no modicum of weight to the fact of inadequacy of price bid for the property at such sale. No sound reasons and no authority whatever are cited to sustain the appellant's conclusion in this regard."

It is apparent that if Bleakmore, the record owner of the stock, had made no assignment, but still claimed the stock, he would not be heard to urge the ground of inadequacy of execution sale price. We know of no rule which permits the assignee to any different right. Paraphrasing the language of Farmers' Nat. Gold Bank v. Wilson, supra, whatever the result to appellant, it is his own fault. He had it in his power at the start to avoid all danger by doing what he ought to have done—caused the proper transfer of the stock to have been made on the books of the corporation.

[5, 6] Incidentally, it may be noted that at the time of the sale the stock in question was pledged to its full value or thereabouts, the finding being that the same was pledged for a valuable consideration, and on the basis of its then full and fair market value. This pledge was made in 1921, and appellant acquired title in 1924 subject to the pledge. At the time of the sale under execution, the stock was still pledged so that its net value does not appear. But, argues appellant, plaintiff had no notice of this pledge and therefore as to him the value of the property must be taken as $1,400, regardless of the lien thereon. This contention cannot be sustained. The adequacy of the sale price must be determined by the real value of the property sold, regardless of what the purchaser might have known. It would seem absurd to say that when a purchaser pays $5 for property worth nothing, the price is grossly inadequate because the purchaser thought he was purchasing property of the value of $1,400. In any event, the property being hypothecated in 1921 and subject, so far as the record discloses, to the pledge lien at the time of the assignment to appellant, there is then no showing of appellant's injury regardless of the execution sale price. In other words, if at the time of sale under execution, appellant owned the stock, subject to the lien created by Bleakmore to the full value of the stock, appellant was not injured by the sale, nor was the grossness of the inadequacy in the sale price an element of damage or oppression as against appellant.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 436

PEOPLE v. SULLIVAN.

Cr. 230.

District Court of Appeal, Fourth District, California.

May 11, 1932.

1. Criminal law ⇐1081.

Notice of appeal from judgment, being filed over two days after rendition thereof, *held* ineffective for any purpose (Pen. Code, § 1239).

It appeared that, at the time the court made an order denying a motion for a new trial, appellant gave oral notice of appeal, but failed to specify whether appeal was taken from such order, or from the judgment which was entered on the same day. About two weeks thereafter he filed a written notice of appeal from the judgment.

2. Criminal law ⇐1069(6).

Statement of grounds of appeal and points relied on for reversal, being filed two weeks after entry of judgment, *held* too late, requiring dismissal of appeal (Rules of Supreme Court and District Courts of Appeal, rule 2, § 7).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Harry Sullivan was convicted of bookmaking, and he appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

O. A. Thorpe, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J.

The record before us discloses that on February 11, 1932, the trial court made an order denying appellant's motion for a new trial. At that time he gave an oral notice of appeal without specifying whether the appeal was taken from the order denying the motion for a new trial or from the judgment. From the context it would appear that it was taken from the order only. On February 25, 1932, the appellant filed a written notice of appeal from the judgment entered on the 11th day of February, 1932, and on the same day filed a statement of his grounds of appeal and the points upon which he relied for a reversal of the judgment. No briefs have been filed on behalf of the appellant.

[1, 2] It is apparent that the only notice of appeal that might be considered effective for any purpose was the oral notice given on February 11, 1932. The written notice of appeal from the judgment was filed after the time prescribed by section 1239 of the Penal Code and is not effective for any purpose. The statement of grounds of appeal and the points upon which appellant relied for reversal of the judgment were filed too late, and, under the provisions of section 7 of rule 2 of the rules of the Supreme Court and District Courts of Appeal, the motion to dismiss the appeal must be granted. People v. Schroeder (Cal. App.) 297 P. 105.

The motion to dismiss the appeal is granted, and the appeal is dismissed.

We concur: BARNARD, P. J.; SCOVEL, Justice pro tem.

123 Cal.App. 485

HARWELL v. REINIGER et ux.

Civ. 8289.

District Court of Appeal, First District, Division 1, California.

May 16, 1932.

Rehearing Denied June 15, 1932. Hearing Denied by Supreme Court July 14, 1932.

1. Vendor and purchaser ⊂⊃338.

Action for money had and received will lie at instance of party not in pari delicto to recover money paid under void executory contract for sale of realty.

2. Vendor and purchaser ⊂⊃334(5).

Purchaser could recover money deposited under agreement to purchase lot where vendors had already contracted to sell lot to another and purchaser received no other consideration for deposit.

3. Vendor and purchaser ⊂⊃37(7).

Vendors' failure to inform purchaser regarding outstanding conveyance contract against lot constituted fraud, invalidating contract, notwithstanding vendors may have had title at time for conveyance (Civ. Code, § 1572).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Suit by K. M. Harwell against Charles Reiniger and wife, as individuals and as copartners doing business under the firm name and style of the Reiniger Investment Company. From a judgment for plaintiff, defendants appeal.

Affirmed.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Goodspeed, Pendell & McGuire, of Los Angeles, for respondent.

KNIGHT, J.

The defendants, as owners of a tract of land near Los Angeles which they had subdivided into lots for the purpose of sale, accepted from plaintiff a deposit of $903 on the sale of a lot which they had previously contracted to sell to another; and upon their refusal to return the deposit plaintiff brought this action to recover the same and was awarded judgment, from which the defendants appeal. The trial took place before the court sitting without a jury, and the main ground urged for reversal is that the findings when "taken in connection with the pleadings" do not support the judgment.

The complaint contained three causes of action, separately stated. The first and second were for rescission of contract on the grounds of failure of consideration and fraud, and the third was for money had and received. In its decision the trial court did not pretend to find separately on each cause of action, but followed chronologically the negotiations between the parties as they occurred, and then from the facts found drew the legal conclusion that plaintiff was entitled to the return of the deposit.

[1] The objections defendants make against the sufficiency of the findings relate to matters pleaded in the first and second causes of action. It is well settled, however, that an action for money had and received will lie at the instance of a party not in pari delicto to recover money paid under a void

executory contract for the sale of real estate. 17 Cal. Jur. 613; Smith v. Bach, 183 Cal. 259, 191 P. 14; Smith v. Bach, 54 Cal. App. 236, 201 P. 611; Smith v. Bach, 53 Cal. App. 63, 199 P. 1106. Therefore, if the findings as a whole are legally sufficient to sustain the judgment under the third cause of action, for money had and received, the question of their sufficiency in connection with the matters pleaded in the first and second causes of action becomes moot. Summarized, the material facts established by the findings are as follows: In July, 1927, defendants entered into a written contract to sell to plaintiff lot 107 of tract 8077 (not the one here involved) for the sum of $1,750, and in conformity with the terms of the contract plaintiff made an initial cash payment thereon of $437 and thereafter paid the monthly installments of $17.50 and the interest on deferred payments up to April, 1928, at which time defendants agreed to sell to plaintiff the lot in question here, described as lot 117 in tract 9008, for the sum of $2,150, payable as follows: $903 cash down payment, and the balance in monthly installments of $21.50 a month with interest on deferred payments, the first installment falling due on May 10, 1929. At the same time defendants further agreed, according to the findings, "that if plaintiff would pay an additional sum of $210.00 to apply upon the balance of the unpaid purchase price of said Lot 107, defendants would release plaintiff from payment of any accruing interest on either of said Lots 107 or 117 for the period of one year thereafter, and that in the event plaintiff desired to be released at the end of a year from one or the other of said contracts to purchase, defendants would release plaintiff from one of said contracts as desired by plaintiff and cancel the same, and would apply all money theretofore paid on said contract by plaintiff, as a payment on the remaining contract." Pursuant to such agreement, plaintiff paid to defendants $1,113, and received in acknowledgment thereof a receipt reciting, among other things, the terms upon which lot 117 was to be sold, the application of $903 "as a deposit on a reservation" thereof, and the balance of $210 as a "pay up on Lot 107, Tract 8077, for one year," and providing for the execution of a sales contract to be thereafter prepared and signed subject to certain conditions specified in said receipt, among them being the recordation of the map showing the plan of the subdivision, and the right of the owners "to return the above deposit at their option, at any time prior to the signing and execution of sales contract." The receipt further provided that the contemplated sales contract should contain the "conditions and restrictions set out in the owners' standard form of contract," which the trial court found were never agreed upon. Shortly after the acceptance of the deposit and the delivery of such receipt defendants informed plaintiff that they had previously contracted to sell said lot 117 to one Rose Roach; whereupon they tried to induce plaintiff to select another lot and apply the deposit thereon. Plaintiff declined to do so, however, and demanded the return of the $903, but defendants refused to return the same or any part thereof. Subsequently, and despite the outstanding Roach contract, defendants tendered to plaintiff a sales contract for said lot which they requested her to sign, but she refused to sign or accept the same, and thereafter brought this action to recover the deposit. Regarding the Roach contract, the trial court found that it had never been recorded, that plaintiff was not aware of its existence at the time she paid the deposit, and that said contract "ever since has been and still is a valid and subsisting executory contract of sale of said lot 117 to said Rose Roach." It further found that there was a failure of consideration for the payment of said deposit, and that the omission of defendants to inform plaintiff of the outstanding Roach contract constituted a fraud under the provisions of section 1572 of the Civil Code.

[2] It is evident that, regardless of the question of fraud or the failure to find on certain allegations contained in the first and second causes of action, the foregoing findings are amply sufficient, under the authorities above cited, to support a judgment for money had and received.

[3] Defendants also contend that they were absolved from returning the deposit for the reason that, notwithstanding their knowledge of the existence of the Roach contract, they tendered to plaintiff a sales contract which she refused to sign or accept; and in support of such contention they seek to invoke the aid of the general rule that, where there has been no fraudulent representation as to the vendor's title, the fact that he has an imperfect title or no title at all, at the time of the execution of the contract of sale, does not invalidate the contract of sale, since it is sufficient if the vendor has good title at the time he is called upon to perform. Lemle v. Barry, 181 Cal. 6, 183 P. 148; Backman v. Park, 157 Cal. 607, 108 P. 686, 137 Am. St. Rep. 153. Such rule has no application here, however, because no sales contract was ever entered into. As shown by the findings and the contents of the receipt above referred to, the $903 was paid and accepted merely as "a deposit on a reservation" of a lot. The sales contract was a matter to be taken up and settled later, subject to certain conditions; and, before those conditions were agreed upon or complied with, plaintiff learned that there was already an outstanding contract against said lot. Furthermore, there is the finding of the trial court that the failure to inform plaintiff of the outstanding Roach contract constituted a fraud. Clearly, under

such circumstances, it cannot be held that she was required to proceed further with the transaction.

In our opinion the appeal is utterly without merit. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

123 Cal.App. 392

DI VITA v. MARTINELLI et al.

Civ. 8027.

District Court of Appeal, First District, Division 2, California.

May 10, 1932.

Rehearing Denied June 9, 1932. Hearing Denied by Supreme Court July 8, 1932.

1. Automobiles ⇐200.

If one learning to drive negligently started automobile under owner's direction when accident occurred, she and owner were severally and jointly liable (Civ. Code, § 1975).

2. Automobiles ⇐200.

Driver negligently starting automobile and owner, if on joint adventure when accident occurred, were jointly liable.

3. Automobiles ⇐245(26).

In action for personal injuries by automobile, whether driver negligently starting car and owner were liable jointly, severally, or not liable, *held* jury question.

4. Automobiles ⇐245(26).

In action for injuries by automobile, evidence respecting driver's starting car and owner's immediate presence made their liability jury question.

5. Automobiles ⇐245(26).

In action for injuries by automobile, whether part owner, present when inexperienced defendant started car and, knowing plaintiff's danger, exercised proper care, *held* jury question.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Benigno Di Vita against Rodi Martinelli and another. Judgments were rendered for each defendant, and plaintiff appeals.

Reversed.

Elmer P. Delany, of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondents.

STURTEVANT, J.

The plaintiff sued to recover damages for personal injuries. At the end of the plaintiff's case each defendant separately moved for a nonsuit; the motions were granted; and from the orders of nonsuit and the judgments entered thereon the plaintiff has appealed.

On the 1st day of March, 1930, the plaintiff was standing on the sidewalk near the curb on the south side of a telephone pole which is located at the southeast corner of the intersection of San Bruno avenue and Twenty-Fifth street in San Francisco. At the same time an automobile owned by Rodi Martinelli and his brother was standing in the street parallel to the curb a short distance to the south of where the plaintiff stood. The defendant Rodi Martinelli, Selma St. Louis, and another young lady, had driven to that spot and stopped. Mr. Martinelli's uncle occupied the house immediately east of where the car was parked. When the party arrived Mr. Martinelli stopped the car, and, leaving the young ladies remain in it, he went into the house. Afterwards he came out, passed around to the left-hand side of the car out in the street, and stood there putting on his overcoat. While he was so engaged the plaintiff stood by the telephone pole. Martinelli saw him and the position he occupied. The plaintiff was resting his right shoulder against the pole and was facing out into the street. About the time that Mr. Martinelli started to put on his overcoat there is some evidence that he said, "Let's go." About that time Miss St. Louis reached to her left and turned on the ignition. Mr. Martinelli stood by the left running board, saw her do so, and said nothing. Soon thereafter she stepped on the starter. As she did so the automobile went forward and caught and bruised the plaintiff's right leg on the inside above the ankle.

From time to time before the date of the accident Miss St. Louis had ridden in the automobile with Mr. Martinelli and he had given her instructions regarding the operating of the automobile; but as yet she had not obtained a license.

The plaintiff testified that before the machine started forward no horn was blown. He also testified that he stood on the sidewalk looking at the machine and that he saw the machine start forward, but it did so in a jump and caught him before he could get out of the way. He did not see whether Miss St. Louis started the machine or the other girl started it.

Prior to the date of the trial Miss St. Louis and Mr. Martinelli had been married. As Mrs. Martinelli the young lady was called as a witness under section 2055, Code of Civil Procedure. She testified that just before the machine started she turned on the ignition;

she then stepped on the starter and the car lurched forward suddenly and came in contact with Mr. Di Vita. At other times during the six months preceding the accident, in the presence of Mr. Martinelli, she had turned on the ignition and had stepped on the starter. On such occasions he never said, "Don't do it," and he never asked her to do those things. She just did them of her own accord. Shortly prior to the accident and while Mr. Martinelli was in the car, she had driven the machine. At the time of the accident she was familiar with the gear shift of that automobile. She knew that there were three shifts forward and one reverse. She knew that if the engine was running and the gear was placed in first or reverse that the car would start. When they drove up to the corner where the car was parked Mr. Martinelli was driving, but the witness did not recall whether at the time he stopped the car was left in gear. At the time she turned on the ignition she did not notice whether the car was in gear. But she knew that before starting the engine you should first see if the car is in gear.

Before proceeding to discuss separately each order made by the trial court, it will be noted that from the evidence introduced the only debatable question was as to who was responsible. The uncontradicted evidence showed that the automobile was owned by Rodi Martinelli and his brother. The evidence does not disclose the name of the brother and he was not made a party. Rodi Martinelli and Selma St. Louis were made defendants and both were charged with responsibility. On March 1, 1930, both were minors.

[1-4] There is evidence that prior to March 1, 1930, Selma St. Louis had been and at the time of the accident she was still engaged in learning how to drive the automobile and was acting under the direction and supervision of the defendant Rodi Martinelli, and was acting as his chauffeur. Civ. Code, § 1975. If so, as the record stood when the motion was made, both Rodi Martinelli and Selma St. Louis might have been held severally or jointly liable. Weddle v. Heath, 211 Cal. 445, 455, 295 P. 832. Taking another view of the record, there was some evidence that both of said persons were on a joint adventure at the time of the accident. If so, under that aspect, both parties could be held jointly liable for the tort. 33 C. J. 873. Whether they were jointly liable, severally liable, or not liable, depended upon the evidence direct, and indirect as to what relation existed between the two at the time of the accident, and also upon the exact facts as to what occurred at the time of the accident. All of these questions were to be determined by the jury after all of the evidence had been introduced. Be the relations between Rodi Martinelli and Selma St. Louis whatever they may have been, both owed to the plaintiff the duty of exercising ordinary care not to injure him. He was not concerned with the question as to whether they were partners, master and servant, or independent principals. Taking any view of the record that we may take, it may be said that at the time the motions were granted the plaintiff had made a prima facie case and that it cannot be said the evidence was wholly insufficient to carry the case to the jury.

[5] The accident happened in the immediate presence of Rodi Martinelli. Whether he be considered as the owner, and/or operator, and/or master, he was in full control, and a slight movement on his part, or a word on his part, would have prevented any movement of the automobile. Knowing the plaintiff's position standing in front, knowing what he knew about the inexperience of Selma St. Louis in operating the car, and seeing what she did in starting the ignition and the starter, the question arose: Did he exercise proper care? Of course, that question was also for the jury.

From what we have said it follows that neither motion should have been granted.

The orders and judgments are therefore reversed.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 291

RANCHO SAN CARLOS, Inc., v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.

Civ. 7921.

District Court of Appeal, First District, Division 1, California.

May 4, 1932.

1. Alteration of instruments ⇐12.

Where one signs instrument containing blanks, he must intend it to be filled in by person to whom it is delivered.

2. Principal and agent ⇐160½.

Where depositor signs checks in blank and delivers same to his agent, fraudulently filling in blanks and negotiating checks, drawee bank paying same without notice of fraud is not liable to drawer.

3. Banks and banking ⇐148(2).

Bank must pay checks of its depositors drawn payable to order only to person who becomes holder thereof by genuine indorsement.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Alteration of instruments ⇐12.

Person affixing signature to printed blank intrusting it to another to have blanks filled cannot deny latter's authorization to complete same so far as is consistent with printed words.

5. Bills and notes ⇐60.

Drawee bank *held* not liable for loss sustained by drawer which, by signing checks in blank, enabled its employee to perpetrate fraud (Civ. Code, § 3090, subd. 3).

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Jr., Judge.

Action by Rancho San Carlos, Inc., against Bank of Italy National Trust & Savings Association. From a judgment for defendant, plaintiff appeals.

Affirmed.

C. F. Lacey, J. A. Bardin, and J. T. Harrington, all of Salinas, for appellant.

Silas W. Mack and John Thompson, both of Monterey, and J. Joseph Posner, of San Francisco, for respondent.

PER CURIAM.

In July, 1928, the plaintiff had a commercial checking account with defendant bank at Monterey, Cal. Plaintiff had in its employ a bookkeeper named Harris, and another employee by the name of James P. Dunnigan. It was plaintiff's custom to deliver to Harris checks in blank signed by its superintendent for the purpose of enabling Harris to pay plaintiff's current bills. On July 30, 1928, Harris filled in one of the checks so delivered to him for the sum of $10,000, the check being in terms payable to order, and inserted Dunnigan's name therein as payee. He then forged Dunnigan's signature as indorser on the instrument, and deposited the same to the credit of Dunnigan's checking account in the First National Bank of Monterey. All this was without the knowledge or consent of Dunnigan. On the same day the last-named bank indorsed and presented the check to defendant, which paid the same and charged plaintiff's account therewith. Harris, by false representations, then induced the delivery to himself of a check signed in blank by Dunnigan. This check was drawn on the latter's account in the First National Bank of Monterey and was made payable to Harris. The latter filled in the check for $9,800, presented it to the drawee bank, procured its payment, and absconded. The action was brought to recover the amount of the check first mentioned from the defendant bank.

The court found that the check was delivered to Harris by plaintiff with power and authority to fill in the blank spaces and use the same in payment of its debts; that Dunnigan had no interest in the amount for which the check was drawn, that he was a fictitious person, and that the fact was known to Harris; that the acts of Harris were done in the course of and within the general scope of his employment; that plaintiff was negligent in delivering the check to him, and any loss suffered by it was proximately caused by such negligence. Judgment was entered in favor of defendant, and plaintiff appealed therefrom.

Plaintiff attacks certain findings and the conclusion of the trial court that the check was in legal effect payable to the order of a fictitious person, the fact being known to the person who within the meaning of the statute was the one making it so payable.

[1, 2] It is the rule that, if one signs an instrument containing blanks, he must intend it to be filled in by the person to whom it is delivered (Cassetta v. Baima, 106 Cal. App. 196, 288 P. 830); and, where a depositor signs checks in blank and delivers the same to his agent, who fraudulently fills in the blanks and negotiates the checks, the drawee bank which pays the same without notice of the fraud is not liable to the drawer, since the negligence of the latter is the proximate cause of the loss (Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. [N. S.] 529; Edelen v. Oakland Bank of Savings, 39 Cal. App. 302, 178 P. 737).

[3] In the present action, however, it is conceded that the indorsement of the name of Dunnigan was forged; and it is the duty of a bank to pay the checks of its depositors drawn payable to order only to a person who becomes the holder thereof by a genuine indorsement; otherwise the amount paid thereon cannot be charged to the depositor's account (Hatton v. Holmes, 97 Cal. 208, 31 P. 1131; Garthwaite v. Tulare Bank, 134 Cal. 237, 66 P. 326; Otis Elevator Co. v. First National Bank, supra; Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A. L. R. 1193). But a check made payable to a fictitious or nonexisting person, when such fact is known to the person making it so payable, is an instrument payable to bearer (Civ. Code, § 3090); and according to the conclusion of the trial court such was the case here. It has been held that, where the drawer is requested to draw a draft to the order of a fictitious person not known to the drawer to be such, the knowledge of the drawer and not the knowledge of the person at whose request the draft was drawn controls, and the instrument is not one payable to bearer within the provisions of the statute. Robertson Banking Co. v. Brasfield, 202 Ala. 167, 79 So. 651; American Surety Co. of New York v. First Nat. Bank, 203 Ala. 179, 82 So. 429; American Express Co. v. People's Savings Bank, 192 Iowa, 366, 181

N. W. 701; United Cigar Stores Co. v. American Raw Silk Co., 184 App. Div. 217, 171 N. Y. S. 480, Id., 229 N. Y. 532, 129 N. E. 904; City of St. Paul v. Merchants' National Bank, 151 Minn. 485, 187 N. W. 516, 22 A. L. R. 1221; Second National Bank v. First National Bank, 7 Ohio App. 68. The same rule was followed in Los Angeles Investment Co. v. Home Savings Bank, supra. But, where an agent has authority to draw checks on his principal's bank account, it has been held that a check knowingly drawn by an agent to the order of a fictitious person, or to an existing person having no interest in the transaction and not intended by the agent to receive the check, is payable to bearer. Snyder v. Corn Exchange Bank, 221 Pa. 599, 70 A. 876, 128 Am. St. Rep. 780; Mueller et al. v. Liberty Ins. Bank, 187 Ky. 44, 218 S. W. 465; Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank, 134 Tenn. 379, 183 S. W. 1006; American Hominy Co. v. National Bank of Decatur, 294 Ill. 223, 128 N. E. 391. It is conceded that Dunnigan was not a party to any agreement, express or implied, whereby the First National Bank of Monterey undertook to collect the check or to credit the same or its proceeds to his account, or that he ratified the acts of any of the parties to the transaction. And it is clear that, while this bank assumed that it was acting for Dunnigan, this being part of Harris' plan, it was not the latter's intention that Dunnigan should have any interest in the check or its proceeds or should knowingly receive the same, as such knowledge would have frustrated the fraudulent scheme. Nor did the acts mentioned result in a transfer to him of either the check or its proceeds. Mutual assent was necessary to the existence of a contract (Civ. Code, § 1550); and no donation is valid or obligatory until accepted (De Levillain v. Evans, 39 Cal. 120); nor, in view of the circumstances, could his assent or acceptance be presumed (7 Cor. Jur., Banks and Banking, p. 641; Leech v. First Nat. Bank, 99 Mo. App. 681, 74 S. W. 416).

[4] As stated, one who affixes his signature to a printed blank or a bill of exchange or promissory note, and intrusts it to another for the purpose of having the blanks filled in, cannot be heard to deny that the latter was authorized to complete the same so far as is consistent with the printed words (3 R. C. L., Bills and Notes, § 59, p. 874); and here the person to whom the signed blank was intrusted, and who was authorized to complete it, made it payable to one who, although known to him to be an existing person, was not intended to have more than an apparent interest therein, and this for the purpose of misleading the banks.

It has been held that the words, "the person making it so payable," refer to the person who actually drew the check, whether he be the nominal maker or not [Mueller et al. v. Liberty Ins. Bank, supra; American Sash, etc., Co. v. Commerce Trust Co. (Mo. App.) 25 S.W.(2d) 545]; and in principle the same rule should apply where the person who actually makes the check payable is expressly or impliedly authorized to complete it in that manner.

[5] The facts stipulated by the parties, together with the evidence, fully support the findings, and the conclusion of the trial court that the case is within the provisions of subdivision 3 of section 3090 of the Civil Code is sustained in principle by the following decisions involving similar facts: Mueller et al. v. Liberty Ins. Bank, supra; American Sash, etc., Co. v. Commerce Trust Co., supra; Norton et al. v. City Bank & Trust Co. (C. C. A.) 294 F. 839; Snyder v. Corn Exchange Nat. Bank, supra; American Hominy Co. v. National Bank of Decatur, supra; Trust Co. of America v. Hamilton Bank of New York, 127 App. Div. 515, 112 N. Y. S. 84; Bartlett v. First Nat. Bank of Chicago, 247 Ill. 490, 93 N. E. 337; Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Edelen v. Oakland Bank of Savings, supra. See, also, article entitled "The fictitious payee," 18 Mich. Law Rev. 296.

The judgment is affirmed.

HALLINAN v. PRINDLE et al.*

Civ. 8319.

District Court of Appeal, First District, Division 2, California.

May 12, 1932.

Rehearing Denied June 11, 1932. Hearing Granted by Supreme Court July 11, 1932.

1. Trial ⇐340(5).

Motion to amend verdict against two defendants in the sum of "$——— dollars," and against third defendant in the sum of $10,000, as apportionment of damages, *held* properly denied.

Denial of motion was proper because there was no attempt to apportion damages, but a finding that plaintiff take nothing from the first two defendants.

2. Judgment ⇐199(1).

Where defendant made no motion for directed verdict, court erred in granting judgment notwithstanding verdict; power to give relief being limited to granting new trial.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 202.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by T. J. Hallinan against Kirk H. Prindle, Church of St. Matthew Mills Memorial Hospital, and Ann M. MacKinnon, wherein there was verdict for plaintiff against Church of St. Matthew Mills Memorial Hospital, and for the individual defendants. From judgment for individual defendants and for Church of St. Matthew Mills Memorial Hospital notwithstanding the verdict, plaintiff appeals.

Affirmed as to individual defendants, and reversed and remanded with directions as to the other defendants.

Vincent W. Hallinan, of San Francisco, Joseph J. Bullock, of Redwood City, and Michael Riordan and C. K. Bonestell, both of San Francisco, for appellant.

Hartley F. Peart and Hadsell, Sweet & Ingalls, all of San Francisco, for respondent Kirk H. Prindle.

Redman, Alexander & Bacon, of San Francisco, Ross & Ross, of Redwood City, and Herbert Chamberlin, of San Francisco, for respondents Church of St. Matthew Mills Memorial Hospital and Ann M. MacKinnon.

STURTEVANT, J.

This is an action to recover for personal injuries. In his complaint plaintiff alleged that he was suffering from a growth on the outer surface of the abdomen; that he employed the defendant Kirk H. Prindle as surgeon to remove the growth; that he employed the defendant hospital to furnish him hospitalization; that said hospital employed the defendant Ann MacKinnon as nurse; that in performing the operation the defendants negligently administered a local anæsthetic by injecting formalin instead of some anæsthetic such as novocaine; and that he was thereby injured to his damage. He named as defendants the surgeon, the nurse, and the hospital. Each answered separately. The case was tried before the court sitting with a jury. On Thursday the jury returned a verdict as follows: "We, the jury in the above entitled cause find for the plaintiff as follows: Against Kirk H. Prindle in the sum of $ no dollars. Against Church of St. Matthew Mills Memorial Hospital, a corporation, in the sum of $10,000. Against Ann M. MacKinnon in the sum of $ no dollars." Thereupon the court directed the clerk to record the verdict. He did so. Then the court directed him to read the verdict as recorded. He did so and at the same time he asked the jury if that was its verdict. They replied it was. Then the following proceedings were had: "Mr. Hallinan: If the court please, at this time I make this motion: I move the court to return the jury to the jury room and instruct them to find a different verdict, for the reason that this verdict is void and invalid, that the jury cannot apportion the damages, that they should find a verdict against the three defendants and assess the entire sum of $10,000 against all three defendants. It can then be collected from either or any of them, they being all jointly and severally liable, but in this form it is a judgment for the plaintiff against the two defendants and no damage fixed, and against the Church of St. Matthew Mills Memorial Hospital, with the damages fixed at $10,000, and I ask that the jury be instructed that the judgment in that form is void and they should return a verdict against all three defendants for the amount of $10,000." Thereupon counsel for each defendant objected. "The Court: Now the case is over I will say that I agree with you that it is not a proper verdict to render, but it has been rendered and I shall not direct them to render any other verdict. You are now excused, members of the jury, until Friday morning at 10 o'clock." On the next day the attorney for the plaintiff repeated his motion and asked for a judgment against all of the defendants in the action for the sum of $10,000. The motion was denied. Thereupon the attorney for the defendant corporation made a motion that notwithstanding the verdict a judgment should be rendered in favor of the corporation. That motion was based on two grounds: (1) That the defendant corporation was a charitable institution, not engaged in business for a profit; and (2) as the verdict was in favor of the nurse it follows that the employer was not liable and no verdict against it could stand. The motion was granted. Thereupon the court entered a judgment: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff, T. J. Hallinan have and recover from said defendant Kirk H. Prindle the sum of no dollars, and from said defendant Ann M. MacKinnon the sum of no dollars, and that defendant Church of St. Matthew Mills Memorial Hospital, a corporation, have and recover from said plaintiff T. J. Hallinan, its costs and disbursements incurred in this action, amounting to the sum of $——— Dollars." From that judgment the plaintiff has appealed.

[1] The plaintiff contends the trial court erred in refusing its motion to amend the verdict. He claims the verdict as rendered apportioned the damages and that in a tort case the jury has no right to apportion damages. The defendants Prindle and MacKinnon assert that the verdict as rendered did not purport to apportion the damages. In this assertion we think the defendants are clearly in the right. The verdict was but an awkward statement that the plaintiff take nothing as against the two defendants Prindle and MacKinnon. The same point was made before the supreme court of Minnesota.

We are entirely satisfied with the ruling made by that court. In Royal Indemnity Co. v. Island Lake Tp., 177 Minn. 408, 225 N. W. 291, at page 292, that court said: "The verdict returned by the jury was: 'We, the jury in the above entitled action, find for the plaintiff and assess damages in the sum of none dollars.' In a case like this, there are usually sent out to the jury two printed forms of verdict, one finding for plaintiff with a blank space therein in which to insert the amount of damages found for the plaintiff, the other a verdict for defendant. The jury used the first form, simpy inserting the word 'none' in the blank space. It is clear that the intention of the jury, by the verdict returned, was to find that plaintiff was not entitled to any damages against the defendant. It had the same effect as, and was in fact though not in form, a verdict for defendant. The court might well have had the verdict corrected before being finally received and recorded. It was not, however, necessary." The court did not err in refusing to make the order requested nor in ordering judgment in accordance with its interpretation of the meaning of the verdict.

[2] The plaintiff also claims that the trial court erred in granting the motion of the defendant corporation for a judgment in its favor, notwithstanding the verdict. This objection rests on the fact that the defendant corporation had made no request that a verdict in its favor be directed. Such a request, the plaintiff contends, is a sine quo non to a motion for judgment non obstante veredicto. The defendant cites no authority supporting the ruling. A similar condition of the record confronted the court in the case entitled In the Matter of the Estate of Mary Easton, Deceased (Cal. App.) 5 P.(2d) 635. At page 636 of 5 P.(2d) the court said: "Evidently, therefore, the main purpose of the statute in requiring such a motion to be made as a condition precedent to the exercise of the court's power to render judgment non obstante veredicto is to give the party against whom the motion is directed an opportunity to introduce whatever further and additional evidence he may have at hand to overcome the grounds of the motion. Such is the apparent interpretation given the section by the decision in the Estate of Fleming, 199 Cal. 750, 251 P. 637, 638, wherein the court was considering the effect of the denial of a motion for a directed verdict based on insufficient grounds; and it was said: 'Had the motion for a directed verdict been granted on an assignment of grounds which was insufficient, and the contestant thereby deprived of the opportunity to meet objections, which should have been more precisely stated, by introducing other evidence, she would be in position to complain.' Here, as stated, no motion whatever, oral or written, was made by respondents; nor does it appear that appellants knew of the contents of the paper submitted by respondents to the court; therefore, appellants were afforded no opportunity to supply additional testimony to meet, if they could, the grounds of respondents' objections to the sufficiency of the evidence. It follows, therefore, that since respondents failed to comply with the provisions of said Code section by omitting to present a motion for a directed verdict, and the verdict was against them, the court was without authority to render judgment in their favor contrary to the verdict. All that it could do under the circumstances was to grant a new trial after the entry of judgment in conformity with the verdict." See, also, In the Matter of the Estate of Charles Yale, Deceased (Cal. Sup.) 4 P.(2d) 153.

For the reasons stated in the foregoing case we think the trial court committed error in granting the motion of the defendant corporation. The judgment in favor of Kirk H. Prindle and in favor of Ann MacKinnon is affirmed, but the judgment in favor of the defendant corporation is reversed, with directions to enter judgment in accordance with the verdict, and thereafter to hear and determine such other and further proceedings as may be necessary to a final disposition of the cause. The defendant Kirk H. Prindle and Ann MacKinnon will recover their costs on appeal, but the plaintiff will recover his costs on appeal as against the defendant corporation.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 446

STEALEY v. CHESSUM et al.

Civ. 8108.

District Court of Appeal, First District, Division 2, California.

May 12, 1932.

1. Automobiles ⇐244(6).

Evidence showed driver of automobile which struck deceased in back was negligent.

2. Automobiles ⇐244(51).

Evidence showed deceased who was struck in back by automobile was not contributorily negligent.

3. Automobiles ⇐246(60).

Refusing instruction that presumption exists that deceased used ordinary care when crossing highway and that presumption was evidence *held* error, where presumption was only evidence to refute defense of contribu-

tory negligence of deceased when struck in back by automobile.

4. Automobiles ⇐246(60).

Instruction relative to burden of showing negligence of driver of automobile in emergency *held* erroneous for failure to recite limitation that emergency was not created by driver.

Court instructed jury that, in a case where alleged negligent act of driver of automobile consists of an omission of duty suddenly and unexpectedly arising, it is incumbent upon plaintiff to show that circumstances were such that driver had an opportunity to become conscious of facts giving rise to duty and a reasonable opportunity to perform such before he can be held liable on grounds of negligence; but instruction failed to recite a due limitation "without negligence on his part" or similar language.

5. Automobiles ⇐246(4).

Refusing instruction that driver of automobile must be vigilant at all times and not assume that street is clear *held* error.

Requested instruction recited that right of driver of automobile to use of public street is in nowise superior to that of pedestrian; accordingly, driver has no right to assume that street is clear, but must be vigilant, must anticipate presence of others, and keep a proper lookout for them, and fact that he did not know that a pedestrian was on the street is no excuse for conduct which would have amounted to recklessness if he had known that such pedestrian was on the street.

6. Trial ⇐252(1).

Trial court may refuse to give any portion of requested instruction because addressed to set of facts not presented by record.

7. Automobiles ⇐218.

Pedestrian was under no duty to look behind her to ascertain danger, if any, of automobile negligently driven.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Alfred D. Stealey against George S. Chessum and another. From a judgment for defendants, plaintiff appeals.

Reversed.

Rufus H. Kimball, of San Francisco, and Ross & Ross, of Redwood City, for appellant.

Edmund Scott, of Redwood City, for respondents.

STURTEVANT, J.

This is an action to recover for personal injuries. The defendants had judgment, and the plaintiff has appealed. About 11 o'clock at night on the 29th day of November, 1930, the automobile driven by the defendant George Chessum struck Mrs. Florence S. Adams in the back, knocked her down, and so injured her that she died immediately. The accident occurred at a point about halfway between Burlingame avenue and Ralston avenue on El Camino Real, the highway leading from San Francisco to San Jose. As her sole heir, the plaintiff, her brother, commenced this action.

Except as we will mention, no vehicles were driving on the highway, and it was not obstructed by any objects preventing an unobstructed view between Burlingame avenue and Ralston avenue. Between the curbs the highway is 50 feet wide. There is a slight down grade to the south. The highway is paved and is surfaced with black asphaltum. The distance between the curb lines of the two avenues above mentioned is 350 feet. On each side of the highway is a sidewalk 4 feet wide, but the record does not disclose its condition or whether it is usable. On the western side of the highway between the sidewalk and the property line there are large eucalyptus trees. On the same side of the highway, in the tree line, there are three electroliers, one at each end of the block and one in the middle of the block. The one in the middle of the block is located approximately 20 feet south of one tree and 70 feet north from the next tree. There are buildings on each side of the highway—seven in all. On the evening of the accident it was clear until some time after the accident, when the fog came in.

At the time of the accident the deceased was 53 years of age, and had an expectancy of 16.72 years. She weighed about 115 pounds, and was 5 feet 6 inches tall. She was wearing a tan-colored coat, and had some papers and a purse in her hand. She had been in San Francisco and had come down on the bus. She was seen to alight from the bus at the northwest corner of Burlingame avenue and the highway. From that moment she was not seen again by anybody except the defendant and his companion. Those two had been in North Burlingame and were returning. They were driving south on the highway at a speed which each stated to be 30 or 35 miles an hour. At this point it may be remarked that there was evidence that the accident happened in a residence district and that the speed limit at that point was 20 miles an hour. As the automobile approached from the north, it was driven slightly on the right-hand side of the middle of the highway. When it was opposite a point approximately in the middle of the block, the driver saw the decedent 6 to 10 feet in front of him. Her back was toward him, and she was apparently walking in the same direction that he was driving. He at-

tempted to stop, but his car hit decedent, knocked her down, and from the injuries inflicted she died immediately. An examination disclosed that both legs were broken, that her neck was broken, and that her chest was crushed. The right-hand light on the automobile was broken, the right-hand fender was bent, and the hood on the engine was dented, bent, or twisted, according to the language of different witnesses. After the impact, the driver drove his automobile up to the sidewalk and stopped. The distance between the automobile and the body of the deceased was about 45 feet. The body of the deceased lay in the highway with her head resting on the curb. The point where the body lay was about 25 feet south from the electrolier hereinabove spoken of as being situated in the middle of the block. At a point about 10, 12, or 20 feet north of where the body lay the purse of the deceased was picked up. The newspapers and the hat of the decedent were also picked up somewhere north of the body, but the record does not show how far. Although the driver estimated his speed at 30 or 35 miles an hour, other witnesses testified that his speed was 45 or 50 miles per hour. There was evidence that as he drove forward he did not sound a horn, and there was no evidence to the contrary.

[1, 2] Looking back over the facts as recited above, it will be noted that there was an abundance of evidence proving or tending to prove the negligence of the driver. It will also be noted that there was no direct evidence of contributory negligence on the part of the deceased.

[3] The plaintiff complains because the trial court refused to give some of his requested instructions. Among others, the plaintiff requested the trial court to instruct the jury: "You are instructed that there is a presumption that Florence S. Adams used ordinary care for her safety as she was crossing the highway on the night she was injured. This presumption is, in itself, a species of evidence and it shall be so considered in your deliberations until and unless it is overcome by satisfactory evidence." No similar instruction was given. It is not claimed it was not sound in law. The presumption therein mentioned was the only piece of evidence that the plaintiff had which tended to refute the claim of the defendants that the deceased was guilty of contributory negligence. Under such circumstances it has been held to be error to refuse to give that instruction. Kinnear v. Martinelli, 84 Cal. App. 721, 725, 258 P. 686.

[4] On the request of the defendants the court instructed the jury: "In a case where the alleged negligent act of the driver of an automobile consists of an omission of duty suddenly and unexpectedly arising, it is incumbent upon the plaintiff to show that the circumstances were such that the driver of the automobile had an opportunity to become conscious of the facts giving rise to the duty and a reasonable opportunity to perform such before he can be held liable on the grounds of negligence." Because of the failure to recite a due limitation "without negligence on his part" or similar language, the plaintiff says the foregoing instruction is not a correct statement of the law, and it was error to so instruct the jury. That contention has been sustained by several well-considered cases; among others may be cited Vedder v. Bireley, 92 Cal. App. 52, 60, 267 P. 724; Dougherty v. Ellingson, 97 Cal. App. 87, 96, 97, 275 P. 456. The defendants reply that it is true that the violation of the statutory rules as to speed is presumed to be negligence, but they assert that they introduced evidence which wholly dispelled that negligence. They point to the fact that they stopped within 45 feet. They cite the statute (section 94 of the California Vehicle Act [as amended by St. 1929, p. 530, § 36]), which, speaking of the requirements of brakes, provides that a set is sufficient which will stop a vehicle going 30 miles an hour within eighty-three and three-tenths feet. They also assert that under the evidence they were entitled to drive 40 miles per hour and were not limited to 30 miles per hour. The answer is not sufficient. It does not in any way tend to show that an emergency arose, nor that one arose when the defendants were exercising due care. There was evidence that before the defendant driver entered the intersection of Burlingame avenue and El Camino Real he was driving at a speed estimated at 45 or 50 miles per hour, and that he so continued until the instant of the impact. Conceding that he claimed he was not going that fast, nevertheless there was no evidence that he was confronted with an imminent peril except of his own creation. It was error to give the instruction quoted under the facts of the instant case.

[5] The plaintiff requested an instruction worded as follows: "I instruct you that the right of a driver of an automobile to the use of a public street is in no wise superior to that of the pedestrian; accordingly, the driver of an automobile has no right to assume that the street is clear, but under all circumstances and at all times he must be vigilant, must anticipate the presence of others, and keep a proper lookout for them. The fact that he did not know that a pedestrian was on the street is no excuse for conduct which would have amounted to recklessness if he had known that such pedestrian was on the street." The court gave the first clause ending with the word "pedestrian" and struck out the rest. The instruction as requested was properly framed, was addressed to the evidence, and should have been given.

Meyers v. Bradford, 54 Cal. App. 157, 159, 201 P. 471.

[6] The plaintiff tendered an instruction as to the rights of one in the act of crossing a street. The court struck out the first part and gave the last part. The plaintiff claims the court erred. We think not. It might have refused to give the whole or any portion, because it was addressed to a set of facts not presented by this record.

[7] Acting on the request of the defendants, the court gave three several instructions on contributory negligence. No one of them was addressed to any facts found in the record. They were applicable to street crossing cases, but not to this case. Each one under the facts of this case necessarily implies that the decedent was bound to look back to ascertain danger, if any. No such duty rested on her. Burk v. Extrafine Bread Bakery, 208 Cal. 105, 110, 280 P. 522. Furthermore, there was no evidence that the decedent did not look back.

As shown above, the evidence tended to show that the defendant driver was negligent. There was no direct evidence of contributory negligence, and it is presumed the decedent was not guilty of contributory negligence. Under these circumstances, the error complained of in giving and refusing the above-mentioned instructions was prejudicial.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 396

PEOPLE v. PAYSEN.

Cr. 2174.

District Court of Appeal, Second District, Division 2, California.

May 10, 1932.

Rehearing Denied May 24, 1932. Hearing Denied by Supreme Court June 9, 1932.

1. Criminal law ⇐543(1).

In burglary prosecution, testimony of complaining witness given at preliminary examination *held* admissible as against objection it was hearsay (Pen. Code, § 686).

Pen. Code, § 686, provides that, where witness who has testified at preliminary examination and has been cross-examined by defendant cannot with due diligence be found within state, testimony given at preliminary examination should be received as evidence at trial.

2. Criminal law ⇐543(1).

Surprise of defendant at receiving evidence of complaining witness given at preliminary examination furnished no ground for excluding evidence (Pen. Code, § 686).

3. Criminal law ⇐543(1).

That former testimony of absent witness was ambiguous and unintelligent could not affect admissibility.

4. Criminal law ⇐912.

Where trial court has made order denying new trial, right to move for new trial has thus been exercised and exhausted.

5. Criminal law ⇐938(1).

In burglary prosecution, motion for new trial, based on newly discovered evidence, *held* properly denied, because such evidence would not have rendered different result probable, and because such evidence was known to defendant from time of preliminary examination.

Complaining witness did not appear at trial, but her testimony given at preliminary hearing was admitted. Basis for motion for new trial was affidavit of complaining witness that she did not remember having her purse after entering apartment on night in question, and that she might have lost purse before entering apartment house; but such statement was practically the same as statement in her testimony that her last recollection of having purse was when she took her key therefrom to unlock door. It was also clear that defendant knew mental uncertainty of complainant regarding when she had last seen her purse for some time before entry of his plea, and defendant's assumption, based on complaining witness having testified at preliminary hearing, that she would be at trial, did not excuse his failure to secure testimony of witness.

6. Criminal law ⇐911.

Granting new trial on ground of newly discovered evidence rests in trial court's sound discretion.

7. Criminal law ⇐945(2).

New trial should not be granted on ground of newly discovered evidence, unless showing is such as to render different result probable.

8. Criminal law ⇐1156(1).

Denial of new trial will not be disturbed on appeal, unless there appears abuse of discretion.

9. Criminal law ⇐939(1).

Defendant seeking new trial on ground of newly discovered evidence did not exercise due diligence, where witness relied upon had declared intention to leave state, and no excuse was offered for failure to secure her testimony under statute (Pen. Code, § 1335 et seq.).

10. Criminal law ⇐939(1).

Defendant is not entitled to new trial on ground of newly discovered evidence when by

exercise of due diligence evidence could have been produced at trial.

11. Criminal law ⇐938(3).

Evidence known to defendant for several months before trial cannot form basis for motion for new trial.

12. Criminal law ⇐997.

Reasons warranting denial of motion for new trial also called for denial of motion for writ of coram nobis.

13. Criminal law ⇐997.

Writ of coram nobis *held* inapplicable to errors which may be corrected by statutory remedies of appeal and motion for new trial.

14. Criminal law ⇐997.

Writ of coram nobis cannot be utilized to secure new trial on ground of newly discovered evidence, although time for moving for new trial has expired.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

John F. Paysen was convicted of burglary in the second degree, and he appeals.

Affirmed.

Larsen & Shaw, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Frank W. Stafford, of Los Angeles, for the People.

FRICKE, Justice pro tem.

Appellant was tried by a jury and convicted of burglary in the second degree, after having suffered a prior conviction of grand larceny. A motion for a new trial was denied, and thereafter appellant made a second motion for a new trial, and, that being denied, made application for a writ of coram nobis, which was also denied.

[1-3] Appellant's first assignment is that the court erred in receiving in evidence the testimony of the complaining witness given by her at the preliminary examination over the objection that such testimony was hearsay, "ambiguous and unintelligent," that the defendant was taken by surprise as he had expected the witness to be present in person, and that, had he known otherwise, he would have taken her deposition to clear up certain points in the witness' testimony. Before the testimony of the complaining witness was introduced in evidence, the prosecution, proved that this witness was outside of the state of California, to wit, in the state of Arizona, and no objection was made that such a foundation for the reading of the testimony had not been laid. The objection that such testimony was hearsay and therefore inadmissible is fully answered by the express provisions of section 686 of the Penal Code and a long line of decisions to the effect that, where a witness who has testified at the preliminary examination and has been cross-examined by the defendant cannot with due diligence be found within the state, such testimony may be read and received as evidence at the trial. The surprise of appellant at the absence of the witness would not furnish any ground for excluding such testimony, and the objections that the testimony of the witness was "ambiguous and unintelligent," if the testimony were subject to such criticism, could only affect its weight and not its admissibility. This testimony being admissible and establishing the corpus delicti, the further point of appellant that certain extrajudicial statements of the accused were received without competent proof of the corpus delicti is without merit.

[4] Appellant contends that his second motion for a new trial was improperly denied. This motion was based upon alleged newly discovered evidence. No appeal was taken from the order of September 18, 1931, denying appellant's first motion for a new trial, the notice of appeal herein having been given on November 7th, the date of the denial of the second motion. Not only is the appeal obviously one from the order of November 7th, but it came entirely too late to operate as a notice of appeal from the order denying the first motion for a new trial. Furthermore, the statement of appellant of his third point specifically shows that he is complaining only of the order denying the second motion. The point is without merit, for it is well settled in this state that, when the trial court has made its order denying a motion for a new trial, "the right to move for a new trial had thus been exercised and exhausted." People v. Ingersoll, 21 Cal. App. 763, 132 P. 1052, 1053. See, also, People v. Martin, 199 Cal. 240, 248 P. 908; People v. Prudencio, 93 Cal. App. 241, 269 P. 698; People v. Walker, 142 Cal. 90, 75 P. 658; People v. Center, 61 Cal. 191; People v. Sing Lum, 61 Cal. 538; People v. Fice, 97 Cal. 459, 32 P. 531; People v. Wessel, 98 Cal. 352, 33 P. 216. Once a motion for a new trial has been ruled upon in a criminal case and an order made either granting or denying such application, the only remedy for the party deeming himself aggrieved is by an appeal from such order, for the court is without authority to entertain a subsequent motion the object of which is to change or vacate its former order. While there is sometimes an exception to this rule in cases where the order on the motion was made inadvertently or where the defendant is not sentenced within the time provided by section 1191 of the Penal Code, and the case falls within the provisions of section 1202 of the same Code, there is nothing in the case at bar which brings it within ei-

ther of these exceptions, and the second motion for a new trial was therefore properly denied.

[5-8] The testimony of the complaining witness, Anna Porter, by whom the corpus delicti was established, was that she resided in the Mariner Arms Apartments in the city of Long Beach; that she lost a purse containing $29.95, some medicines, a fever thermometer, her driver's licenses in two states, and some other articles; that she last remembered having her purse when she returned home on the night in question and took her key out of it to enter the apartment building; that she had no distinct recollection of so doing, but that it was her universal custom to lay her purse on the mantel; that when she went to the mantel the next morning she found her key there, but no purse; that also on this morning she found her door unfastened, but that she did not definitely recall locking it the night before, and that she had given no one permission to enter her apartment or to take anything therefrom. The basis for the second motion for a new trial and the application for a writ of coram nobis is an affidavit of the complaining witness wherein she deposes that she does not remember having her purse after entering the Mariner Apartments on the night in question and that it might be possible that she lost the purse before entering the apartment house on that occasion. The latter statement as to a possibility is, of course, not a statement of fact and could have no part in determining either of the motions before the court. The statement in the affidavit that affiant did not, at the time of making the affidavit, remember having had her purse after entering her apartment, is practically and at best the same as the statement in her testimony that her last recollection of having the purse was when she took her key therefrom to unlock the door. Hence the affidavit is no more than a reiteration, in a slightly different form, of the evidence at the trial. Since this lack of recollection of the location of the purse after the complainant entered her apartment appears in her testimony at the preliminary examination, which was read at the trial, the court was warranted in denying a new trial upon two grounds: (1) That the competent portion of the evidence contained in the affidavit, had it been introduced at the trial, was not such as would have rendered a different result probable, and (2) that the evidence was not newly discovered, but was known to the defendant from the time of the preliminary examination.

[9-11] The granting of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. People v. Radz (Cal. App.) 6 P.(2d) 527; People v. Oxnam, 170 Cal. 211, 149 P. 165. A new trial should not be granted on this ground unless the showing is such as to render a different result probable [People v. Radz, supra; People v. Buckley, 143 Cal. 375, 392, 77 P. 169; People v. Ledbetter, 106 Cal. App. 109, 288 P. 832, and cases cited; People v. Malone (Cal. App.) 4 P.(2d) 287; People v. Jenkins (Cal. App.) 4 P.(2d) 799], and a denial of such a motion will not be disturbed on appeal unless there appear an abuse of discretion on the part of the trial court (People v. Oxnam, 170 Cal. 211, 149 P. 165; People v. Cook, 68 Cal. App. 186, 228 P. 733; People v. Staigers, 92 Cal. App. 628, 268 P. 923). It is clear that appellant knew the mental uncertainty of the complainant as to when she had last seen her purse for at least some time prior to the entry of his plea on May 20, 1931. The trial was several times continued and not actually begun until September 3d. In the meantime, appellant twice changed counsel, and two of the three continuances of the trial were at his request. While the short period of time between the employment of counsel who tried the case and the trial might excuse their failure to secure evidence, the burden of exercising due diligence rested upon appellant himself. He had no assurance that the complaining witness would be alive and present at the trial, other than the assumption, based on her having testified at the preliminary hearing, that she would be there. That assumption does not excuse his failure to secure the testimony of the witness. People v. Carson, 49 Cal. App. 12, 15, 192 P. 318. It also appears from the record that the witness was in the city of Long Beach and at the Mariner Apartments as late as the month of August, and no excuse is offered for the failure to secure further testimony from her, if such was desired, under the provisions of section 1335 et seq. of the Penal Code, especially since the record shows that at the preliminary examination the witness had declared that it was her intention to go to the state of Arizona. A defendant is not entitled to a new trial on the ground of newly discovered evidence when by the exercise of due diligence such evidence could have been produced at the trial (People v. Walton, 97 Cal. App. 782, 276 P. 426; People v. Staigers, supra; People v. Freeman, 92 Cal. 359, 28 P. 261; People v. Byrne, 160 Cal. 217, 116 P. 521); and evidence known to a defendant for a period of several months before the trial cannot form a basis for a motion for new trial on that ground.

[12-14] For the reasons stated, appellant's motion for a new trial was without merit. The reasons which warranted a denial of that motion on the merits also called for a denial of the motion for a writ of coram nobis. 1 Freeman on Judgments, § 94; 5 Ency. of Plead. and Prac., p. 27. This writ was also properly denied, because, "where

remedies exist by statute which did not exist at common law, the office and function of the writ are abridged thereby, and in such cases the writ is unavailable. These remedies are the right to appeal and to make a motion for a new trial, and, where they are provided by statute, to that extent an application for a writ of coram nobis cannot be entertained. It is in those cases where the defendant has been denied a trial upon the merits—in other words, where there has been no trial at all—that relief of this kind may be granted." People v. Mooney, 178 Cal. 525, 529, 174 P. 325, 327; People v. Sandoval, 200 Cal. 730, 737, 254 P. 893. The coming into existence of the remedies of appeal and motion for a new trial supplanted the ancient writ of coram nobis to the extent that this writ ceased to be applicable to those errors which may be corrected by those statutory remedies. People v. Reid, 195 Cal. 249, 255, 232 P. 457, 36 A. L. R. 1435. In the case last cited it was argued by appellant that, where the facts upon which the application for the writ of coram nobis was based were not discovered until too late to present them upon a motion for new trial, the statutory remedy should be deemed unavailable, and the writ could be resorted to. Upon this point the court said (page 257 of 195 Cal., 232 P. 457, 461, 36 A. L. R. 1435): "Where the Legislature has provided a statutory remedy which supplants in whole or in part a corresponding common-law remedy, and has appended thereto a statute of limitations different from that which governs the common-law remedy, there is presented the situation of a conflict between the common law and the statute, in which case the latter must prevail. * * * We conclude, therefore, that the existence of a statutory remedy for the wrong here complained of by motion for a new trial, precludes a resort to the common law in this behalf." It therefore appears definitely settled in this state that where, after conviction, new evidence is discovered which, had it been produced at the trial, might have rendered a different result probable, the remedy is by motion for a new trial, and, if that be denied, by an appeal from the order denying such motion; that, the Legislature having provided these remedies, the writ of coram nobis cannot be utilized in this state to secure a new trial upon the ground of newly discovered evidence, and that this rule is not affected by the fact that the time within which a motion for a new trial may be made has expired.

The judgment and orders appealed from are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

LOS ANGELES COUNTY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

CITY OF LOS ANGELES v. SAME.

Civ. 8147, 8148.

District Court of Appeal, Second District, Division 1, California.

April 22, 1932.

Rehearing Denied May 18, 1932. Hearing Denied by Supreme Court June 21, 1932.

1. Master and servant ⇐416, 417(7).

Finding of Industrial Accident Commission stands on same footing as that of judge or jury, and is not set aside if based on substantial evidence.

2. Master and servant ⇐417(7).

Review of Industrial Accident Commission's findings may be had on theory commission has no jurisdiction to make finding unsupported by evidence.

3. Evidence ⇐577½.

In hearing before Industrial Accident Commission, evidence consisting of transcript of testimony given at coroner's inquest *held* competent (St. 1917, p. 871, § 60(a).

4. Courts ⇐55.

Deputy marshal of municipal court *held* charged at all times with performance of duty as peace officer (Pen. Code, § 817; Pol. Code, § 4157; St. 1929, p. 1744, § 25a).

5. Master and servant ⇐405(4).

Evidence *held* to sustain finding that deputy marshal, stabbed while interfering with robbery while returning home after office hours, was injured in "course of employment" (St. 1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

6. Master and servant ⇐404.

Industrial Accident Commission in making award is not bound by conventional rules of evidence.

7. Master and servant ⇐361.

Notwithstanding Compensation Act enjoins on courts liberal construction of its terms, courts may not ignore common law and other definitions in determining who are "employees" (St. 1917, p. 877, § 69).

8. Master and servant ⇐364.

Payment of municipal court attachés by county under Municipal Court Act does not make county their employer (St. 1925, p. 656, § 22).

9. Master and servant ⇐361.

Relationship essential as basis for workmen's compensation award is one at least

analogous to that of master and servant (Civ. Code, §§ 1965, 2009).

10. Master and servant ⇐364.

Deputy marshal, attaché of municipal court of city of Los Angeles, created by ordinance under Constitution, *held* employee of city, not county, notwithstanding county paid salary under statute (Const. art. 6, § 11, amended in 1924; St. 1925, pp. 655, 656, §§ 18, 19, 22).

Proceedings under the Workmen's Compensation Act by William T. Calderwood and another, claimants, opposed by the County of Los Angeles and the City of Los Angeles, alleged employers. To review an award of the Industrial Accident Commission of the State of California, the County of Los Angeles and the City of Los Angeles appeal separately.

Award annulled as to the County of Los Angeles, and affirmed as to the City of Los Angeles.

Hearing denied by Supreme Court; SHENK, CURTIS, and PRESTON, JJ., dissenting.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for petitioner County.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Willis L. Grafton, Deputy City Atty., all of Los Angeles, for petitioner City.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

TAPPAAN, Justice pro tem.

This matter is presented here on two writs of review wherein the county of Los Angeles and the city of Los Angeles are the respective petitioners, seeking a review of an award made by respondent Industrial Accident Commission in favor of respondents William T. Calderwood and Emma K. Calderwood, and charging petitioners jointly with the payment of the indemnity awarded.

The facts, in so far as they are material here, are briefly as follows: Perman C. Calderwood, the son of respondents William T. and Emma K. Calderwood, was killed at about the hour of 7 o'clock p. m., December 22, 1930, by a stab wound inflicted by a person who had robbed a malt store in the city of Los Angeles. Calderwood, at the time of his death, was employed as a deputy marshal of the municipal court established in the city of Los Angeles. His duties as deputy marshal for more than one year before his death had been the serving of processes and warrants delivered to him for service by the marshal's office. On the day of his death it would appear that he had left the marshal's office at about 5 o'clock in the afternoon, and was on his way to his home when killed.

There are presented here two questions: First, did the injury for which indemnity was awarded arise out of and in the course of his employment; and, second, who was the employer of deceased at the time of his death? Both of these questions involve definitions of the term "employment."

The finding made by the commission on this subject reads as follows: "Perman Carlton Calderwood, age 35, while employed on December 22, 1930, as a deputy marshal in the municipal court jointly by the County of Los Angeles, a body corporate and politic, and City of Los Angeles, a municipal corporation, sustained injury occurring in the course of and arising out of his employment when while apprehending one then engaged in a felonious assault and robbery upon a citizen, he was stabbed, proximately resulting in death on said date."

[1, 2] "The finding of the commission in such matters stands upon the same footing as the finding of a judge, or the verdict of a jury, and is not to be set aside if there is any substantial evidence upon which it can rest. Pigeon's Case, 216 Mass. 51, 52, 102 N. E. 932, Ann. Cas. 1915A, 737. * * * A review of the findings in such cases may be had, however, on the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it. Dearborn v. Industrial Accident Commission, 187 Cal. 591, 203 P. 112; Southern Pacific Co. v. Industrial Accident Commission, 177 Cal. 378, 380, 170 P. 822." Pruitt v. Industrial Acc. Com., 189 Cal. 459, 466, 209 P. 31, 34. A very clear and concise statement of the first question presented here is made in the case of Enterprise Foundry Co. v. Industrial Acc. Com., 206 Cal. 562, 275 P. 432. At page 563 of 206 Cal., 275 P. 432, the following language is used: "That the injury arose or grew out of decedent's employment may be conceded; whether at the time of the injury he was, in fact, 'performing service * * * incidental to' and was 'acting within the course of his employment' (Workmen's Comp. Act [Deering's Gen. Laws 1923, Act 4749, p. 1714] § 6), is the real point at issue. It is essential to the power to make an award, and the burden is upon an applicant for compensation to show not only that the injury arose out of, but also that it occurred within, the course of the employee's employment."

[3] There is ample and uncontroverted evidence to establish the following facts: That the deceased at the time of his death was regularly employed as a deputy marshal of the municipal court established in the city of Los Angeles; that he was stabbed to death while attempting to arrest a person engaged in the robbery of a citizen; that the work to which he was assigned as deputy marshal at the time of his death consisted of the service of processes and warrants given to him for service by the marshal; and that at the time

of his death he had completed the usual work of the day and was on his way home. The evidence of just what occurred at the time of the death of deceased is meager in extent, and uncertain and unsatisfactory as to many material details. It consists in large part of the transcript of the testimony given before the coroner at the inquest held on the body of the deceased. Evidence of this character is competent in proceedings of this special nature. Section 60 (a), Workmen's Compensation Act, c. 586, p. 871, St. 1917; Employers' L. A. Corp. v. Industrial Acc. Com., 92 Cal. App. 119, 126, 267 P. 922. There were no eyewitnesses who saw the blow struck, nor did the deceased make any statement before his death. The only direct evidence as to the circumstances surrounding the death of deceased is found in the testimony given by two witnesses at the coroner's inquest. One of these witnesses, who was at the time in an automobile in the street and near the scene, testified in part as follows: "First thing I knew I thought they had slugged this deputy or officer * * * Calderwood * * * I saw him scuffling around." The other witness, a police officer, who arrived on the scene some time after the death of Calderwood, testified: "Calderwood just happened to be at the scene * * * he thought it just a fight and tried to separate them * * * one ran and he took charge of the other."

There is no evidence that the deceased was engaged, at the time of his death, in the performance of any work assigned to him by the marshal, nor that he had been so engaged at any time since he left the marshal's office to go home. There is no evidence that deceased was at the time of his death engaged in the performance of any of the duties for which he was specifically employed as deputy marshal, nor is there any direct evidence that at that time he was assuming to act as a peace officer. The basic reason for the enactment of the Workmen's Compensation Act has been clearly defined by our courts. In the case of Employers' L. A. Corp. v. Industrial Acc. Com., 179 Cal. 432, 436, 177 P. 273, 274, in commenting upon that subject, our Supreme Court used the following language: "Under that law we are fixing a liability which it is the policy of the law to place upon the business, or industry, in which the employee is engaged, by placing the responsibility for indemnity upon the employer." But the policy of the law, as thus broadly stated, is subject to the limitation that "the burden is upon an applicant for compensation to show not only that the injury arose out of, but also that it occurred within, the course of the employee's employment." Enterprise Foundry Co. v. Industrial Acc. Com., supra.

[4-6] Respondents contend, and with such contention we agree, that deceased was, as a deputy marshal of the municipal court, charged at all times with the performance of the duties of a "peace officer." In the enumeration of peace officers found in section 817 of the Penal Code is that of "marshal." The duties of marshals are fixed by section 25a of the Municipal Court Act (St. 1929, p. 1744) as those of sheriff. Section 4157 of the Political Code defines the duties of sheriff, and among such duties are to preserve peace, prevent and suppress any affrays and breaches of the peace. That an affray had taken place prior to the death of deceased is a conceded fact. There is some evidence to the effect that the deceased took charge of one of the robbers at a time before his death. The evidence as to what deceased was doing at the time of his death is circumstantial and involves a question of fact. From the evidence presented, together with the inferences deducible therefrom, it cannot be said that there is no evidence sufficient to support the finding that the injury occurred in the course of deceased's employment. Pruitt v. Industrial Acc. Com., supra; Hillen v. Industrial Acc. Com., 199 Cal. 577, 580, 250 P. 570. This is especially true when consideration is given to the fact that the commission, in making the award, is not bound by conventional rules as to evidence. Employers' L. A. Corp. v. Industrial Acc. Com., 92 Cal. App. 119, 126, 267 P. 922, supra.

The remaining question presented here involves the question as to who was the employer of the deceased and is charged with the duty of paying the award made by the commission. Both the county of Los Angeles and the city of Los Angeles deny the employment and liability for indemnity, and suggest in their briefs that the relationship and liability rests upon the other. The commission adopted the precedent established by Solomon, and held both liable for the indemnity. Both the city of Los Angeles and the county of Los Angeles have filed petitions asking a review of the award and, by stipulation, the proceedings upon both petitions were consolidated and submitted to be considered as one proceeding before this court.

[7] The Workmen's Compensation Act in section 8 (a) (St. 1917, p. 835) defines an employee as: "Every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, and all elected and appointed paid public officers. * * *" Although the act (section 69) enjoins upon the courts a liberal construction of its terms, the courts may not ignore the common law and other definitions in determining who are, and who are not, employees, but may make use of such sources of information to decide what the Legislature intended by the language made use of. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 813, 159 P. 721.

In the case of Simpson v. Payne, 79 Cal. App. 780, 251 P. 324, where the board of supervisors of Los Angeles county sought to fix the salary to be paid to an attaché of the municipal court established in the city of Los Angeles, it was held that the board was without power to fix the salary of such court attaché, and pointed out that the status of clerks and other attachés of the municipal court must not be confused with that of the county clerk and his deputies, who are county officers. This case appears to be the only case reported involving the status of attachés of the municipal court.

[8] There is ample authority, aside from the case just cited, to sustain the contention of the county of Los Angeles that it was not the employer of deceased. For a clear statement of this phase of the matter under consideration, it is necessary briefly to refer to acts under which the municipal court was created. In 1924 an amendment to article 6, § 11, of the Constitution made provision for the establishment of municipal courts, and delegated to the Legislature the power to prescribe, by general law, the manner in which, the time at which, the term for which, the judges, clerks, and other attachés, except where such matters are otherwise provided for in the amendment to the Constitution, shall be elected or appointed. The power was also granted to fix the salary of such officers and to provide for its payment. Pursuant to the powers granted by this constitutional amendment, the Legislature enacted the Municipal Court Act (St. 1925, p. 648). The charter of the city of Los Angeles, in section 429, made provision for the establishment of a municipal court in the city of Los Angeles, and the city council of the city of Los Angeles, by ordinance, created and established such court within the city. The creation of the court was optional with the city of Los Angeles, and, in its creation and establishment, the county of Los Angeles played no part, except that it re-formed the township lines of certain existing townships to exclude city territory therefrom. The Municipal Court Act, § 22, provided that the salaries of the judges, clerks, and marshals of the municipal court shall be paid by the county, and that the county shall provide the court with quarters and necessary supplies. Section 1463 of the Penal Code makes provision for partial reimbursement of the county for such expense out of the fines collected in the municipal court. In the case of Simpson v. Payne, supra, it was held, as hereinbefore noted, that the county had no control over the salaries of attachés of the municipal court. The contention of the city that, from the fact that the Legislature has placed upon the county the burden of the payment of the salaries of the attachés of the municipal court, the county must be deemed the employer of the deceased, is without justification. Although, in most cases where the contract of employment exists between individuals, the source of payment as a rule is one of the indicia of the existence of the relationship, in cases involving governmental functions, this does not always seem to be true. In the case of the salary of a judge of the superior court, unquestionably a state officer, part of his salary is paid by the county.

[9] The relationship which must exist as the basis of the awarding of indemnity under the Workmen's Compensation Act is one that is always at least analogous to that of master and servant. Gabel v. Industrial Acc. Com., 83 Cal. App. 122, 256 P. 564; Civ. Code, §§ 1965 and 2009.

In Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 417, 156 P. 491, 495, the court quotes Wood on Master and Servant, § 317, with approval, and as follows: "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct." It is obvious that, where one has never exerted or had the right to exert, the slightest degree of control over one injured, he is not answerable under an award for indemnity. Pruitt v. Industrial Acc. Com., supra.

[10] Applying the principles just referred to, it is clear that the deceased was not an employee of the county of Los Angeles. As has been pointed out, the county played no part in the establishment of the municipal court. The county made no contract with the deceased. Under section 18 of the Municipal Court Act, supra, the marshal of the municipal court appoints the deputy marshals. The marshal is appointed by the judges of the municipal court, who are elected by the voters of the city of Los Angeles. The section of the Municipal Court Act just mentioned provides that the marshal, in the appointment of deputies, shall take their names from an eligibility list furnished him by the civil service commission of the city of Los Angeles.

The right to discharge is of importance in this regard. "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right * * to end the service whenever he sees fit to do so." Press Publising Co. v. Industrial Acc. Com., 190 Cal. 114, 120, 210 P. 820, 823.

Section 19 of the Municipal Court Act, supra, provides that the deputy marshal shall hold office during good behavior, and that he may be discharged by the appointing officer, subject to the benefit of any rules affecting such discharge that may be provided under the civil service provisions of the city charter. The right to employ, control, and dis-

charge the deceased was a function devolving upon the city of Los Angeles, and it must be held answerable for the indemnity awarded. Although the constitutional amendment providing for the establishment of the municipal court granted plenary power to the Legislature to prescribe the functions and duties of the court and its officers, and to change them from time to time, there is nothing in the record here to show that the Legislature has attempted to exercise that control in the case of the deceased. This power, dormant in the state, has been delegated to the city of Los Angeles, and assumed and exercised by it. The deceased was injured while under the control and direction of the city of Los Angeles, and in the performance of a duty which devolved upon him as a result of his employment by the city of Los Angeles.

The award of the commission, in so far as it charges the county of Los Angeles, is annulled; as to the city of Los Angeles it is affirmed.

We concur: CONREY, P. J.; YORK, J.

123 Cal.App. 460

MENVEG v. FISHBAUGH et al.

Civ. 8252.

District Court of Appeal, First District, Division 2, California.

May 13, 1932.

1. Parent and child ⇐12.

Finding owners of realty were informed of acts of their son in making sale and terms thereof, and approved such acts in writing, *held* supported.

2. Frauds, statute of ⇐158(4).

Finding sellers' escrow instructions were signed by owners and forwarded to their agent *held* supported.

3. Principal and agent ⇐166(1).

Ratification, to be binding, must have been made with full knowledge of material facts (Civ. Code, §§ 1624, subd. 5, 2307).

4. Frauds, statute of ⇐116(10).

That owners signed and acknowledged deed and also signed sellers' escrow instructions, setting forth terms of sale contract, and delivered them to their agent, *held* to meet requirement that ratification of unauthorized sale by agent be in writing (Civ. Code, §§ 1624, subd. 5, 2307, 2310).

5. Principal and agent ⇐175(3).

Ratification of agent's unauthorized act is equivalent in effect to previous authorization (Civ. Code, §§ 1624, subd. 5, 2307).

6. Principal and agent ⇐145(2).

Contract of agent who deals in his own name without disclosing that of his principal is contract of, and binding on, principal.

7. Frauds, statute of ⇐103(1).

Generally, letter or telegram is sufficient memorandum to take case out of statute of frauds.

This is so, though it be addressed to writer's agent or to third person.

8. Vendor and purchaser ⇐214(2).

Purchaser may assign contract for purchase of realty without vendor's consent, in absence of restrictions against such assignment.

9. Principal and agent ⇐184(1).

Generally, judgment cannot be had against both principal and agent.

10. Principal and agent ⇐184(1).

Where, in action for specific performance, court found that owners delivered deed to agent, and that agent or his attorney still had possession of deed, judgment against both owners and agent *held* justified.

Judgment against both owners and agent was justified, since the court had right under evidence to require agent to deliver the deed to the purchaser.

11. Specific performance ⇐131.

Where, at date of rendition of judgment of specific performance, it was impossible to determine amount of escrow fee, and other expenses which were to be deducted from purchase price, court properly left matter open to future adjudication.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Emil L. Menveg against Rufus H. Fishbaugh and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

G. C. DeGarmo and H. B. Cornell, both of Los Angeles (Winthrop M. Crane, of Los Angeles, of counsel), for appellants.

John A. Jorgenson, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This is an action for specific performance. Judgment was rendered in favor of plaintiff, and from this judgment defendants have appealed.

Substantially, the facts are as follows: On February 14, 1927, appellants Rufus H. Fishbaugh and Rosella S. Fishbaugh, residing at Markle, Ind., were the owners of two certain lots in the city of Wilmington, Los Angeles county, Cal., and on that day appellant Ernest C. Fishbaugh, the son of the said Fishbaughs,

without the knowledge of his said parents, signed a written contract by the terms of which he agreed to sell to respondent the said two lots for the sum of $4,000.

Respondent signed the said contract as purchaser. It was also signed by T. C. Thompson & Co., by E. A. Murphey, as agent. At the time this agreement was executed Ernest Fishbaugh was paid $100, and same was credited to respondent as a deposit on account of said purchase price.

On the same day this contract was signed Ernest Fishbaugh sent a telegram to his father stating that he had sold the lots for $4,000 and for him to send deeds and papers at once, and on the next day he received an answering telegram from his father congratulating him on the sale, and stating that he would send deed at once. The deed referred to in this telegram was the deed by which Rufus Fishbaugh and wife had acquired title to said lots. Shortly thereafter Rufus Fishbaugh mailed this old deed and guaranty of title to his son at Los Angeles.

On February 20, 1929, L. M. Volker, the secretary of Ernest Fishbaugh, mailed said documents to Thompson & Co. On February 23, 1929, Thompson & Co. mailed a letter to Rufus Fishbaugh, addressed to him at his home in Indiana, in which they acknowledged receipt of the said deed and title guaranty covering the two lots in Wilmington which they had sold through his son and stating that they had placed the escrow instructions with the Bank of Italy, Wilmington branch, under escrow No. 5229, and that said bank was on that day sending them seller instructions and papers for their signatures. On February 25, 1929, W. M. Stamp, assistant cashier of said bank, mailed a letter to Rufus Fishbaugh inclosing sellers' escrow instructions and a deed for said lots, with request that said Rufus Fishbaugh and wife sign and acknowledge the said deed, and stating that, as soon as he received back said documents, he would proceed to close said escrow. On March 6, Thompson & Co. sent a telegram to Rufus Fishbaugh, in which they notified him that said bank had not received back the said documents, and, on March 7, Thompson & Co. received an answer to their telegram from Rufus Fishbaugh in which he stated that said documents were mailed to his said son on February 28, 1929.

On March 7, 1929, Ernest Fishbaugh sent a telegram to his father, in which he stated that he had received a better offer for said lots and for his father to wire him at once that he had changed his mind and did not desire to sell, and on March 8, 1929, Rufus Fishbaugh wired back to his son that he had changed his mind and not to sell said lots.

On March 8, Ernest Fishbaugh wrote Thompson & Co. that his father had changed his mind about selling said lots, and inclosed check for $100 to reimburse them for the deposit made.

[1] This check was returned to Ernest Fishbaugh. It is not disputed that respondent has performed all of the conditions and promises to be performed in said contract upon his part, and has offered to pay appellants the balance of the purchase price and has tendered same into court. Appellants contend that certain findings are not supported by the evidence, namely, that the finding of the court that appellants Rufus Fishbaugh and wife were at all times informed of the acts of Ernest Fishbaugh in making the sale of said real estate to respondent and the terms thereof and approved all of such acts in writing. This contention cannot be sustained for the reason that, not only was Rufus Fishbaugh notified by telegram from his son that the lots were sold for $4,000, but he and his wife received and signed these sellers' escrow instructions and signed and acknowledged the deed conveying the said lots to the Toro Company, Inc., this company being a holding company in which respondent was interested and which at his request was substituted as grantee. These documents were mailed by Rufus Fishbaugh to his said son, were received by him, and through his secretary were transmitted to appellants' attorney, G. C. De Garmo. At the trial respondent requested of said De Garmo that he produce said documents, which he refused to do, merely stating that he did not have them.

[2] Appellant claims that the finding that the sellers' escrow instructions were signed by Rufus Fishbaugh and wife, and that they forwarded them to their said son, is not supported by the evidence. A review of the testimony will show that this finding is sufficiently supported.

[3-5] The next contention of appellants is that Ernest Fishbaugh at the time he signed the contract had no authority either written or oral from his parents to sell the said lots or to enter into any contract for their sale. While it is true that there is no evidence that Ernest Fishbaugh had any written authority from his parents to enter into an agreement for the sale of said lots, and therefore under the provisions of subdivision 5 of section 1624 of the Civil Code such agreement would be invalid and not binding upon his parents still the law is well settled that such agreement may be rendered valid and binding by subsequent ratification. Civ. Code, § 2307, 1 Cal. Jur. 766. The ratification to be binding must have been made with full knowledge of all the material facts. Promis v. Duke, 208 Cal. 420, 427, 281 P. 613; 1 Cal. Jur. 777.

The court found that appellants Rufus Fishbaugh and wife were at all times informed of the acts of their said son in making the sale of said lots and of the terms thereof and approved said acts in writing. This finding is supported by the telegrams between Rufus Fishbaugh and son and by the letter and sellers' escrow instructions sent

Rufus Fishbaugh by said Stamp, the assistant cashier of said bank. The court was also justified by the evidence in finding that Rufus Fishbaugh and wife signed the sellers' escrow instructions and the grant deed forwarded to them by said Stamp, and that the said sellers' escrow instructions and grant deed were sent to and received by their said son. By section 2310 of the Civil Code it is provided that a ratification can be made only in the manner that would have been necessary to confer original authority for the act ratified. In other words, the ratification must be in writing and signed by the party or parties so ratifying. The telegram of the son stating that he had sold the lots for $4,000 and the answer thereto congratulating him upon the sale, and the fact that Rufus Fishbaugh and wife signed the sellers' escrow instructions and signed and acknowledged the deed which they sent to their son for delivery in escrow, would seem to meet this requirement. There was also the telegram from Rufus Fishbaugh to Thompson & Co., who were representing the son in this sale, stating that the deed and escrow instructions had been mailed to his son.

Appellants contend that, as there was no delivery of the documents signed by Rufus Fishbaugh and wife to respondent or to the escrow holder, there was in fact no ratification, and in support thereof cite Zellner v. Wassman, 184 Cal. 80, 193 P. 84, 87. In that case the court used the following language: "It has been held in this state that an undelivered deed cannot be regarded as a sufficient memorandum of an oral agreement for the sale of land therein described when the deed is silent as to the terms of the alleged agreement and merely conveys the land from one party to another. Swain v. Burnette, 89 Cal. 564, 570, 26 P. 1093." In the case now under consideration Rufus Fishbaugh and wife, not only signed and acknowledged the deed, but they also signed the sellers' escrow instructions which fully and clearly set forth a memorandum of the terms of the said contract, and delivered them to their said son. This met the requirement that the ratification must be in writing. And such ratification is equivalent in effect to a previous authorization. Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 P. 737; Ballard v. Nye, 138 Cal. 588, 597, 72 P. 156; Central Savings Bank v. Coulter, 72 Cal. App. 78–87, 236 P. 956.

[6] The contract in the instant case was signed by the son as the seller of said land, but the rule is well established in this state that the contract of an agent who deals in his own name without disclosing that of his principal is the contract of the principal, and the principal is liable thereon. 1 Cal. Jur. 856; Central Savings Bank v. Coulter, supra.

[7] Appellants invoke the aid of the statute of frauds, but under the facts proven in this case we see no merit in this contention. The general rule is that a letter or telegram is a sufficient memorandum to take the case out of said statute, though it be addressed to the writer's agent or to a third person. 20 Cyc., 255; Moss v. Atkinson, 44 Cal. 3.

[8] A contract for the purchase of real estate is assignable by the purchaser (25 Cal. Jur. 698) and can be assigned without the consent of the vendor (Laack v. Dimmick, 95 Cal. App. 456–459, 273 P. 50, and authorities cited), unless there are restrictions against such assignment.

[9, 10] The court found that respondent had performed all the conditions and promises on his part to be performed in said agreement and offered to pay appellants the balance of the purchase price aforesaid and tendered the same in court. There is no contention upon the part of appellants that the court erred in this finding. They claim, however, that the court erred in rendering judgment against Ernest Fishbaugh. As a general proposition, a judgment cannot be had against both the principal and agent, but in this case the court found that the deed executed by Rufus Fishbaugh and wife was delivered by them to Ernest Fishbaugh, and the evidence was to the effect that it still remains in the possession of Ernest Fishbaugh or his attorney.

Under these circumstances we think the court had the right to require of him, by its judgment, that he deliver the said deed to respondent.

[11] The judgment sets forth that the court is unable to determine in this action the amount of the deduction on account of the costs of one-half of the escrow fee, title charges in continuing title, and other incidental expenses in their behalf, and that, if respondent pays said charges, he may recover same hereafter in an independent action. Appellants contend that this part of the judgment is erroneous for the reason that it permits the court to decree the recovery in the future of a speculative contingent unliquidated sum. Respondent produced in evidence a copy of the sellers' escrow instructions, the original of which was signed by Rufus Fishbaugh and wife, which stated that an amount equal to one-half of the escrow fee, title charges in continuing title to date, drawing documents, and other incidental expenses of the escrow, were to be deducted from the purchase price of said lots.

By reason of the fact that at the date of the rendition of the judgment it was impossible to determine the amount of these items, or to offer proof of same, we are of the opinion that the court could not do otherwise than leave these matters to future adjudication.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

PEOPLE v. BULLOCK.

Cr. 2150.

District Court of Appeal, Second District, Division 1, California.

May 4, 1932.

Rehearing Denied May 18, 1932. Hearing Denied by Supreme Court June 2, 1932.

1. False pretenses ⇐51.

Forgery ⇐47.

In prosecution for forgery and issuing checks without sufficient funds, whether all instruments allegedly written by defendant were by same person *held* for jury.

2. Constitutional law ⇐55.

Legislature has power to create presumptions in law of evidence.

3. Constitutional law ⇐311.

Statute making notice of protest of check presumptive evidence of knowledge of insufficiency of funds *held* not to deny due process (Pen. Code, § 476a, as amended by St. 1929, p. 1940).

4. Criminal law ⇐398(1), 444.

In prosecution for issuing checks without sufficient funds, protests authenticated by signature of notary who executed them and having attached his seal of office and being original documents and not copies *held* proper in form (Pen. Code, § 476a, as amended by St. 1929, p. 1940; Civ. Code, §§ 1182, 3233 et seq.; Code Civ. Proc. § 1875, subd. 7).

5. Criminal law ⇐1036(1).

Objection to form of instrument introduced in evidence made for first time on appeal came too late.

6. False pretenses ⇐49(1).

Evidence showing defendant withdrew funds from bank on check given without sufficient funds sustained conviction (Pen. Code, § 476a, as amended by St. 1929, p. 1940; Code Civ. Proc. § 1963, subds. 2, 3).

7. False pretenses ⇐49(1).

In prosecution for issuing checks without sufficient funds, evidence showing defendant attempted to withdraw funds from bank account opened by him with checks given without sufficient funds sustained conviction (Pen. Code, § 476a, as amended by St. 1929, p. 1940; Code Civ. Proc. § 1963, subds. 2, 3, 20).

8. False pretenses ⇐14.

In issuing checks without sufficient funds, it is immaterial whether financial detriment is suffered (Pen. Code, § 476a, as amended by St. 1929, p. 1940).

In issuing checks without sufficient funds, it is immaterial under Pen. Code, § 476a, as amended by St. 1929, p. 1940, whether financial detriment be suffered; gist of the offense being intent with which the check was drawn or delivered and knowledge of the person issuing it that he was without funds or credit in the bank upon which the check was so drawn.

9. False pretenses ⇐39.

Defendant issuing checks without sufficient funds is presumed to know that checks deposited by him in bank would be returned unpaid (Pen. Code, § 476a, as amended by St. 1929, p. 1940; Code Civ. Proc. § 1963, subds. 2, 3).

10. False pretenses ⇐42.

In prosecution for issuing checks without sufficient funds, evidence that purpose was to show banks desirability of checking system perfected by defendant *held* inadmissible (Pen. Code, § 476a, as amended by St. 1929, p. 1940).

Such evidence was inadmissible, since that the secondary purpose of a criminal act is lawful is not a matter of defense.

CONREY, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Jay Bullock, alias J. McCanless, was convicted of issuing checks without sufficient funds and forgery, and he appeals.

Affirmed.

William W. Larsen and Leiland R. Shaw, both of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

TAPPAAN, Justice pro tem.

The defendant was tried upon four counts of issuing checks without sufficient funds and two counts of forgery. The jury's verdict was guilty upon all six counts. This appeal is from the judgment on the verdicts and from the order of the court denying defendant's motion for a new trial.

[1] The evidence discloses that the defendant made use of the same general plan in all the transactions involved in the charges made against him. In each instance the defendant opened a checking account with a bank by depositing with the bank a check drawn by him upon a bank that was without the state of California. Some of these checks so deposited purported to be certified by the bank upon which they were drawn. In some cases of the accounts so opened by the defendant, he returned and attempted to draw against the account. In one instance he did withdraw funds from such an account. In all the deposits so opened by defendant, the checks with which the accounts were opened were in due course of business returned unpaid and duly protested. The accounts in the several banks so opened by defendant, no two

in the same institution, were opened in different names, and different addresses were given. The prosecution introduced testimony that the checks and other instruments alleged to have been written by defendant were all written by the same person. The defendant produced a fellow resident of the county jail, who testified that they were not written by the same person. The question of the verity of this expert testimony is one of fact for the jury.

From an examination of the record here, there is found ample evidence to support all of the verdicts rendered as against defendant, and to this evidence defendant presents objection only to that phase of the evidence involving the question as to the fact that the various checks presented by defendant were fictitious and drawn against nonexistent funds. The prosecution in all instances, to support this necessary element of the charges, introduced in evidence "Protests" of the several instruments. This method of proof of this fact in actions of a civil nature has been sanctioned from time immemorial. It is recognized in such cases by both common law and statutory enactment. In matters involving criminal charges, section 476a of the Penal Code, as amended in 1929 (St. 1929, p. 1940), made provision for this class of evidence. The constitutionality of this section is here attacked by defendant. The section referred to reads in part as follows:

"Where such check, draft or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be *presumptive evidence* of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

"The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depositary or person or firm or corporation for the payment of such check, draft or order." (The section as enacted was not italicized.)

[2, 3] Defendant states his position as follows: "Our contention that the defendant was deprived of the right to due process of law is based wholly upon the fact that the defendant, upon trial, was not confronted by the witnesses against him: that is to say, those witnesses whom the State must necessarily have introduced in order to prove the charges made."

The contention as advanced by defendant here denies the power of the Legislature to provide for and create presumptions in the law of evidence. This power is now universally recognized by the courts, both state and federal. In the case of Casey v. United States, 276 U. S. 413, at page 418, 48 S. Ct. 373, 374, 72 L. Ed. 632, it is said in this connection: "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government." That defendant had a deposit in some banks situated at a distant place and that he had on deposit with such banks sufficient funds to pay the check that he drew thereon were facts that were peculiarly within defendant's knowledge. "The general power of the Legislature to create legal presumptions of evidence and also presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof, are fully considered in Casey v. United States and cases cited therein. The law, as therein observed, is full of presumptions. Nor are we forced, in sustaining the legislation in the instant case, to go as far as courts may properly go, as was said in Yee Hem v. United States [268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904], supra: 'If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute.' Citing Dunlop v. U. S., 165 U. S. 486, 41 L. Ed. 799, 17 S. Ct. 375; Wilson v. U. S., 162 U. S. 613, 40 L. Ed. 1090, 16 S. Ct. 895. [See, also, Rose's U. S. Notes.]" People v. Osaki, 209 Cal. 169, 194, 286 P. 1025, 1035. The quoted decision, Yee Hem v. U. S., is to be found at 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904. This doctrine was approved also in the cases of People v. Bruno, 209 Cal. 782, 286 P. 1037, and People v. Guzman, 209 Cal. 783, 286 P. 1037.

[4, 5] The Legislature in amending section 476a of the Penal Code was, without doubt, actuated by the decision of the Supreme Court in the case of People v. Frey, 165 Cal. 140, 131 P. 127, 129. In this the doctrine of ab inconvenienti was urged by the prosecution, and, in commenting upon that argument, the court said: "If practical difficulties are involved, that is a matter for legislative adjustment." The defendant objects that the notices of protest were not in proper form. This court has examined the notices of protest introduced at the trial and made exhibits therein. The protests are in all instances in a form that complies both with the law of the state wherein they were made and executed, and also with the law of this state. Civ. Code, § 3233 et seq. They were all properly authenticated by the signature of the notary public who executed them, and in all cases, the notary public has attached to them his seal of office. Our courts are required to take judicial notice of the seals of notaries public. Code Civ. Proc. § 1875, subd. 7. The instruments introduced in evidence were the original documents and not copies. No statute requiring any further authentication of these instruments other

than the signature and seal of the notary has been cited to the court or found by this court. The proof of instruments in this manner is not new or novel. Civ. Code, § 1182. In any event, as defendant at the time of trial failed to make any specific objection to the form or sufficiency of the notices, he may not now and for the first time make that objection. Pratt v. Pratt, 43 Cal. App. 261, 278, 184 P. 956.

[8-9] Defendant urges that the intent to defraud, an element of the crimes with which defendant stands charged, is not established by the evidence. In the two cases where defendant is charged with forgery, the evidence establishes that defendant withdrew substantial sums as against the checks. In the other cases, there is evidence of a substantial character that defendant attempted to withdraw funds from some of the accounts opened by him. Under section 476a of the Penal Code, it is immaterial whether financial detriment be suffered; the gist of the offense is the fraudulent intent with which the check was drawn or delivered and knowledge by the person issuing it that at the time he was without funds or credit in the bank upon which the check was so drawn. People v. Wilbur, 33 Cal. App. 511, 165 P. 729; People v. Hamby, 55 Cal. App. 37, 202 P. 907; People v. Cortze, 108 Cal. App. 111, 290 P. 1083. The evidence was sufficient to support the jury's verdict upon this question of fact. There is a presumption that an unlawful act was done with an unlawful intent, and that a person intends the ordinary consequences of his voluntary act. Code Civ. Proc. § 1963, subds. 2, 3. The defendant must have known that the ordinary course of business would be followed by the banks, and that the checks deposited by him would return unpaid. Code Civ. Proc. § 1963, subd. 20.

[10] The defendant at the time of trial offered to prove that the ultimate purpose of his transactions with the banks was to impress upon those institutions the desirability of a checking system perfected by him. There was no error in the exclusion of this evidence. That the secondary purpose of a criminal act is lawful is not a matter of defense.

The record fails to disclose any error by the court in the matter of cross-examination of defendant's witnesses. There was no abuse of discretion by the court in that regard.

The judgment and order appealed from are affirmed.

HOUSER, J. (concurring).

I reluctantly concur in the judgment. My consent to the affirmance of the judgment has resulted solely from the compelling force of the precedents as established by the cases to which, in the opinion of my associate, attention has been directed. It is clear that the constitutional guaranty of "due process of law" is in great danger of being set at naught. With but slight extension of the rule, either as promulgated by the statute, or as judicially announced preceding its enactment, in any criminal prosecution in which the district attorney may find it difficult to produce evidence of the guilt of the defendant, he may invoke the doctrine of "ab inconvenienti" and thus shift to the defendant the entire burden of establishing his innocence. The formerly time-honored but now not greatly respected rule of law which requires the prosecution to prove beyond a reasonable doubt every essential element of the crime of the commission of which the defendant is charged would appear to have been given a construction which would seem to be wholly at variance with the plain language of the ordinary rule and completely out of harmony with ancient judicial precedents. It is but a short step backward to a former procedure which permitted prosecution on mere hearsay information, and on which, in the absence of the most positive affirmative proof of innocence, the accusation itself was sufficient to sustain a judgment of conviction. To my mind, the trend of judicial utterance is too much toward the abrogation of many of those constitutional principles which affect human rights and which were most dearly obtained. With the destruction of the doctrine of "burden of proof on the prosecution," no innocent man will be safe; but personal liberty will again become a prized, if not an uncommon, condition or attribute to the citizen of the republic.

CONREY, P. J. (dissenting).

I dissent. Assuming (although it is a doubtful assumption) that the "presumptive evidence" rule stated in section 476a of the Penal Code by its terms extends to the *fact* of insufficiency of funds or credit, I think that this legislative attempt to create such evidence by presumption is unconstitutional and void, because it permits the state to deprive a person of liberty without due process of law. It destroys the presumption of innocence, without any foundation of legal evidence tending to overcome the presumption of innocence. The notarial certificates, showing presentation, nonpayment, protest and notice of protest, do not furnish evidence of any facts justifying the bank's refusal to pay. They do say that the "reason given" was in two instances, "no account"; in another, "certification forged"; in another, "no account, certification forgery." And in two others, there is no statement at all of the reason given for refusing to pay. Perhaps it should be conceded that the return of the checks unpaid, and their production in evi-

dence with the attached notarial certificates, may lawfully be used to raise the presumption that the checks were presented for payment and that payment was refused, and that, as to those facts, the provisions of section 476a are valid. Code Civ. Proc. § 1875, subd. 7, and § 1963, subd. 15. But the mere fact that a bank has refused to pay a check, is not in its nature different from the fact that any other person to whom a demand has been presented has refused to comply with the demand. He may, or he may not, owe the amount claimed. To prove that the defendant in this action did not have any funds or credit sufficient to meet his checks, it was necessary to produce evidence, legal evidence, tending to prove the fact. It is his right, that he shall have the opportunity to meet, confront, and cross-examine any witness by whom it is sought to prove an essential fact of that kind.

In the instant case, there is no relation between the facts shown by the notarial certificates (with respect to the reasons given to justify refusal to pay the checks), and the further facts sought to be proved, such that on any reasonable theory the one can be inferred from the other. As applied to this question of fact, the so-called presumption is, I venture to say, an arbitrary deprivation of fundamental right.

123 Cal.App. 473

TRAVELERS' INS. CO. OF HARTFORD, CONN., v. BYERS.

Civ. 934.

District Court of Appeal, Fourth District. California.

May 13, 1932.

1. Insurance ⇐646(3).

Insured's consultation with physician or hospitalization prior to application could not be presumed to have been for bodily disease or infirmity, where there was no evidence of purpose of consultation or hospitalization.

"Bodily infirmity" is defined as meaning a settled disease or ailment that would probably result to some degree in general impairment of physical health and vigor, and not merely temporary disorder arising from sudden and unexpected derangement of system; and "illness" is defined as meaning disease or ailment which affects general soundness and healthfulness of system, while "consulting a physician" should be interpreted as relating to consultation as to some disease or illness with which applicant was or has been afflicted, not to some feeling of trivial discomfort or temporary indisposition not affecting general health.

[Ed. Note.—For other definitions of "Bodily Infirmity," "Consult with Physician" and "Illness," see Words and Phrases.]

2. Insurance ⇐292.

"Medical advice or attention" refers to advice or attention for some ailment which would affect insured's general soundness or healthfulness.

[Ed. Note.—For other definitions of "Medical Attendance," see Words and Phrases.]

3. Fraud ⇐50.

There is a presumption against fraud approximating in strength that of innocence of crime.

4. Fraud ⇐49.

One seeking relief from fraud must allege and prove fraud by clear and satisfactory evidence.

5. Insurance ⇐645(1).

Insured's failure to disclose in application name of last physician consulted *held* immaterial, where no issue was raised as to concealment in this respect.

6. Insurance ⇐291(6).

Failure of application to disclose slight cold and slight attack of influenza *held* not fraudulent concealment of prior illness.

7. Insurance ⇐646(3).

It was presumed that kidney condition which doctor testified was of over six months' duration was not present when insured's application was made more than six months prior to death.

8. Insurance ⇐258.

Failure to disclose facts of which applicant for insurance is ignorant will not warrant avoiding policy.

9. Insurance ⇐646(3).

Insurer asserting falsity of statement in application must show insured made willfully false statement.

10. Trial ⇐36.

In suit to rescind policy, offer of statement of proof of death *held* immaterial, where allegation of cross-complaint, as to furnishing certificate of proof of death, was admitted.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Suit by the Travelers' Insurance Company of Hartford, Conn., against Lillie W. Byers individually and as executrix of the estate of James C. Byers, deceased, in which defendant

filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

O'Melveny, Tuller & Myers and J. R. Girling, all of Los Angeles, for appellant.

Glen H. Munkelt and Harden & Green, all of San Diego, for respondent.

SCOVEL, Justice pro tem.

On June 7, 1928, James C. Byers signed an application for an insurance policy in the Travelers' Insurance Company, the appellant herein. The application was in the usual form and contained the following questions, answers, and statements by Mr. Byers:

"17. Have you within the past 5 years suffered any mental disease or infirmity or any bodily disease or infirmity? A. No.

"18. Have you within the past 5 years received medical advice or attention? A. No. Surgical advice or attention? A. No. * * *

"20. Are you now in good health? A. Yes."

The application was taken by an agent of appellant, E. A. Egge, and without further medical examination appellant's insurance policy No. 1433740 was issued to Byers on August 14, 1928, effective from June 18, 1928. This application and policy will hereafter be referred to as the "Egge application" and "Egge policy."

On November 21, 1928, said Byers again made application for another policy with appellant, signing a similar form of application, in which the following questions and answers were set forth:

"17. Have you within the past 5 years suffered any mental disease or infirmity or any bodily disease or infirmity? A. No.

"18. Have you within the past 5 years received medical advice or attention? A. Yes, slight colds, influenza. Surgical advice or attention? A. No. * * *

"20. Are you now in good health? A. Yes.

"21. Give details explaining all affirmative answers to questions 11 to 19 inclusive, as indicated by the following headings:

Illness or Condition.	How Long ill?	Complications?	Date of complete recovery?	No. of attacks.	Physicians consulted.
			Month Year		
Slight Colds.	2 days	none	odd times.	3 or 4	
Influenza.	10 days	none Slight case, might have been only a cold.	Oct 1923 or or Nov. 1924.	1	John C. E. Nielsen, M. D."

On December 14, 1928, appellant's medical examiner examined Byers, finding him to be an "excellent risk." Two questions and the answers given thereto by Byers during the medical examination are as follows: "12. What physician did you last consult? A. None. 13. Name and residence of usual medical attendant or family physician. A. None." This application was taken by C. J. Stafford, and appellant's policy of insurance issued thereon on December 28, 1928, effective December 27, 1928. This application and policy will hereafter be referred to as the "Stafford application" and "Stafford policy."

On April 29, 1929, James C. Byers was killed as the result of a fall from the fourth floor of Mercy Hospital in the city of San Diego. Respondent, Lillie W. Byers, surviving wife of James C. Byers, filed proof of death with appellant, and demanded the amount of both insurance policies, she being named as beneficiary therein. Appellant refused to make payment, and filed its complaint seeking to rescind both policies on the ground that it had been induced to issue the policies by reason of certain fraudulent representations on the part of James C. Byers, and alleging that at the time the applications for the policies were made he had represented the following: (a) That he had not within the previous five years suffered any mental disease or infirmity or any bodily disease or infirmity; (b) that within the previous five years he had received no surgical advice or attention, and within said period received medical advice or attention for slight colds, causing him illness for two days, and influenza causing him illness for ten days; (c) that he was then in good health. The complaint further alleged that such statements and representations were false and made by said James C. Byers, knowing them to be false and untrue.

Respondent's answer is in the form of a denial. In addition thereto, she filed a cross-complaint asking for recovery of the amounts of the policies. Appellant answered the cross-complaint, seeking to avoid liability on the policies by reason of the alleged fraudulent representations made by the insured in his application for the policies above set forth. At the trial the court found in favor of the defendant on the complaint and in favor of the cross-complainant and against the cross-defendant on the cross-complaint. The court further found that the representations alleged were made, except that no representation was made in the application for the Egge policy as to his having had medical advice or attention for slight colds or influenza, and that such representations were true.

Appellant attacks the judgment and findings as not supported by the evidence. We

will consider the Stafford policy first. There is no evidence whatsoever showing that within the five years previous to making the application, or within five years previous to the issuance of the policy thereon, the insured, James C. Byers, had ever suffered any mental disease or infirmity, or received any surgical advice, nor that he was not in good health when the applications were signed or when the policies were issued except for a possible kidney condition hereinafter discussed. Neither does the transcript set forth any evidence showing that the statement in the Stafford application that the applicant had received medical advice or attention for slight colds and for influenza within five years prior to the date thereof was untrue. Thus the only alleged false statements remaining are as to whether or not the insured had, within the previous five years, suffered any bodily disease or infirmity or within such time received medical advice or attention. The testimony of Dr. Worthington, called by appellant, shows that the insured called at his office 16 times during November, 1926, January, February, and May, 1927, and January, 1928. It does not appear, however, what these consultations were for, whether for an illness of the insured or in regard to an illness of some member of his family. Dr. Sherill, called by appellant, testified that the insured was admitted to the Scripps Metabolic Clinic at La Jolla at 9 a. m., November 22, 1926, and was dismissed at 2 p. m., November 23, 1926; that while at the hospital the insured received either medical advice or attention. It does not appear anywhere in the transcript why the insured was admitted to the clinic at La Jolla, and, as suggested by counsel for defendant in his brief, for all that does appear, he may have been checkng up on his general physical condition, merely as a precautionary measure.

Bodily infirmity has been defined in French v. Fidelity & Casualty Co. of N. Y., 135 Wis. 259, 115 N. W. 869, 875, 17 L. R. A. (N. S.) 1011, as meaning "a settled disease, an ailment that would probably result to some degree in the general impairment of physical health and vigor." And the word "bodily infirmity as used in an accident policy exempting the insurer from liability only includes an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder arising from a sudden and unexpected derangement of the system." To the same effect is Meyer v. Fidelity & Casualty Co., 96 Iowa, 378, 65 N. W. 328, 59 Am. St. Rep. 374.

The word "illness," as used in a question in an application for insurance as to whether or not an applicant had ever had any illness, is defined in Poole v. Grand Circle, W. O. W., 18 Cal. App. 457, 123 P. 349, 350, as meaning a disease or ailment of such a character as to affect the general soundness and healthfulness of the system, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution of the insured. It "'relates to matters which have a sensible, appreciable form, * * * and applies ordinarily to matters of a substantial character,' and not to a slight and temporary indisposition, speedily forgotten."

[1] In the absence of any evidence whatsoever showing for what purpose the insured here consulted Dr. Worthington or entered the hospital, it cannot be presumed that such consultation or hospitalization was for more than a temporary illness, or perhaps a mere physical examination. We do not think that it can be construed as showing the insured at that time to be suffering from a "bodily disease or infirmity" within the foregoing definitions. As to whether or not these visits contradict and render false the insured's statement in the application that he had not within the five-year period received any medical advice or attention, falls within the same category.

In Fidelity & Casualty Co. of New York v. Cross, 131 Miss. 632, 95 So. 631, 634, it is held that a question in an application for insurance which calls for a disclosure of the medical or surgical attention previously received by the applicant does not require an applicant to disclose the fact of previous medical examinations which show that the applicant was in good health and physically sound at the time such examinations were made, as such examinations do not come within the meaning of the term "medical or surgical attention received" as used in the application. Our own courts have had occasion to construe and define what "consulting a physician" as used in an insurance policy application means. In Poole v. Grand Circle, W. O. W., supra, the application contained the question: "When did you last consult a physician," to which the plaintiff answered: "Not since childhood." The application was dated October 19, 1908. It appeared that approximately two years prior to the date of the application a physician had visited the applicant, at which time she was confined to her bed, suffering from an acute cold, as a result of which there was temporary difficulty during the menstrual period; that on October 1st following the applicant called at the physician's office, when an examination was made and everything found normal, except that the womb was a trifle small and somewhat sore, due to congestion resulting from the cold; that early in 1907 the physician gave the applicant a general tonic to build her up and give her an appetite. In an action upon the policy the insurance company set up the foregoing question and answer as a false representation, contending that the foregoing evidence showed that the applicant had consulted a physician since her

childhood, contrary to her statement in the application. In construing what "consulting a physician" as used in the application meant, the court states on page 460 of 18 Cal. App., 123 P. 349, 350: "A reasonable construction of the question implies that it should be interpreted as relating to a consultation as to some disease or illness with which the applicant was or had been afflicted, not to some feeling of trivial discomfort or temporary indisposition, not affecting the general health."

[2-4] The question as to the insured, Byers, having received medical advice or attention in the Stafford application, refers to medical advice or attention for some ailment which would affect the general soundness and healthfulness of his system, and, unless his consultations with Dr. Worthington or his entrance to the hospital were for such a purpose, his answer to the question was true. The presumption, however, is against fraud, and, as stated in Truett v. Onderdonk, 120 Cal. 581, 53 P. 26, this presumption approximates in strength that of innocence of crime. One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. And, in the absence of any evidence to the contrary, it must be presumed in support of the judgment that the consultations with Dr. Worthington and the entrance of the insured into the hospital were at the most but for minor ailments of which no disclosure was necessary by the insured.

[5] It will be noted that in the report of the physical examination for the Stafford policy the applicant also failed to disclose the name of the last physician he had consulted professionally, and stated that he had no usual medical attendant or family physician. The evidence does not reveal the name of any usual medical attendant or family physician of the insured. No issue is raised either in appellant's complaint or in its answer to the cross-complaint as to any concealment of the name of the physician last consulted by the insured. There being no issue as to any fraud in such concealment, the truth or falsity thereof is not material.

[6] The rules of law above set forth are equally applicable to the Egge application and policy. In this application, however, no statement was made by the insured that he had had "slight colds for two days, three or four times, and a slight attack of influenza, which might have been only a cold, lasting for a period of 10 days," within the five-year period as was disclosed in the Stafford application. Such slight illness, however, falls within the rule of Poole v. Grand Circle, W. O. W., supra, as being a mere indisposition not affecting the general soundness and healthfulness of the system nor tending to undermine and weaken the constitution of the insured. Under such circumstances, concealment thereof is not fraudulent, and an action or defense founded thereon cannot be sustained.

[7-9] In addition to the evidence hereinbefore set forth, the surgeon who performed the autopsy upon the body of Mr. Byers following his death testified that the body pathologically showed a chronic condition of the kidneys, and that by chronic condition he meant a condition of over six months' duration. He did not, however, venture an opinion as to how long the condition had existed. The Egge application was made, and the policy thereon issued more than six months prior to the death of the insured. It must be presumed, therefore, that the condition was not present at the time the application was made. If the autopsy surgeon's testimony is true, the kidney condition must have existed at the date of the Stafford application and policy, however. Nowhere in the transcript is there any evidence remotely tending to show that the insured had any knowledge whatsoever of such condition at the time the Stafford application was signed and when he stated that he was in good health and had not suffered any bodily disease or infirmity within the preceding five years. If it be assumed that these statements were untrue by reason of the presence of a chronic kidney condition, still there is nothing to show that they were "willfully false," as is required to support an action for rescission of a policy of insurance on the ground of fraud or sustain a defense based on the ground of fraud in an action upon the policy. A failure to disclose facts of which the applicant is ignorant will not afford ground for avoiding the policy because of concealment. 32 Cor. Jur. 1272. A presumption of intent to deceive is only raised when the statements are made with knowledge of their falsity (Whitney v. West Coast Life Insurance Co., 177 Cal. 74, at page 80, 169 P. 997), and the burden is upon the party asserting the untruthfulness of a statement to show not only that the statement was erroneously made, but that it was willfully so (O'Connor v. Grand Lodge, A. O. U. W., 146 Cal. 484, 494, 80 P. 688).

The findings of the court, therefore, that the statements set forth in plaintiff's complaint and answer to the cross-complaint were true are supported by the evidence.

[10] Appellant's final contention is that the court erred in refusing to admit in evidence Plaintiff's Exhibit No. 6 for identification, being the certificate of proof of death forwarded with the demand for payment of one of the policies, claiming that it was alleged in the cross-complaint that a certificate of proof of death had been forwarded with the claim by the beneficiary, and, unless forwarding thereof were proven, no liability under the policy could attach. Each cross-complaint alleged that a certificate of proof of

death was so furnished, and each answer of appellant to the cross-complaints admitted the allegation. There was therefore no issue upon the matter; the offer of the statement of proof of death was not material, and it was properly denied.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 99

KELLER et al. v. CITY OF LOS ANGELES et al.

Civ. 8255.

District Court of Appeal, First District, Division 2, California.

April 26, 1932.

Rehearing Denied May 26, 1932. Hearing Denied by Supreme Court June 24, 1932.

1. **Municipal corporations** ⇐488, 489(5).

In absence of fraud, city council's decision *held* conclusive against landowners not filing with clerk objections to assessment (St. 1903, p. 376, as amended; and p. 381, § 19, as amended by St. 1929, p. 1590).

Landowners, having failed to protest against alleged inequalities of assessment under Street Opening Act (St. 1903, p. 376, as amended), were concluded by city council's decision and could not afterward dispute its legality so far as any alleged inequalities in assessment were concerned.

2. **Municipal corporations** ⇐450(2).

That one or more lots fronting on street are omitted from assessment district does not alone render assessment under Street Opening Act void on face, where landowner has right to hearing (St. 1903, p. 376, as amended).

If the property owner is given right to be heard before body levying assessment, its determination is final.

3. **Municipal corporations** ⇐455.

City council's decision on hearing respecting amounts of assessment under ordinance opening alley is as conclusive as court's judgment in civil matter (St. 1903, p. 376, as amended).

4. **Municipal corporations** ⇐513(7).

To justify court in setting aside assessment irrespective of city council's decision, complaint must show on face that under no conditions could land be benefited in proportion stated (St. 1903, p. 376, as amended).

5. **Evidence** ⇐83(2).

Without allegation of fraud, city council is presumably guided by honest discretion in approving assessments (St. 1903, p. 376, as amended).

6. **Municipal corporations** ⇐513(7).

Complaint *held* not to show that assessment was so manifestly unjust as to invalidate assessment irrespective of city council's decision (St. 1903, p. 376, as amended).

Complaint in question alleged in part that property of assessed valuation of $150,290 had been assessed, under ordinance opening alley, to amount of $34,100, while other property having assessed value of $2,436,250 had been assessed to amount of only $13,642.

7. **Municipal corporations** ⇐511(2).

Landowners seeking court review *held* obligated to file objections to assessment, notwithstanding information or belief that city council would arbitrarily overrule objections (St. 1903, p. 381, § 19, as amended by St. 1929, p. 1590).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by H. W. Keller and another against the City of Los Angeles and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Faries & Williamson and McIntyre Faries, all of Los Angeles, for appellants.

Erwin P. Werner, City Atty., and Jerrell Babb, Deputy City Atty., both of Los Angeles, for respondents.

JAMISON, Justice pro tem.

Plaintiffs brought this action to have declared void the assessment based upon benefits received by the land under an ordinance of the city of Los Angeles, opening an alley between Flower and Figueroa streets, and extending from Eighth street to within 170 feet of Seventh street, and to restrain defendants from proceeding further with the said assessment, and to recover from defendants the portion of said assessment paid by plaintiffs under protest, as shall be found unlawfully assessed against them.

Demurrers were sustained to the complaint, the amended complaint, the second amended complaint, and thereupon plaintiffs filed a third amended complaint and a second amended supplemental complaint to which defendants demurred upon the grounds: First, that said complaints did not state facts sufficient to constitute a cause of action; and, second, that said complaints are uncertain in that it cannot be ascertained therefrom in what manner the defendants acted without jurisdiction or contrary to the rights of plaintiffs, or whether or not plaintiffs availed themselves of the right given them by the statute to file objections with the city clerk, or whether or not there was any hearing of any objections on the part of plaintiffs by the city council, or

what right plaintiffs had to question the validity of the assessment proceeding, and that for the reasons aforesaid the complaints are ambiguous and uncertain. This demurrer was also sustained and, plaintiffs refusing to further amend, judgment was rendered against them, and from this judgment plaintiffs have appealed.

The proceedings for the opening of said alley were had pursuant to the Street Opening Act of 1903 (St. 1903, p. 376, as amended). The complaint alleges that the council of the city of Los Angeles adopted an ordinance declaring its intention to order the opening of an alley from a line 170 feet southwesterly from the southwesterly line of Seventh street to the northeasterly line of Eighth street in said city and specifying the boundaries of the district to be benefited, and to be assessed to pay the expense thereof, and to be known as the assessment district; said ordinance being designated as Ordinance No. 50709. Prior to the initiation of this ordinance, proceedings were pending for the opening of an alley 20 feet wide from Seventh street to Eighth street in the center of the block between Flower and Figueroa streets; that in the meantime a corporation known as Barker Bros., Incorporated, leased all the property fronting on Seventh street between Flower and Figueroa streets and extending southerly 170 feet, said lease being for a term of 99 years, and erected a building thereon 150 feet high. The proceedings to open the said alley from Seventh to Eighth streets were then abandoned and the proceeding under ordinance No. 50709 was instituted. Said Barker Bros. now owns and maintains, and at the time of levying said assessment owned and maintained, one of the largest retail furniture stores in this country, and that all of the three frontages on Seventh, Figueroa, and Flower streets have ornate and elaborate entrances to the ground floor of said building for the use of pedestrians and customers, but that there is no means of ingress to or egress from said building for the delivery thereunto or therefrom of furniture or express except by means of said alley. Said assessment was not based upon any consideration of, or in proportion to the benefits to the property located in said assessment district from said improvements, but that the primary purpose was known to defendants to be for the benefit of said property of Barker Bros.; that plaintiffs' property is of the assessed valuation of $150,290 and has been assessed in this proceeding to the amount of $34,100; that the property occupied by Barker Bros. has a total assessed value of $2,436,250 and has been assessed in this proceeding to the amount of $13,642; that more than 90 per cent. of vehicles or pedestrians using said alley have been vehicles or pedestrians going to or from the Barker Bros.' building; that defendants arbitrarily and with total disregard of rights of the property owners, or the benefits accruing to them from the opening of said alley, assessed the cost of said opening upon the front-foot basis.

One of the contentions of appellants is that the assessments of the property was in violation of law and therefore void for the reason that section 16 of the Street Opening Act of 1903 as amended by St. 1925, p. 243, provides that the assessment shall be in proportion to the benefits to be received from the said improvement. They claim that instead of following the plain requirements of this law and proceeding to estimate the benefits that would be received by the property from opening this alley, to save the trouble of doing so, or in order to favor Barker Bros., they adopted the front-foot method and by doing so sidestepped this duty which the law imposed upon them.

Section 19 of said Street Opening Act (St. 1929, p. 1590) provides that objections in writing to the assessments shall be filed with the clerk and laid before the next meeting of the city council, and it shall thereupon hear such objections and pass upon same, or if there are no objections the said city council shall confirm the assessments and the action of the council upon such objections and assessments shall be final and conclusive. It does not appear from the complaints that appellants filed any protest against their assessment with the city clerk or that they made any objections to the city council regarding same. Apparently as a reason for not doing so, appellants allege in their complaint that prior to the expiration of the time for filing objections they were informed and believed that the respondents arbitrarily agreed among themselves that all protests on file at the time of the hearing would be overruled, and therefore protesting would be an idle act and would not receive consideration; that respondents arbitrarily overruled objections filed by others at said hearing and confirmed the assessments as originally made.

[1] Passing upon statutes similar to the Street Opening Act of 1903 the decisions of the Supreme and Appellate Courts have been uniform in holding that respondents cannot make any objection to the assessment in this action that he could have made before the city council at the time provided by section 19 of said act for hearing of protests. The failure to so object rendered the decision of the city council conclusive against appellants, in the absence of fraud, or arbitrary action amounting to fraud, in matters which the council could have remedied or corrected. Blake v. City of Eureka, 201 Cal. 643, 258 P. 945; Farley v. Reindollar et al., 174 Cal. 703, 707, 165 P. 19; McGarry v. Ellis, 54 Cal. App. 622, 202 P. 463; Harney v. Benson, 113 Cal. 314, 45 P. 687; O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

The case of Spring Street Co. v. Los Angeles, 170 Cal. 24, 148 P. 217, L. R. A. 1918E, 197, relied upon by appellants, is not in point upon this question, for in that case it appears that the plaintiff filed its protest with the city council and the same was denied.

In City Construction Co. v. Kenny, 83 Cal. App. 240, 256 P. 601, the court held that inequalities or injustice in spreading the assessment were matters which appellant should have protested and not having done so such inequalities, if any, will not afterwards be held to invalidate the assessment. (Citing authorities.)

We are of the opinion that appellants having failed to protest against the alleged inequalities of the assessment are concluded by the decision of the city council, and cannot afterward dispute its legality so far as any alleged inequalities in the assessment are concerned.

[2] Appellants next contend that the assessment is illegal and void for the reason that it appears upon the face of the assessment and from the complaints that all the property in the assessment district had not been assessed. Exhibit Z, attached to the third amended complaint and made a part thereof, purports to contain a list of all the property situated in the assessment district. The said complaint alleges that in arriving at the amount of the assessment on the several lots affected by said assessment the front-foot method was used; that is to say, the sum of $341 per foot was assessed against each foot of the lots fronting on said alley except to the 35 feet on each side of said alley measured from its intersection with Eighth street. In other words, the said complaint alleges that 70 feet of the lots in said assessment district fronting on said alley were not assessed at all. Appellants cite in support of this contention People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677, Dyer v. Harrison, 63 Cal. 447, and Diggins v. Brown, 76 Cal. 318, 18 P. 373, wherein it is held that the failure to assess all the property in the assessment district renders the assessment void. In Larsen v. City and County of San Francisco, 182 Cal. 1, 14, 186 P. 757, 763, the Supreme Court said: "There is a distinction between the power of the board making the assessment in cases where the Legislature has itself fixed the limits of the assessment district and designated the land which is benefited and which is to be assessed for the expense of a public improvement, and cases where a local legislative body has authority to levy the expenses upon a district to be fixed by itself and to determine what property is benefited and is to be assessed for the improvement. The ordinary case of a front-foot assessment is an example of the first alternative. There the Legislature has declared what property shall be assessed, and its declaration is a determination that the property to be assessed is also the property benefited. In a case of that character the board which levies the assessment cannot depart from the legislative determination, and if it omits from the assessment any parcel of the land which the Legislature has thus declared is benefited and is to be assessed for the improvement, the assessment is void." The court cited in support of this declaration the cases relied upon by appellants.

The court further stated that it was obvious that these decisions do not apply to the case there being considered, for the reason that the authority which is empowered to determine whose land is benefited and the amount of benefits that shall be assessed against the several parcels benefited by the improvement is not determined by the legislative act authorizing the improvement but the board levying the expense. Further along in this case the court declared that, "The contention that benefited property was omitted from the assessment, and the whole assessment is therefore invalid, is disposed of by the case of Duncan v. Ramish, 142 Cal. 686, 76 P. 661," and commenting on the case of Davies v. Los Angeles, 86 Cal. 49, 24 P. 771, also cited by appellants, the court said, in substance, that while there is a statement in this case to the effect that where the property in an assessment district is not all assessed the assessment is invalid, there was no discussion of the question and the matter of the finality of the determination of the board after a hearing, and that this question was not passed upon nor even suggested in this case.

There is ample authority upholding the doctrine that the mere omission from the assessment of one or more lots fronting on the street does not of itself render the assessment void on its face. San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 P. 72; Buckman v. Landers, 111 Cal. 347, 43 P. 1125; O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020; Ahlman v. Barber Asphalt Pav. Co., 40 Cal. App. 395, 181 P. 238.

If the property owner is given the right to be heard before the body levying the assessment, its determination is final.

[3] The said third amended complaint alleges that the city council did hold a hearing on the amounts of said assessment. Its decision upon such hearing is as conclusive as the judgment of a court in a civil matter. 19 Cal. Jur. 192; Hutchinson Co. v. Coughlin, 42 Cal. App. 664, 184 P. 435; Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Lambert v. Bates, 137 Cal. 676, 70 P. 777; Gallagher v. Voyce, 99 Cal. App. 791, 279 P. 490.

[4] It is urged by appellants that facts set forth in said complaint bring the case within the ruling of Spring Street Co. v. City of Los Angeles, 170 Cal. 31, 148 P. 217, L. R. A.

1918E, 197, which held that the assessment might be so manifestly and so grossly unjust upon its face as to justify the court in setting it aside regardless of the decision of the city council. But to justify the court in setting it aside upon the authority of this case it must appear from said complaint on its face that under no conditions could the several parcels of land, including that of appellants, have been benefited in the proportion stated by the assessment. Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82; Cutting v. Vaughn, supra.

[5, 6] There is no allegation of fraud, and it must be presumed that the city council were guided in approving the assessments made by the street superintendent by the exercise of an honest discretion. It cannot be said from the allegations of the complaint that the assessment of appellants' property was so manifestly and grossly unjust as to render the assessment void.

[7] We are of the opinion that regardless of appellants' information or belief as to the hostile attitude of the city council regarding their protest, it was their duty to have filed a written protest setting forth their objections to the assessment, and that by their failure so to do they have produced a situation where this court cannot now inquire into the irregularities and inequalities thereof, if any there be.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

123 Cal.App. 455

CREASON et al. v. CREASON et al.

Civ. 8185.

District Court of Appeal, First District, Division 1, California.

May 13, 1932.

1. Deeds ⇐68(1½).

Grantor, though blind and feeble, is not incompetent to execute deed and escrow agreement if able to understand their nature and effect.

2. Appeal and error ⇐1012(1).

Where trial is to court, evidence and its weight are matters for trial judge.

3. Appeal and error ⇐1011(1).

Where there is substantial conflict in evidence, appellate court will not interfere with finding.

4. Wills ⇐93.

In action to quiet title and have deed declared testamentary disposition, evidence *held* to sustain finding grantor intended deed and escrow agreement to be irrevocable

5. Estoppel ⇐83(1).

Misrepresentation to create an estoppel must be made by one party to a transaction to another.

6. Estoppel ⇐83(5).

In action to quiet title and have deed declared testamentary disposition, grantee *held* not estopped to deny deed was testamentary disposition because of having referred to it as will in communication with plaintiff.

7. Appeal and error ⇐173(9).

Question of estoppel cannot be raised on appeal where not pleaded below.

8. Appeal and error ⇐1071(6).

Failure to find that deed was intended as testamentary document and that defendant held deed and property in trust for heirs of deceased *held* immaterial.

Failure to so find was immaterial, since finding and conclusion of law that one defendant was the owner in fee simple and entitled to possession of the property negatived the contention that the deed was intended as a testamentary document or that deed and property were held in trust for benefit of all the heirs, in that if further finding had been made that would necessarily have been adverse to complaining parties.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action to quiet title by Fred A. Creason and another against Frank L. Creason and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Russell Scott and Paul Pioda, both of Salinas, for appellants.

J. P. Mandl, of King City, for respondents.

WARD, Justice pro tem.

Plaintiffs and defendants are the children of W. J. Creason, deceased. On August 17, 1925, W. J. Creason, aged seventy-six years, shortly after becoming blind made and executed a certain deed and entered into an escrow agreement with one J. P. Mandl that upon the death of the grantor the deed should be delivered to defendant Frank L. Creason.

The first cause of action in the complaint is in the nature of quiet title. The second cause of action and the answer thereto raise issues of incompetency, undue influence, confidential relations, independent advice, and want of consideration upon the alleged promise of defendant to take and hold the deed in trust during the life of decedent for his

benefit, and after his death to share the property equally with the other heirs. The trial court found for the defendants, Frank L. Creason, the grantee, and Edith Whitaker, a daughter, who filed a disclaimer. From the judgment rendered, plaintiffs appealed.

In appellants' reply brief, attention is confined to the "three material arguments * * * in our opening brief." The three points referred to are that the grantor was mentally incompetent; that the grantor did not intend the deed of August 17, 1925, to operate as an irrevocable gift; and that the parties mutually agreed to rescind the said deed and the escrow agreement.

There is no proof that defendant Frank L. Creason used undue influence or that he exercised dominion over his father or his father's affairs. The confidential relations may be referred to as the affection, attention, and financial assistance which the defendant Frank L. Creason bestowed upon the father. The question of independent advice, in the absence of evidence of undue influence, plays no part in this case. Brown v. Canadian Indust. Alcohol Co., 209 Cal. 596, 289 P. 613. We understand that appellants have abandoned all contentions save those referred to in the reply brief. At any rate, this court approves the trial court's findings in their entirety.

[1-3] The first question to be determined is: Was the father mentally competent to deal with the subject of conveyance, with a full understanding of his rights; that is, did he understand the nature, purpose, and effect of this conveyance? The trial court found that the grantor fully understood the nature and effect of his act in making, executing, and delivering the deed. There is ample evidence, although in conflict with appellants' evidence, to support this finding in the testimony contributed by the notary and other witnesses. The notary read the instruments to the father several times and inquired if that was what he wanted. The father not only suggested, but requested, that the son Frank, who lived a great distance away should come to him that his property might be turned over to the son. It was suggested that independent advice should be obtained by the father, but he refused, saying in substance that he knew what he was doing. Appellants depend principally upon the fact that prior to the execution of the deed, the father had written a purported will; and subsequent to the making of the deed, a second will in which he disposed of his property equally among all of the children. The second will was made several days before his death. The first will, in the form of a letter, was written over nine months before the execution of the deed. Great changes had come into the life of the grantor during this period. He had become feeble in health and had changed his residence from the cabin near San Ardo in Monterey county to the home of his daughter Edith Whitaker in Richmond, Contra Costa county. Although blind and feeble, if he was able to understand the nature and effect of the deed and escrow agreement he signed, with a full realization of the claims of all relatives, he was competent. Estate of Motz, 136 Cal. 558, 562, 69 P. 294; Estate of De Laveaga, 165 Cal. 607, 133 P. 307; Estate of Huston, 163 Cal. 166–169, 124 P. 852. The evidence and its weight are matters for the trial judge to pass upon and determine. Where there is a substantial conflict in the evidence, the appellate tribunal will not interfere.

It is admitted that the grantor wished to have his property disposed of, following his death, without the expense of probate. Edith Whitaker testified that it was during the latter part of July that her father requested her to send for Frank. The deed was executed on August 17th. The grantor had over two weeks in which to change his mind about the conveyance. William Whitaker, the husband of defendant Whitaker, testified: "Dad told Frank he wanted him to go back to King City and have the Judge Mandl make out a deed for this 120 acres to him, and then he told him he wanted him to have an escrow—have it placed in escrow with Judge Mandl until the time of his death, which he wanted Judge Mandl to record for him, or have it recorded."

The evidence discloses that shortly prior to the grantor's death, the plaintiff son Fred wrote to the defendant Frank, stating that his father was not satisfied with his will and that he wanted to draw a new one. Frank replied and referred to the deed as a will, and stated that if his father wanted to make any changes to "go right ahead." The explanation that Frank made of the use of the word "will" instead of "deed" is that his father did not want Fred around when the deed was made; that, if plaintiff knew of the deed he would "go back and worry my father." An examination of the transcript does not disclose that Frank ever assented to set aside the conveyance or to rescind the escrow agreement, but simply informed his brother that if his father desired to make another will to go ahead and do so.

[4] There is evidence substantiating the finding that the grantor intended the conveyance as irrevocable. The escrow agreement was read several times to the grantor, and it provided: "That the said deed shall be accepted by the said second party as delivery unconditionally, for the grantee."

[5-7] The contention of appellants, that the grantee, having referred to the deed as a will, is estopped from denying that the deed is a testamentary disposition of his father's property, is not well founded. An essential of estoppel is that the misrepresentation must

be relied upon and made by one party to the transaction to the other party. Plaintiffs were not parties to this conveyance and defendants did not owe them a duty to inform them of the existence of the deed. However, assuming that defendant Creason was guilty of neglect in failing to assert his interest or title to the property, estoppel is not pleaded and therefore may not be considered on appeal. County of Placer v. Lake Tahoe Ry. & Transp. Co., 58 Cal. App. 764, 209 P. 900; Fair Oaks Bank v. Johnson, 198 Cal. 197–201, 244 P. 335. We fail to find an objection to the evidence presented during the trial of defendant Creason's claim of title upon the ground of estoppel. Metcalf v. Guercio, 74 Cal. App. 637, 645, 241 P. 576.

[8] Appellants contend that the trial court failed to find upon the following issue: That the deed was intended as a testamentary document and that respondent simply holds the deed and the property in trust for the benefit of the heirs of the deceased. It was unnecessary to find upon this issue. If the will made prior to the deed is valid, the testator subsequently eliminated this particular piece or parcel of real estate as part of his testamentary estate by executing the deed and delivering the escrow agreement.

The finding and the conclusion of law that defendant Creason was the owner in fee simple and entitled to the possession of this particular piece of real estate negatives the contention that the deed was intended as a testamentary document or that the respondent holds the deed and property in trust for the benefit of all of the heirs. If further findings had been made, they must necessarily have been adverse to appellants. Hulsman v. Todd, 96 Cal. 228, 232, 31 P. 39.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.: CASHIN, J.

215 Cal. 489

In re SWEITZER'S ESTATE.

SWEITZER v. BANK OF AMERICA OF CALIFORNIA.

L. A. 12818.

Supreme Court of California.

May 16, 1932.

1. Deeds ⇐60.

Deposit of deeds with third party with instructions to return in event grantor should not die *held* to show nondelivery.

2. Husband and wife ⇐274(1).

On death of father in 1916, children by former marriage acquired vested title to undivided one-half of community property, and widow acquired like interest as to remainder (Civ. Code, § 1402).

3. Adverse possession ⇐62(3).

Widow could not, by recording undelivered deed from husband, divest her vested community interest so as to hold under color of title adversely to expectancy of husband's children by former marriage (Civ. Code, §§ 1386, subd. 8, 1402).

Widow could not thus in effect re-enter property under color of title and hold possession of her vested title to undivided one-half interest in community property under Civ. Code, § 1402, adversely to expectancy of husband's children by former marriage, who would, under Civ. Code, § 1386, subd. 8, if widow died intestate leaving no issue, take the property on her death as her own heirs and not as heirs of her predeceased spouse.

4. Executors and administrators ⇐17(2).

Child *held* entitled to appointment as widowed stepmother's administrator (Civ. Code, § 1386, subd. 8; Code Civ. Proc. § 1365).

Child was entitled to appointment as administrator of stepmother who died intestate and without issue, since stepmother could not by recording undelivered deed from husband hold possession of her community interest adversely to expectancy of husband's children by former marriage.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

In the matter of the estate of Emma Sweitzer, sometimes known as Emma Switzer, deceased. From an order denying the petition of Jesse Sweitzer and granting the petition of the Bank of America of California, for appointment as administrator, he appeals.

Reversed.

Superseding opinion of District Court of Appeal in 4 P.(2d) 159.

Matthew S. Platz, J. R. Dorsey, and Dorsey & Campbell, all of Bakersfield, for appellant.

Borton & Petrini and Glen Aldrich, all of Bakersfield, for respondent.

PRESTON, J.

This is an appeal from an order of the Superior Court denying appellant's petition and granting that of respondent for appointment as administrator of the estate of Emma Sweitzer, deceased. Which one of these parties is entitled to the appointment is to be here determined. Emma Sweitzer was the widow of Sam Sweitzer, who died intestate in 1916, leaving four sons by a former marriage, one of whom is appellant. In 1930 Emma Sweitzer also died intestate, but left no issue. Respondent is the nominee of two of her heirs, a brother and a sister.

Appellant relies upon the provisions of subdivision 8 of section 1386 of the Civil Code, and section 1365 of the Code of Civil Procedure, which at the time read in part as follows: "If the deceased is a widow * * * and leaves no issue, and the estate * * * was common property of such decedent and * * * her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse. * * *" Civ. Code, § 1386, subd. 8. "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned * * * in the following order: 1. The surviving husband or wife. * * * 2. The children. 3. The father and mother. 4. The brothers and sisters. * * * This section shall apply to the relatives of the previously deceased spouse of decedent when entitled to succeed to some portion of the estate under subdivision eight of section one thousand three hundred eighty-six of the Civil Code." Section 1365, Code Civ. Proc.

This estate consists of real and personal property, with the fruits thereof, which was in 1916, when Sam Sweitzer was living, the community property of himself and his wife, this decedent. During his last illness he executed two deeds and a bill of sale covering the property wherein he named his wife as grantee and vendee, respectively. These documents he handed to a friend with instructions that in the event of his death they were to be given to his wife, but, if he recovered, they were to be returned to him, because, he stated, if his wife obtained possession of the property during his lifetime she would "throw him out." He also expressed the opinion that, as the property was heavily incumbered, his wife would not get much but

debts. Some seventeen days later he passed away. The said friend immediately delivered the documents to Emma Sweitzer, who had them recorded on the day of her husband's death. No steps were taken by her or by his children to administer his estate. The relations between these parties were not hostile, and, without interference of any kind, the widow enjoyed possession of all said properties during the remainder of her own life, netting a considerable profit through operation and development thereof, and through the discovery and production of oil thereon. She was able to pay the debts and incumbrances, and leave an estate valued at approximately $100,000.

The evidence is almost without conflict and shows the facts to be substantially as above set forth. The trial court made no findings, but, evidently acting upon the theory that there was a valid and complete delivery of the above documents to the wife, transferring title to said properties to her, it made a full and complete order granting to respondent the right to administer this estate, of which order the following portion is made the particular subject of attack by appellant: "That no portion of the estate of Emma Sweitzer was the separate property of said deceased spouse, Sam Sweitzer, while living, and no portion * * * came to said decedent Emma Sweitzer, from said deceased spouse by descent, devise or bequest. That no portion * * * was common property of said decedent and her said deceased spouse, while such spouse was living. That the estate of said Emma Sweitzer, deceased, and the whole thereof at the time of her death, was her sole and separate property and that no part thereof was community property. * * *"

This order of the court below may be sustained only if, under the undisputed evidence, there was in fact a valid delivery of the said instruments to decedent or, conceding that there was no valid delivery thereof, if the right of appellant and his brothers to succeed to part or all of their father's estate was divested by the adverse possession of decedent. These points will be discussed in the order stated.

[1] With reference to delivery of the deeds and bill of sale, the case of Williams v. Kidd, 170 Cal. 631, 151 P. 1, 3, Ann. Cas. 1916E, 703, from which the following quotation is taken, is directly in point: "It is equally well settled that, where a deed is deposited with a third party to be handed to the grantee on the death of the grantor, unless this is accompanied by an intention on the part of the grantor that title to the property shall thereby immediately pass to the grantee, there is no delivery of the deed, and consequently no title is transferred. * * * If it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that the title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. * * *" See, also, McCully v. McArthur, 187 Cal. 194, 201 P. 323; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734; Stone v. Daily, 181 Cal. 571, 185 P. 665, and many other cases therein cited.

The evidence in this case shows beyond doubt that the firm and expressed intention of the grantor was to retain the title to, and possession of, his property until after his death because of his fear that his wife would "put him out" if she secured possession or control of it. It does appear that, subsequent to delivery of the documents to the depositary, said grantor did state that he had deeded or signed over everything to his wife, but there is no evidence whatsoever to show that when he made these remarks his intention had changed or that he had in thought anything further than his handing of the documents to his friend so that in the event of his death the transfer might be accomplished. In other words, the clear and abundant evidence shows that the intent of the grantor was such as to make the instruments inoperative and the attempted transfer invalid. In the cases of Moore v. Trott, 156 Cal. 353, 104 P. 578, 134 Am. St. Rep. 131, and Id., 162 Cal. 268, 122 P. 462, relied upon by respondent, the record upon the second trial contained persuasive evidence showing that the grantor, prior to his death, had intended to and had in fact absolutely relinquished the right of control over or recall of the deeds; hence those cases are distinguishable upon the facts, the evidence there justifying a conclusion contrary to that here announced. It follows that decedent wife did not take the estate as her separate property under said instruments nor were any rights of the children divested by reason of the execution and uncompleted delivery thereof.

The next question is: Have the rights of said children to inherit any or all of this estate been divested by reason of the alleged adverse possession and occupation, subsequent to the death of Sam Sweitzer, of all these properties by his said wife?

[2-4] Upon the death of Sam Sweitzer, intestate, in 1916, his wife was entitled to succeed to one-half and his children to the other half of the community property (section 1402, Civ. Code, prior to later amendments); the children then acquired a present vested interest in and title to an undivided one-half of said property; the widow acquired a like interest as to the other undivided one-half thereof (Phelps v. Grady, 168 Cal. 73, 141

P. 926; Smith v. Barrick, 41 Cal. App. 28, 182 P. 56). She could not immediately afterwards, by recordation of the above-mentioned documents, divest herself of this interest so as to in effect re-enter the property under color of title and hold possession thereof adversely to her own vested right, and the expectancy of the said children who would, if she died intestate, take the property upon her death as her own heirs and not as the heirs of her predeceased spouse. In re Estate of Watt, 179 Cal. 20, 175 P. 415; In re Estate of Hill, 179 Cal. 683, 178 P. 710; In re Estate of Page, 181 Cal. 537, 185 P. 383; In re Estate of Bixler, 194 Cal. 585, 229 P. 704. In other words the widow had already acquired this property, and she could not, by purporting to run an adverse possession against her own undivided interest, thereby transmute it in character from her share of the community estate of herself and her deceased husband to her sole and separate property. Hence, so far as this undivided one-half interest is concerned, the recordation of the invalid deeds was ineffective for any purpose; as it was the community property of this decedent and her deceased spouse, while living, it will go in equal shares to appellant and his brothers, as children of said deceased spouse. Section 1386, subd. 8, Civ. Code. Furthermore, as the children are entitled to succeed to at least this portion of the estate, the right to administer it must be granted to appellant. Section 1365, Code Civ. Proc.

The above conclusion makes unnecessary any discussion pertaining to the other undivided one-half interest in the estate of said Sam Sweitzer, deceased, which his children acquired upon his death. In other words, we are not here determining whether their right to inherit this undivided one-half of the estate was divested by reason of the alleged exclusive possession and occupation of the property by Emma Sweitzer, under color of title, up to the time of her death. The sole purpose of this action is to determine to whom the appointment as administrator shall be given. We have concluded that appellant is entitled to the appointment.

The order appealed from is therefore reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.

123 Cal.App. 519

CULVER CITY LIME CO. v. ORLOPP et al.

Civ. 7077.

District Court of Appeal, Second District, Division 2, California.

May 18, 1932.

Appeal and error ⇐766.

Violation of court rule that points in brief should be separately listed under appropriate heading *held* ground for dismissal of appeal (Supreme and District Courts of Appeal Rules, rule 8).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Culver City Lime Company against Don C. Orlopp and another. From a judgment for plaintiff, defendants appeal.

Dismissed.

Minor Blythe, of Los Angeles, for appellants.

Charles A. Bank, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appellants' brief fails to comply with the provision of rule VIII of this court that "the briefs must present each point separately under an appropriate heading showing the nature of the question to be presented." The brief is wholly without any such heading. Furthermore, appellants, though listing one hundred and fifty alleged errors, in virtually every instance fail to indicate wherein the alleged error lies, and content themselves with making the assertion that the same is reversible error, wholly overlooking the rule that prejudice will not be presumed, and that the burden is upon appellants to show that, if error exists, it resulted in prejudice and caused a miscarriage of justice.

While no grounds for a reversal of the judgment have been presented, and the cause might be disposed of by affirming the judgment, the violation by appellants of the clear provisions of the rules of this court, in the face of the oft-repeated warnings that such violation is ground for the dismissal of the appeal, calls for such action, and it is ordered that the appeal be, and it is hereby dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

123 Cal.App. 605

Ex parte FERGUSON.

Cr. 2227.

District Court of Appeal, Second District, Division 2, California.

May 20, 1932.

Weapons ⇐17(4).

Evidence *held* to justify conviction of possession of metal knuckles (Deering's Gen. Laws Supp. 1925–27, Act 1970, § 1).

Application by A. L. Ferguson for a writ of habeas corpus to be directed to the Sheriff of Ventura County.

Writ discharged, and petitioner remanded.

Jarrett Beckett, of Ventura, for petitioner.

James C. Hollingsworth, of Ventura, for respondent.

WORKS, P. J.

Petitioner was convicted in the superior court under a charge of possession of "metal knuckles," so called, under the provisions of an act of the Legislature (Act 1970, Gen. Laws Supp. 1925–27, § 1), also to be found at page 542 of the Statutes of 1925, and is now in the custody of the sheriff pursuant to the judgment of conviction. He asked for the writ of habeas corpus and the writ issued.

The record made at the trial contains evidence tending to show that petitioner had owned the "knuckles" for very many years after a gift of them by his father, and had sometimes left them lying on shelves and sometimes had kept them in various places outside his actual manual possession. It was urged in argument by petitioner that under this and other evidence it was shown by the record, without dispute, that the weapons were possessed as heirlooms, mementoes, keepsakes, and as curios. It was insisted that a possession of this nature, while undoubtedly within the letter of the statute, was not within its spirit.

Without deciding whether such a possession would render guiltless a defendant prosecuted under the statute, we are satisfied from evidence produced by the prosecution that the evidence of petitioner was not undisputed. The controverting evidence, without stating what it was, tends to show that the possession of the "knuckles" was not of the innocent character claimed by petitioner. The case resolves itself into one of a mere conflict of evidence. The jury was justified in rendering the verdict of guilty and the denounced incarceration of petitioner is therefore lawful.

It is to be regretted that petitioner did not allege in his petition the full nature of the case. If he had done so, we should have been saved the expenditure of much time and labor.

Petitioner is remanded to the custody of the sheriff of Ventura county and the writ is discharged.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

AMERICAN SYSTEM OF REINFORCING v. BREAKERS HOTEL CO. et al.*

Civ. 4548.

District Court of Appeal, Third District, California.

May 20, 1932.

Rehearing Denied June 18, 1932. Hearing Granted by Supreme Court July 18, 1932.

1. Payment ⇐16(1).

Giving of note for debt does not constitute payment, absent agreement to that effect.

2. Principal and agent ⇐123(5, 6).

Ostensible authority depends upon acts or declarations of principal, not upon acts or declarations of agent (Civ. Code, § 2317).

3. Principal and agent ⇐119(1).

Third party relying upon ostensible agency must show at least one specific instance in which similar act of alleged agent was authorized or recognized (Civ. Code, § 2317).

4. Principal and agent ⇐99.

When agent's authority is deduced from recognition of certain acts it must be limited to presumption of other acts of same general kind (Civ. Code, § 2317).

5. Payment ⇐73(4).
Principal and agent ⇐123(3).

Evidence *held* insufficient to warrant finding that bookkeeper had either actual or ostensible authority to accept note as payment, and that note was accepted by creditor as payment (Civ. Code, § 2317).

6. Estoppel ⇐118.

Materialman agreeing to accept from contractor note of certain party, *held* not, under evidence, estopped from asserting that another note given by building owner and received by materialman's bookkeeper was accepted as payment because materialman knew construction contract provided contractor was to be paid in part by note.

7. Principal and agent ⇐155(1).

Receipt given to contractor by materialman's bookkeeper without authority, knowledge, or consent of materialman did not operate as estoppel.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 17 P.2d 138.

8. Estoppel ⊜54.

There can be no estoppel when facts are not known.

9. Estoppel ⊜54.

No one can be presumed to have waived that the evidence of which is unknown.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by American System of Reinforcing against Breakers Hotel Company and others. From the judgment, plaintiff appeals.

Reversed.

O'Melveny, Millikin & Tuller and J. R. Girling, all of Los Angeles, for appellant.

Joe Crider, Jr., John M. Martin, Page, Nolan, Rohe & Freston, Swaffield & Swaffield, William R. Gallagher, and W. E. Lady, all of Los Angeles, Denio, Hart, Taubman & Simpson, of Long Beach, and William P. Redmond and Woodruff, Musick, Pinney & Hartke, all of Los Angeles, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

On September 25, 1925, the Breakers Hotel Company entered into a contract with William G. Reed, as a contractor, for the erection of an hotel building on certain property owned by it in the city of Long Beach. The contract price was $847,269.20. Upon this same date, Reed, as such contractor, and the Metropolitan Casualty Insurance Company, as surety, executed a bond for the benefit of laborers and materialmen, and on October 2, 1925, this contract and bond were filed for record. On October 12th, plaintiff entered into a contract with Reed, by which it agreed to furnish certain material for use in the construction of said building. In carrying out this contract it furnished material to the amount of $64,420.33, of which $52,820.02 was paid in cash, leaving a balance of $11,600.31. Said contract provided: "Party of second part (plaintiff), further agrees to accept, in lieu of cash, $10,000.00 in notes secured by a deed of trust given by Fred B. Dunn to Pacific Southwest Trust & Savings Bank, as trustor, out of the final payment of this contract. Final 20 per cent to be paid 35 days after completion of the work to the satisfaction of the party of the first part" (Reed).

D. J. Stoddard was plaintiff's bookkeeper, and on March 5, 1926, received a note for $10,000 from Reed, dated September 25, 1925, executed by the Breakers Hotel Company, due June 15, 1927, with interest, and secured by deed of trust to Pacific Southwest Trust & Savings Bank, Stoddard receiving at the same time a postdated check for the sum of $2,980, and he thereupon receipted for same as follows: "Received payment on Breakers Hotel job, $12,980.00 Paid 3-6-26, D.J.S." This credit was entered upon the books of appellant, and so remained up to the time of the trial of this action.

Appellant contends that the $10,000 that was delivered to Stoddard, its bookkeeper, by Reed, was not the note called for by the contract entered into between it and Reed, and therefore the said note was not a payment.

[1] It is the well-settled law of this state that the giving of a note for a debt does not constitute a payment of the debt unless there is an agreement that it shall be so accepted. 20 Cal. Jur., and cases cited. Therefore the main question for determination in this appeal is whether or not the acceptance of said note by appellant's bookkeeper constituted a payment.

Appellant claims that Stoddard, as its bookkeeper, had no authority to accept the note as a payment, and especially so because it was not the note called for by the contract. Stoddard testified that he had no such authority. N. E. Dawson, the vice president of appellant, testified that Stoddard had no authority to accept the note as payment. The fact that it was not the note called for by their contract with Reed was not discovered by appellant until it was checking up on the final payment.

[2-5] Respondent contends that, even if Stoddard had no actual authority to accept the note as a payment, he had ostensible authority to do so.

Section 2317, Civil Code, provides that: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." It is well settled that ostensible authority depends upon the acts or declarations of the principal, and not upon the acts or declarations of the agent. 1 Cal. Jur. 741; Files v. Derderian, 44 Cal. App. 256, 186 P. 184. Where a third party relies upon ostensible agency, he must produce evidence of similar transactions in which the act of the agent was authorized or recognized. At least he must show one specific instance in which a similar act of the alleged agent was authorized or recognized. Robinson v. Nevada Bank, 81 Cal. 106, 22 P. 478.

While the evidence is to the effect in the instant case that Stoddard received and receipted for money and checks for debts owing appellant, there is no proof of a single instance where he accepted a note in payment of a debt due appellant, except the note in this case. When authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts

of a wholly different nature. Post v. City and County Bank, 181 Cal. 238, 183 P. 802. The court found that the $10,000 note was delivered to and accepted by appellant as a payment. We find no support in the evidence for this finding. There is no evidence that Stoddard had actual authority to accept the note as a payment, nor is there any evidence from which the conclusion can be drawn that he had ostensible authority so to do.

Respondent calls our attention to a letter written by Stoddard to Breakers Hotel Company, on December 20, 1926, in answer to its letter requesting advice as to notes held and the additional amount due from the Breakers Hotel job, and in this answer he inclosed a copy of the $10,000 note, and stated that, in addition to the note, there was a balance due from Reed amounting to $1,600.31. This letter was written by Stoddard, as bookkeeper, without consulting the officers of appellant company, and without their knowledge or consent. This letter does not strengthen the claim of respondents that Stoddard had authority, actual or constructive, to accept the note as a payment.

[6] Respondent contends that appellant is estopped from asserting that the said note was not accepted as a payment. This claim of estoppel is based upon the fact that, in the contract for the construction of the said hotel building, entered into between Reed and the hotel company, it was agreed that the last payment of $105,000 of the cost price was to be made by the notes of the Breakers Hotel Company, secured by a second deed of trust on the hotel company's property, and that appellant had actual and constructive knowledge of the existence of these facts at the time it entered into its said contract with Reed; that this $10,000 was a part of the $105,000 that was to be paid to Reed in notes. There is no evidence to support this contention. The $10,000 that appellant contracted with Reed to accept as a payment was not to be executed by the Breakers Hotel Company, but was to be executed by Fred B. Dunn. It might well be the case that appellant was willing to accept a note signed by Dunn as a payment to the extent of $10,000, and entirely unwilling to accept such from the hotel company.

[7-9] Appellant also contends that by reason of the receipt given by Stoddard, S. W. Straus & Co., who were authorized to make the payments to Reed, under his contract with the Breakers Hotel Company, as the work progressed, were induced to make this payment that they otherwise would not have made. However, as the giving of this receipt by Stoddard was unauthorized by appellant, and was given without its knowledge or consent, and under circumstances that were not binding upon it or that could be considered its act, therefore it cannot be said that the said receipt operated as an estoppel. Furthermore, there can be no estoppel when the facts are not known, as no one can be presumed to have waived that the evidence of which is unknown. Weintraub v. Weingart, 98 Cal. App. 690, 277 P. 752; Wheaton v. North British, etc., Ins. Co., 76 Cal. 429, 18 P. 758, 9 Am. St. Rep. 216; Puterbaugh v. Wadham, 162 Cal. 618, 123 P. 804; Norton v. Overholtzer, 63 Cal. App. 388, 218 P. 637.

There is no evidence that appellant had knowledge of the giving of this receipt by Stoddard.

The judgment is reversed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 600

PEOPLE v. CLAY.

Cr. 1655.

District Court of Appeal, First District, Division 2, California.

May 20, 1932.

Criminal law ⇐1182.

Conviction was affirmed, where transcript was filed and case placed on calendar for oral argument, but appellant neither filed brief nor appeared at hearing (Pen. Code, § 1253).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Vernon Clay was convicted of violating the State Narcotic Act, and he appeals.

Affirmed.

William Gloria and A. J. Hennessy, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court in the city and county of San Francisco of a felony, to wit, violating the State Narcotic Act.

The transcript on appeal was filed in this court on March 8, 1932. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 9, 1932. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provision of section 1253, Penal Code, the judgment and order are affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

123 Cal.App. 637

WEAVER v. BEARDSLEE et al.

Civ. 7116.

District Court of Appeal, Second District, Division 2, California.

May 23, 1932.

Executors and administrators ⇐312.

Administrator who accepted distributee's order to make payment to another "out of first moneys payable to me" was not personally liable where distributee received only real and personal property (Code Civ. Proc. § 1545).

Administrator was not liable, because he was not required to convert into money the assets of the estate, although under Code Civ. Proc. § 1545, any person interested could have made application to the court that administrator be required to sell.

Appeal from Superior Court, Los Angeles County; Wm. T. Aggeler, Judge.

Action by C. A. Weaver against D. A. Beardslee and another. From judgment for named defendant, plaintiff appeals.

Affirmed.

L. G. Shelton, of Los Angeles, for appellant.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

The defendant assigned to the appellant a portion of his interest in the estate of Isabella Beardslee, deceased, and delivered said assignments to the respondent as executor, directing that the moneys be paid "out of the first moneys payable to me out of said estate as an heir thereto." The assignments were thereafter indorsed, "1-28-25. I accept the above order. D. A. Beardslee, Administrator of the Estate of Isabella Beardslee, Deceased." On distribution of said estate the assignor received real and personal property only. An action was instituted by the appellant against said executor and the original debtor, which resulted in judgment being rendered in favor of the defendant D. A. Beardslee, from which this appeal is presented.

The sole question for determination is "whether an administrator who has accepted an order on him to pay out of the interest of a distributee certain indebtedness of said distributee is personally liable to said assignee upon his failure to comply with the assignment and order which he has accepted."

Section 1545 of the Code of Civil Procedure as it then read (Prob. Code, § 758), provided as follows: "If the executor or administrator neglects or refuses to sell the property of the estate when it is necessary or when it is for the advantage, benefit and best interests of the estate and those interested therein, that the real estate or some portion thereof be sold, any person interested may make application to the court, that the executor or administrator be required to sell, and notice of such application must be given to the executor or administrator before the hearing."

Since the executor was not required to convert into money the assets of the estate, the order upon which the action arose was ineffectual, and cannot be held to have warranted a judgment in favor of the appellant. Haynes v. Meeks, 20 Cal. 288; Couts' Estate, 87 Cal. 480, 25 P. 685; Roach's Estate, 139 Cal. 17, 72 P. 393.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

123 Cal.App. 514

In re REGNIER'S ESTATE.

FRATERNITE FRANCO-AMERICAINE v. REGNIER et al.

Civ. 8157.

District Court of Appeal, Second District, Division 1, California.

May 18, 1932.

Rehearing Denied June 16, 1932. Hearing Denied by Supreme Court July 14, 1932.

1. Wills ⇐489(6).

Evidence of testatrix' interest in French orphans and gifts therefor through certain organizations *held* competent to establish latters' right to bequest thereto (Probate Code, § 105).

2. Wills ⇐514.

"French War Orphans' Relief" and "Fraternite Franco-Americaine," organizations engaged in relief of French orphans, *held* entitled to bequest to such orphans (Probate Code, § 105).

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Josephine Regnier, deceased. On final accounting and petition for distribution by Josephine Gaige, executrix, contested by Della Regnier and another. From an order sustaining contestants' objections and a decree of distribution, the Fraternite Franco-Americaine, a corporation, and another appeal.

Reversed.

Mott, Vallee & Grant, of Los Angeles, for appellants.

Dave F. Smith and Kryne Van den Akker, both of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

Josephine Regnier died April 17, 1928, leaving an estate subject to administration. On December 23, 1927, she had executed an holographic will, which will, after her death, was duly admitted to probate as her last will and testament. This will contained, among other provisions, the following bequest: "I hereby bequeath to the French Orphans of France, one-third of my Estate." In due course of administration the executrix of her estate presented her final account and petition for distribution. In this petition the executrix alleged that "one-third of the property on hand should be distributed to the French Orphans of France."

Two sisters of the deceased, the contestants here, filed objections to the final account and petition for distribution in which they alleged: "That under the terms of said will one-third of said estate is bequeathed to the 'French Orphans of France,' and said objectors hereby allege that said devise is so uncertain that the same cannot be properly carried out and they further object that the said French Orphans of France are not authorized or entitled to receive a legacy under said will." Appellants and their associated charitable corporation, the Fatherless Children of France, Inc., filed an answer to these objections. This answer alleges that the Fatherless Children of France, Inc., was organized in 1918 as a charitable, nonprofit corporation, under the laws of the state of New York, for the purpose of raising funds for the relief of the orphan children of France. That the French War Orphans' Relief was organized for the purpose of receiving funds to be used in the care and relief of the orphan children of France and carried on the work of the Fatherless Children of France, Inc., after it had discontinued its active campaign for funds in 1921. The answer further alleges that Fraternite Franco-Americaine was a corporation organized under the laws of France in 1915, for charitable purposes, and that it has at all times acted in conjunction with the other appearing organization in the actual expenditure in France of the funds collected by them in America. The answer also denied each allegation of the objections. A hearing was regularly had upon the objections, and the court sustained the objections, and by its decree ordered that the one-third of the estate provided to pass to the French Orphans of France should be distributed to the heirs at law of the deceased.

The only findings of fact made by the court are embodied in the decree of distribution, which contains the following provision: "That said decedent in her last will and testament made an attempted bequest of one-third of her estate to the French Orphans of France, and it appearing to the court that there is no organization of that name, nor any organization of a similar name, and that the language of said will attempting to make a disposition of one-third of said estate is so indefinite and uncertain that it is impossible to identify anyone as the intended taker of said one-third of the estate of said decedent; and that said attempted gift of one-third of said estate to the French Orphans of France fails and said one-third of said estate is undisposed of by the will of said decedent. * * *" From this order and decree of distribution the French War Orphans' Relief and the Fraternite Franco-Americaine appeal. The corporate existence of the Fatherless Children of France, Inc., terminated January 22, 1931, after submission of the cause to the trial court, but before the decision was made.

[1] Appellants' contention on this appeal is that the court's finding that the provision of the will for the benefit of the French Orphans of France is "so indefinite and uncertain that it is impossible to identify any one as the intended taker of said one-third of the estate of said decedent" is not supported by the evidence. At the hearing had upon the petition for distribution, the contestants called no witnesses. The appellants introduced the testimony of three witnesses at this hearing, two of whom were nieces of decedent, and one Lucien N. Brunswig, who was an officer of the charitable organizations here involved. The testimony of the nieces was very similar in import. They both had lived with decedent as a part of her family group, and were upon terms of intimacy with her. Decedent's family was of French origin. She was unmarried. In conversation had with her subsequent to the declaration of war in 1914, she had shown great interest in the orphan children of France; that she had given funds to be used for such French orphans; that these funds had been given for the children of France through the organization of which Mr. Brunswig was chairman. At one time in a discussion had as to the terms of the will of the father of one of the witnesses the decedent expressed much surprise that his will did not remember the French children of France and stated "she felt it was very unkind and she felt she would do so." The witness Brunswig testified as to the organizations here involved, and of which he was an officer and one actively engaged in carrying on their charitable work; that such organizations collected and expended funds for the benefit of the orphan children of France during and after the war; that during the period of the war a large amount of publicity was given to the organizations and their work of collecting funds for French orphan children. Documentary evidence was also received as to the corporate existence of the incorporated organizations.

Section 105 of the Probate Code, which is a restatement and consolidation of repealed sections 1318 and 1340 of the Civil Code, reads as follows: "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations." Though some of the testimony received by the trial court may have been objectionable upon the theory that it was hearsay or as a declaration of intention, read as a whole, it clearly establishes decedent's knowledge of, connection with, and sympathy for, the objects and purposes of the appellant charities, and was competent evidence to establish the true identity of appellants, it being obvious that there was a misnomer, the testimony being that there was no such organization as the "French Orphans of France."

[2] The will here involved is holographic. It does not appear that the decedent was one skilled in the drawing of such instruments. Inaccuracy or misnomer, from a layman's standpoint, do not assume their relatively great significance. Respondents contend that the instant case is to be distinguished from cases of misdescription or misnomer, as exemplified by Estate of Gibson, 75 Cal. 329, 17 P. 438, and Estate of Moeller, 199 Cal. 705, 251 P. 311, in that, there is no resemblance between the names of the charities claiming the bequest and the name appearing in the will. With this contention we cannot agree. A name, at best, is but the handle upon which we seize in an effort to establish an identity. It cannot be said that "the smith that works at the stone bridge," a term of yesterday, is not as definite and certain, as the more prosaical "John Smith" of to-day. There is a clear identity as to characteristic and distinguishing features between French War Orphans' Relief, Fatherless Children of France, and French Orphans of France. The location of the charity was definite when it is considered that its purpose was nation wide. The Fraternite Franco-Americaine, though lacking in name similarity, is clearly indicated by purpose and as an integral part of the indicated charity. Respondent has cited a number of cases which have no application here, as they involve the question of patent ambiguity, which question is not presented by the case at bar. The imperfect description of appellants in the will in the instant case is one that the trial court should have, under the circumstances presented here, corrected. Estate of Gibson, supra; Estate of Casement, 78 Cal. 136, 20 P. 362; Estate of Upham, 127 Cal. 90, 59 P. 315; Estate of Moeller, supra.

No issue on the question of the competency of the appellants to accept the bequest is presented upon this appeal.

The judgment and decree appealed from is reversed.

I concur: CONREY, P. J.

I dissent: YORK, J.

123 Cal.App. 267

BOYARSKY v. ROSS, County Auditor.

Civ. 8454.

District Court of Appeal, First District, Division 2, California.

May 2, 1932.

Rehearing Denied June 1, 1932.

1. Counties ⇐113(6).

Under constitutional provision requiring county charter to provide for appointment of assistants to county officers, township officer is in fact "county officer" of limited jurisdiction and subject to enactments under such provision (Const. art. 11, § 7½, subd. 5).

[Ed. Note.—For other definitions of "County Officer," see Words and Phrases.]

2. Clerks of court ⇐11.

Constitutional provision regarding appointment and compensation of justice and inferior court judges and deputies in counties having charter applies to all county and township officers (Const. art. 6, § 11a; art. 11, §§ 4, 5, 7½; Code Civ. Proc. § 103c, as amended by St. 1931, p. 2304).

3. Clerks of court ⇐6.

Justice court deputy clerk not appointed under county charter adopted under constitutional provision specifically dealing with justice and inferior court appointments could not claim right to office under statute enacted under constitutional provision dealing with inferior courts generally (Const. art. 6, § 11a; art. 11, §§ 4, 5, 7½; Code Civ. Proc. § 103c, as amended by St. 1931, p. 2304).

Such deputy clerk could not claim right to office by appointment under Code of Civ. Proc. § 103c, as amended by St. 1931, p. 2304, enacted under Const. art. 6, § 11a, because such latter constitutional provision deals with inferior courts generally, and in such broad terms as to include justice courts, and is limited and

construed together with Const. art. 11, §§ 4, 5, 7½, which deals specifically with number, appointment, and compensation of judges, deputies, and assistants in justice courts and inferior courts in counties having a charter, and is determinative of clerk's right to office.

4. Statutes ⇐162.

Special statute applicable to particular locality is not repealed by statute general in application, unless intent to repeal special law is manifest.

Application for writ of mandate by H. Boyarsky, to be directed to Horace P. Ross, as Auditor of Alameda County.

Writ denied.

Decoto & St. Sure, of Oakland, for petitioner.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondent.

Harold Huovinen, of Oakland, amicus curiæ, for respondent Alameda County Civil Service Employees' Ass'n.

STURTEVANT, J.

[1, 2] This is a proceeding in mandamus. In his petition the petitioner sets forth that on the 9th day of October, 1931, he was appointed as a deputy clerk in the justice's court of Oakland township in Alameda county, and that thereafter he qualified and ever since has been a duly appointed, qualified, and acting clerk in said court; that the salary attached to said position is fixed by section 103c of the Code of Civil Procedure in the sum of $180 per month; that since the date of his appointment the amount of salary earned prior to the filing of this application was the sum of $498.56; that the defendant auditor has refused to draw his warrant in payment of said salary, and petitioner therefore asks a writ of mandate directing the payment. The respondent has filed a demurrer and has also filed an answer. The petitioner states that: "The sole question presented for determination is whether the power of fixing the number and compensation of justices' deputy clerks, of the justice's court of Oakland township, county of Alameda, rests with the board of supervisors of that county or with the legislature of the state of California." However, he divides his argument into two parts. In the first place he claims that the charter of Alameda county made no direct provision on the subject, but, instead of doing so, it purported to delegate the power to the board of supervisors and purported to authorize that board to cover the subject by enacting an ordinance. Stats. 1927, p. 2033, § 12, subd. (c). In this same connection he argues that the charter made no provision for any "inferior courts" or "other officers of inferior courts" (Const. art. 11, § 7½, subd. 3), and he concludes, therefore, that the passage contained in the charter is invalid, and that section 103c of the Code of Civil Procedure is the law in force and which is applicable to his case. Calling attention to the amendment of the Constitution by the enactment of section 11a of article 6 of the Constitution, and the later amendments to the Code of Civil Procedure extending the jurisdiction of justices of the peace in certain localities, the petitioner contends that a justice's court is not an inferior court within the meaning of article 11, § 7½, subd. 3, of the Constitution, and therefore the board of supervisors of Alameda county had no authority to enact an ordinance on the subject of assistants and deputies in the office of the clerk of the justice's court—in other words, that the justice's court of Oakland township was not within the contemplation of the board of freeholders when framing the provisions contained in the charter. To these contentions the respondent replies as follows. Article 11, § 7½, provides: "It shall be competent, in all charters, framed under the authority given by this section to provide, in addition to any other provisions allowable by this Constitution, and the same shall provide, for the following matters: * * * 3. For the number of justices of the peace and constables for each township. * * *" The board of freeholders did as directed. It incorporated in the charter the following provisions covering the subject: "Sec. 21: In each township there shall be as many Justices of the Peace as are, or may be hereafter provided by general law, and not more than one Constable for each Justice's Court, together with such clerks, deputy constables and other officers as may be authorized by the Board of Supervisors; * * * Sec. 22: Justices of the Peace in each township shall be nominated and elected at the times and in the manner and for the terms now or hereafter provided by general law. Constables shall be appointed by the Sheriff from the eligible civil service list. Sec. 23: The compensation of Justices of the Peace of each township and of Constables shall be fixed by the Board of Supervisors. * * *" The respondent also quotes subdivision 5 of section 7½ of article 11 of the Constitution, that the charter shall provide: "5. For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such per-

sons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal." The board of freeholders wrote section 12, which, among other things, provides: "Sec. 12: It shall be the duty of the Board of Supervisors: * * * (b) To provide, by ordinance, for the compensation of elective and appointive officers, assistants, deputies, clerks, attaches and employees unless such compensation is otherwise fixed by this Charter. The compensation of elective officers shall be fixed at least six months prior to the election of such officer. The compensation of elective officers shall not be increased or diminished after the election of such officer or during his term of office; provided, however, that the Board of Supervisors may allow such additional deputies or assistants as may be necessary and proper, to elective and appointive officers during their terms of office, and that the Board of Supervisors may also increase the compensation of such deputies and assistants during the term of office of such officers. * * * (d) To provide, by ordinance, for the number of assistants, deputies, clerks, attaches and other persons to be employed from time to time in the several offices and institutions of the County."

Continuing, the respondent shows that, pursuant to the provisions of the charter, said ordinances have been enacted, and that they provide that seven clerks may be appointed in the office of the justice of the peace of Oakland township, and that prior to the appointment of this petitioner seven appointments had been made, and that there was no vacancy, and the appointment of the petitioner was not provided for. Moreover, the respondent calls attention to the fact that the charter provides a complete civil service system, that ordinances have been enacted putting it in force, that examinations have been had, and that a list of available qualified persons has been prepared, but that the petitioner's name was not on said list. The respondent notes that subdivision 5 of section 7½ uses the expression "offices of the county," and does not expressly use the words "offices of the township," but he contends that a township officer is in fact a county officer of limited jurisdiction. The point is sustained by many cases. Longan v. County of Solano, 65 Cal. 122, 124, 3 P. 463; Crockett v. Mathews, 157 Cal. 153, 106 P. 575; Keith v. Ramsey, 34 Cal. App. 340, 341, 167 P. 408; Kilroy v. Whitmore (Cal. App.) 300 P. 851; People v. Cobb, 133 Cal. 74, 76, 77, 65 P. 325; Cox v. Jerome, 31 Cal. App. 97, 99, 100, 159 P. 884. Furthermore, picking up section 7½ of article 11, and reading it in its entirety, no doubt remains that it was intended to apply to all county and township offices and the deputies and assistants therein as those particular offices were heretofore known, to others recently created, and to others to be thereafter created by general statutes or by amendments to the Constitution. Moreover, when the people were called upon to vote on the proposed amendment to the Constitution, adding section 7½ to article 11, there were published by authority of law (Pol. Code, § 1195) written statements as to the meaning and scope of the section. Senator Caminetti, the author stated:

"This proposal to amend the organic law occupying the second place on the official ballot for the ensuing special election on constitutional amendments, known as the 'County Home Rule Amendment,' is a logical growth from the successful administration of 'charter cities' formed under the 'home rule' provisions of our constitution relating to municipalities.

"When the constitution of 1879 was framed it was with the knowledge that the one adopted in 1849 permitted special legislation for county and local governments and for many other purposes. This privilege had been abused to such an extent as to create a widespread demand for uniformity in county government as well as for the regulation of many other matters of state concern. As a result the uniform system of county and township government, since in force, was inserted therein. It was supposed to be impregnable to the assault of those demanding special laws, as to county and township officers, their salaries, and the number and compensation of deputies when such are allowed; but a way was devised, by classifying counties so as to put each county in a class by itself, to obtain on these subjects in the guise of uniformity what formerly was openly secured under special legislation. Thus the old system is still in control and is generally supreme. * * *

"A county should be governed by the same rule that a discreet business man conducts his affairs. The present county system does not work on such a plan. Home rule in county, township and road government will approximately, if not wholly, secure such a condition. It will have the merit of being a people's government, with the immediate power of correcting abuses in the possession of the electorate. * * *

"It will be noted that these subjects, viz.:

"(a) All matters of a local nature, affecting county administration and county and township officers and deputies, their employment, method of selection, amount of compensation, etc.; and

"(b) Road administration, including construction, repair and maintenance of all except state highways, are the two with which it will be competent, under this proposed amendment, for the people of a county to deal. These subjects generally require in the detail of their administration more of the people's taxes than all the balance of

the business affairs of the county; hence it is considered proper that they should form the nucleus for the proposed charter county governments."

Senator T. W. H. Shanahan, writing in opposition to the adoption of the amendment, took the position that by the amendment a charter could be adopted that would provide for the appointment instead of the election of officers, but he was at great pains to indicate that a charter adopted by a board of freeholders would include all of the officers—both county and township.

In what has been said above it will be noticed that the respondent bases no right or defense on any part (except the first clause) of subdivision 3, section 7½, of article 11 of the Constitution. He was not bound to do otherwise. The entire subdivision is as follows: "3. For the number of justices of the peace and constables for each township, or for the number of such judges and other officers of such inferior courts as may be provided by the Constitution or general law, for the election or appointment of said officers, for the times at which and the terms for which said officers shall be elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors, and if appointed, for the manner of their appointment." It will be observed that the passage is in the disjunctive. It will be conceded that the mandate of the Constitution directs the board of freeholders to provide for justice's courts or inferior courts. However, there is no mandate to provide for both. We have shown above that the charter under consideration does provide for justice's courts. That was sufficient. The passage just quoted is closely allied to section 1, article 6, of the Constitution as it read when section 7½ was adopted: "Section 1. The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, Superior Courts, Justices of the Peace, and such inferior courts as the Legislature may establish in any incorporated city or town, or city and county." That there should be inferior courts, whether justice's courts or otherwise, has at all times been provided in the Constitution. Therefore, to the end that a county, governed by a freeholders' charter should not depart from the general policy of the state, subdivision 3 was inserted in section 7½ of article 11. However, as we have shown above, the provisions of said subdivision have been complied with so far as any element of this case is concerned and other matters need not be discussed.

As shown above, it has at all times been provided that our judicial system shall include courts inferior to Superior Courts. Const. art. 6, § 1. From time to time, in one place or another, we have had justice's courts, recorder's courts, municipal criminal courts, police courts, and quite recently municipal courts. Lately, in some counties where the population is large, it has been provided that the justice's courts therein shall have a more extended jurisdiction than other justice's courts. Const. art. 6, § 11a; Stats. 1929, c. 473, p. 834. But we have never had two or more different classes of justice's courts. Cases involving municipal courts are not helpful. Those courts are a class unto themselves. Const. art. 6, § 12; In re Rissman, 87 Cal. App. 176, 261 P. 727. If in Alameda county provision were to be made for inferior courts as distinguished from justice's courts, then the petitioner might claim that the charter should have provided for his appointment, term of office, compensation, etc. Const. art. 11, § 7½, subd. 3; Simpson v. Payne, 79 Cal. App. 780, 251 P. 324. But no such court has been provided. A justice's court has been provided. Although the justice's court of Oakland township has a broader jurisdiction than a justice's court in some other township, it is still a justice's court. Certainly there is nothing on the face of the Constitution to show that the words "justice of the peace" were used in subdivision 3, § 7½, article 11, with any different meaning or limitation than used elsewhere in that same instrument. Nothing is contained in Statutes of 1929, chapters 470 and 473 (pages 832, 834) to the effect that the justice's courts therein named are not the same justice's courts as those referred to in the numerous sections of the Code of Civil Procedure (sections 831h–927q) and other general laws.

[3, 4] As shown above, the petitioner claims his appointment was validly made under Code of Civil Procedure, § 103c, as enacted by Statutes of 1931, chapter 1092 (page 2304), and that that statute was validly enacted under section 11a, article 6, of the Constitution, as that section was adopted in 1928. Continuing, he claims that section 7½, article 11, of the Constitution, which was adopted in 1911, and the charter adopted thereunder, are not controlling as to his rights. It will be noted, however, that section 11a, article 6, deals with the number of judges, but is wholly silent as to any other officer of the court. On the other hand, section 7½ of article 11 specifically deals with the number, appointment, and compensation of the judges, deputies, and assistants in justice's courts and inferior courts in a county having a charter. But section 11a, article 6, deals with inferior courts generally and in such broad terms as to include justice's courts. Does it modify or repeal section 7½ of article 11? It is settled law that constitutions will be construed under the rules for construing statutes. In Bateman v. Colgan, 111 Cal. 580, at page 586, 44 P. 238, 240, the court quoted with approval: "It is a rule of construction that a special statute providing for a particular case,

or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would be taken strictly, and, but for the special law, include the case or cases provided by it." When a charter is involved, general enactments are specially limited by construction in such manner as to protect the charter. Wood v. Board of Election Com'rs, 58 Cal. 561, 564. Therefore the petitioner has obtained no rights under section 11a of article 6 of the Constitution or the statutes enacted thereunder. That he has no rights under general laws enacted under sections 4 and 5 of article 11 is expressly stated in section 7½ of article 11.

The application for a writ is denied.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 639

PETERSON v. LA SALLE et al.

Civ. 8124.

District Court of Appeal, Second District, Division 2, California.

May 23, 1932.

1. Appeal and error ⇨1002.

Appellate court cannot interfere with verdict based on conflicting evidence.

2. Appeal and error ⇨216(2).

Where rendition of services was undisputed and defendant made no request for additional instructions, he could not object on appeal to instruction to find for plaintiff if jury found employment of plaintiff at wages and for time alleged.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Ole Peterson against Frank La Salle and another. From judgment for plaintiff against named defendant, the named defendant appeals.

Affirmed.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for appellant.

Earl Curtis Peck, of Los Angeles, for respondent.

CRAIG, P. J.

The defendant appealed from a judgment entered upon a verdict of a jury awarding to the plaintiff compensation for alleged work, labor, and services.

Portions of the testimony of each of the respective parties set forth in the briefs are equally positive and concededly contradictory as to the fact of employment, and other evidence upon that issue is admittedly absent.

[1] The appellant first contends that respondent's services were terminated prior to the date alleged by the latter and as found by the jury. The sole basis for such contention consists of evidence of various demands and refusals of wages, from time to time, of the respondent in person. Upon a review of the record in the instant case it cannot be said that an appellate court would be authorized to judge as to the credibility of witnesses nor to question the verdict and judgment without holding that in the very nature of things the respondent's testimony could not have been true. We feel that such ruling here would invade the province of the jury. Wilson v. Kestenholz, 113 Cal. App. 13, 297 P. 954.

[2] It is insisted that an instruction merely that, if the jury should find from the evidence that the plaintiff was employed by the defendant, at the wages, and for the period of time, as alleged, their verdict should be in his favor, was insufficient in that their conclusion might have been different had the trial court also directed that they be governed by a preponderance of the evidence. No such instruction was requested, nor was the fact of rendition of services disputed: hence appellant cannot complain on appeal.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

123 Cal.App. 520

PEOPLE v. VAN ZANDT.

Cr. 67.

District Court of Appeal, Fourth District, California.

May 18, 1932.

As Modified May 31, 1932.

1. Criminal law ⇨656(9).

That court, in making statement of case prior to examination of jury, allegedly stated that offense occurred, *held* not prejudicial, evidence sustaining conviction and jury being fully instructed.

Court's error, if any, in stating that defendant was charged with driving automobile while under influence of intoxicating liquor on certain day within county, being state highway No. 26, "the offense happening near, * * *" was not prejudicial to any of defendant's substantial

rights, since, at close of trial, jury was fully and fairly instructed that jurors were sole judges of fact and were instructed on whom burden of proof rested and as to presumption of defendant's innocence, and evidence was amply sufficient to sustain conviction, it being clear that court was not attempting to instruct jury either as to law or as to facts involved prior to examination of jury, but was merely making general statement of charge, in order that prospective jurors might intelligently answer subsequent questions as to their qualifications.

2. Criminal law ⇐227.

Preliminary examination on felony charge need not be held in township where offense occurred (Pen. Code, §§ 811, 813, 821, 824, 858, 860, 872).

Complaint may be filed before any magistrate, charging commission of public offense anywhere within county, and, when defendant is brought before such magistrate, he has jurisdiction to entertain preliminary examination, and, under Pen. Code, § 872, if it appears from examination that public offense has been committed and there is sufficient cause to believe defendant guilty thereof, he may hold defendant to Superior Court for answer.

3. Criminal law ⇐1158(3).

Denial of new trial motion supported by affidavit that trial jury was special venire *held* implied finding, conclusive on appeal, that panel was regular.

Where clerk's minutes showed that jury was regular panel, and affidavit, filed by defendant on motion for new trial, recited that jury was special venire, and court denied motion, it must be assumed that conflict was resolved in favor of regularity of jury panel, which finding is conclusive on appeal.

4. Criminal law ⇐1111(1).

Appellate court is bound by record.

5. Criminal law ⇐1128(2).

Appellate court could not accept statement in brief that counsel did not know jury was not regular panel until after jury was sworn, where record was silent in such respect (Pen. Code, § 1060).

In absence of anything in record showing lack of knowledge of facts by defendant or his counsel, particularly where an opportunity was given to present matter to trial court on motion for new trial, appellate court could not accept counsel's statement in his brief on appeal as proof of fact that neither he nor defendant had knowledge that jury was special venire so as to excuse defendant's failure to take challenge to panel before a juror was sworn.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Adolph Van Zandt was convicted of driving an automobile while he was under the influence of intoxicating liquor, and he appeals.

Affirmed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

SCOVEL, Justice pro tem.

The defendant in this action was convicted in the Superior Court of Riverside county of the crime of driving an automobile while under the influence of intoxicating liquor. The information alleges that the defendant on December 11, 1931, at the county of Riverside, state of California, did willfully and unlawfully drive an automobile along and over that certain public highway in the county of Riverside, to wit, state highway No. 26, the defendant being then and there, and while so driving and operating said automobile, under the influence of intoxicating liquor. After arraignment, the defendant filed a demurrer and motion to dismiss the information on the ground that he had not been legally committed by a magistrate, for the reason that it did not appear in the transcript of the preliminary examination in what township the alleged crime was committed or whether or not state highway No. 26 was a public highway. Nowhere in the transcript on this appeal, however, does the evidence produced at the preliminary examination appear. The demurrer was overruled, and the motion to set aside the information denied. Thereupon the defendant pleaded not guilty, and the case was set for trial before the regular jury panel. The clerk's minutes of the trial show that the regular jury panel was present at the trial, and that defendant was duly convicted, and no question is raised as to the sufficiency of the evidence to sustain their verdict. A motion for new trial was thereafter filed by defendant on the ground that defendant had not been tried by the regular jury panel supported by the affidavit of defendant's counsel that the jury who tried the action was a special venire. The motion was denied and judgment pronounced. Defendant has appealed, and, as a basis for his appeal, raises three points.

[1] The first point is that the court in making a statement of the case prior to the examination of the jury invaded the province of the jury by making a statement of fact. The statement objected to is as follows:

"The Court: Members of the Jury, this is an action entitled The People of the State of California, Plaintiff, vs. Adolph Van Zandt, Defendant, in which the defendant Adolph Van Zandt, is charged with a felony, to wit,

driving an automobile while under the influence of intoxicating liquor on the 11th day of December, 1931, in this county, being State Highway No. 26, the offense happening near Banning.

"Mr. Seymour: We take exception to the court's statement and assign it as prejudicial error. State Highway No. 26 extends from Los Angeles to the Mexican line.

"The Court: Objection overruled."

Appellant now claims that the court advised the jury that the offense charged had actually occurred. It will be noted however, that the basis of counsel's exception was, not that the court stated that the offense occurred, but apparently that the court stated to the jury that state highway No. 26 was in Riverside county. A casual reading of the statement will show that the court, in referring to state highway No. 26, was merely reciting the allegation in the information to the effect that the defendant was charged with driving on state highway No. 26. Perhaps the latter portion of the court's statement, to wit, "the offense happening near Banning," is subject to some objection as a statement of fact, and it would doubtless have been better had the court qualified the statement by designating the offense as the "alleged offense." It is quite clear, however, that the court was not attempting to instruct the jury either as to the law or as to the facts involved, but was merely making a general statement of the charge in order that prospective jurors might intelligently answer subsequent questions as to their qualifications. At the close of the trial, the jury was fully and fairly instructed that they were the sole judges of the facts, upon whom the burden of proof rested, and the presumption of defendant's innocence. And, the evidence being amply sufficient to sustain the conviction, we do not see that the error of the court, if error it be, was prejudicial to any of defendant's substantial rights.

[2] The next point raised by defendant is that the venue of the action was not established, inasmuch as the record of the trial in the Superior Court does not show that the crime was committed in the township in which the preliminary examination was held and from which defendant was committed to the Superior Court. We are cited to no authority for the assertion that the preliminary examination must be held in the township where the offense occurred. The procedure for prosecuting felonies is set forth in Penal Code, § 811 et seq. Section 811 of the Penal Code provides that, when an information is laid before a magistrate of the commission of a public offense triable within the county, he must take depositions of the informant or prosecutor and any witnesses produced. Section 813 provides for the issuance of a warrant. Sections 821 and 824 provide for taking the defendant before the magistrate who issued the warrant. Sections 858 and 860 provide for the arraignment and preliminary examination, setting forth that, when the defendant is brought before the magistrate, he shall be informed of the charge and within a reasonable time thereafter proceed with the examination of the case. From the foregoing, it clearly appears that a complaint may be filed before any magistrate charging the commission of a public offense anywhere within the county, and that, when the defendant is brought before him, such magistrate has jurisdiction to entertain a preliminary examination thereof, and under section 872, if it appears from the examination that a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof, hold the defendant to the Superior Court for answer.

[3-5] Appellant also challenges the jurisdiction of the jury impaneled at the trial. The transcript, as the statement of facts above sets forth, shows a conflict as to whether or not defendant was tried by the regular jury panel. The clerk's minutes show that the jury was the regular panel. The affidavit filed by defendant on motion for new trial recites that the jury was a special venire. But, the court having denied the motion, it must be assumed that the conflict was resolved in favor of the regularity of the jury panel, which finding is conclusive upon this court on appeal. Furthermore, section 1060 of the Penal Code provides that a challenge to the panel must be taken before a juror is sworn. In order to avoid this statutory provision, counsel in his brief states that he did not know that the jury was not the regular panel until after the jury had been sworn. This court, however, is bound by the record. Nothing appears in the record to show that defendant's counsel had no knowledge of the fact, if, indeed, the case was tried by a special venire. The affidavit filed in support of defendant's motion for a new trial fails to so state. In the absence of anything in the record showing a lack of knowledge of the facts by the defendant or his counsel, particularly where an opportunity was given to present the same to the trial court upon the motion for new trial, we cannot accept counsel's statement in his brief on appeal as proof of the fact. We do not want to be understood as holding that under such circumstances the matter of irregularity in selection of a trial jury can be raised after the jury is sworn. A decision on the point is unnecessary to this appeal. It is sufficient to say that lack of knowledge thereof on the part of appellant does not appear upon the record.

No error appearing in the record, the judgment and orders appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 614

PETROFF v. NUNES.

CONDOS v. SAME.

CAMPBELL v. SAME.

Civ. 3993.

District Court of Appeal, Third District, California.

May 21, 1932.

1. New trial ⇐70.

Motion for new trial for insufficiency of evidence to support judgment is addressed to court's sound discretion.

2. Appeal and error ⇐979(1).

Granting or refusal of new trial for insufficiency of evidence to support judgment will not be disturbed on appeal, except for abuse of court's discretion.

3. Automobiles ⇐6.

Statute requiring guest in automobile to prove owner's gross negligence to recover damages for injuries sustained is not retroactive (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

4. New trial ⇐70.

Granting of new trial for insufficiency of evidence to support judgment for defendant motorist in action for injuries to guests *held* not abuse of discretion (St. 1923, p. 557, § 122).

The evidence warranted inference of defendant's negligence, proximately contributing to plaintiffs' injuries, in driving at excessive speed on wet pavement close behind another automobile and failing to ascertain that highway was free from approaching vehicles for 100 yards ahead before attempting to pass latter car.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Consolidated actions by Nick Petroff, Nick Condos, and C. H. Campbell, respectively, against Fred Nunes. Judgment for defendant, and, from an order granting a new trial, defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, and Joseph M. Raines, of Fairfield, for appellant.

William M. Maxfield, of San Francisco, Franklin P. Bull, of Los Angeles, and Elmer E. Robinson and William A. Lahanier, both of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

This is an appeal from an order granting a new trial in the above-entitled consolidated actions after a judgment in favor of the defendant which was rendered in an automobile casualty.

On December 28, 1927, at 11 o'clock in the forenoon, the defendant was driving his Essex automobile easterly along the public highway between Vacaville and Dixon. He was accompanied by the three plaintiffs, who were riding with him as his guests. They were going duck hunting. It had been raining. The pavement was wet. There is a conflict of testimony regarding the essential facts of the case. There is, however, substantial evidence to indicate that the defendant was driving at a negligent rate of speed, in close proximity to another machine which preceded his car, and that he sought to pass this automobile without first ascertaining that his left-hand portion of the highway was free from approaching vehicles. There is evidence to support the assertion that the defendant was driving at the rate of 35 or 40 miles an hour. His machine had skidded on the wet pavement just prior to the accident, and one of the plaintiffs warned him against excessive speed. About three miles beyond Vacaville the defendant overtook an automobile which was traveling "at a slow rate of speed." The machines were then approaching a bridge. The highway was straight and comparatively level. Both cars were traveling on the extreme right-hand side of the pavement. The defendant's machine was running "right close to it (the forward car), very near to it." Suddenly, just before reaching the bridge, the tail-light of the front machine was flashed on, but the car did not appear to slacken its speed. Without looking to see that the left-hand side of the pavement was clear of approaching machines, the defendant suddenly turned his machine to pass the forward car on its left-hand side. He did not see an approaching machine. At a point about 18 or 20 feet beyond the bridge, while his car was still on the left-hand side of the pavement, it was struck by an approaching Ford truck. All of the plaintiffs were injured. Each of the guests riding in the defendant's machine at the time of the accident, brought a separate action for damages against him for injuries sustained as a result thereof. In a jury trial of these consolidated cases, a verdict was rendered in favor of the defendant. Judgment was entered accordingly. Upon motion, a new trial was granted, chiefly upon the ground of the insufficiency of the evidence to support the judgment. From this order granting a new trial, the defendant has appealed.

The appellant contends that section 141¾ of the California Vehicle Act, which was adopted by the Legislature in 1929 (St. 1929, p. 1580), is retroactive in its application, and required the plaintiffs in this action to prove that the defendant was guilty of gross neg-

ligence in the operation of his machine in order to entitle them to damages. It is asserted the court erred in granting the motion for new trial because the record is devoid of evidence of negligence on the part of the defendant.

[1, 2] A motion for new trial which is based upon the ground of insufficiency of the evidence to support the judgment is addressed to the sound discretion of the court, and the granting or refusal of a new trial will not be disturbed on appeal except for an abuse of this discretion. 20 Cal. Jur. 27, § 13; 2 Cal. Jur. 905, § 533.

[3] Section 141¾ of the California Vehicle Act is not retroactive. It has no application to the rule of evidence requiring a guest who is riding in an automobile to prove gross negligence on the part of the owner as a basis for damages for injuries sustained as a result of an accident which occurred prior to the enactment of that provision of the law. Krause v. Rarity, 210 Cal. 644, 293 P. 62; Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529. The accident which is involved in this case occurred in 1927. It was therefore unnecessary to prove gross negligence against the defendant in order to establish a liability against him in the present case.

[4] The record contains evidence from which the court was warranted in inferring that the defendant was guilty of negligence which proximately contributed to the injuries which were sustained by the plaintiffs. The court may have reasonably inferred from the evidence that the defendant drove his machine at an excessive rate of speed, considering the presence of a wet pavement, to a position in dangerous proximity to the automobile which preceded his car, and that, when he sought to pass this car, he failed to first ascertain that the highway was free from approaching vehicles for a distance of one hundred yards ahead. Section 122 of the California Vehicle Act (St. 1923, p. 557), as it then existed, provided that: "On all occasions, the driver of a vehicle shall drive the same upon the right half of a public highway and close to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing other vehicles, in which latter case, the vehicle may be driven on the left side of the highway if such left side is clear and unobstructed for at least one hundred yards ahead."

The defendant testified that he did not see the approaching Ford truck which struck his machine at a point just beyond the bridge. The defendant's car had traversed a very short distance in passing the automobile. It was broad daylight. The atmosphere was then clear. The highway was level and straight. There was no congestion of traffic. There was no excuse for failure to see the approaching Ford truck. It is therefore reasonable to conclude the defendant failed to look for approaching vehicles before he proceeded to pass the car. This omission is evidence of actionable negligence. There appears to be no abuse of discretion on the part of the trial court in granting the motion for a new trial.

There is evidence that the defendant's machine skidded in passing the other car. The appellant contends the accident occurred from the unavoidable skidding of the machine. The court was warranted in concluding that the skidding occurred because of the excessive rate of speed at which the defendant was running on a wet pavement, or that it was the result of negligent failure to ascertain that the highway was free from appproaching vehicles before the turn was made upon the left-hand portion of the highway. The cause of the accident became a question of fact to be determined by the court. In view of the conflict of evidence which the present record discloses, the order granting a new trial should not be disturbed.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

123 Cal.App. 503

PEOPLE v. VOSGER.

Cr. 2182.

District Court of Appeal, Second District, Division 1, California.

May 17, 1932.

1. Criminal law ⇐1159(2).

Appellate court will not vacate conviction, where record discloses substantial and convincing evidence supporting charge.

2. Infants ⇐20.

Evidence of crime *held* not so incredible as to be no evidence; accused's denial and subsequent admission of having seen victim tending to substantiate victim's testimony (Pen. Code, § 288).

3. Criminal law ⇐742(1).

Where complaining witness' claimed disqualification for giving allegedly incredible testimony was limited to its weight rather than admissibility, jury question was presented.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

John Vosger was convicted of violating section 288 of the Penal Code, and he appeals.

Affirmed.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and S. L. Sefton, of San Francisco, for the People.

TAPPAAN, Justice pro tem.

[1] The defendant was convicted of a violation of section 288 of the Penal Code. From this judgment he appeals. Defendant's first specification of error is that the evidence is insufficient to show commission of the material elements of the crime charged. The court has carefully examined the record presented here, and such examination has disclosed that there was evidence presented at the trial of defendant, of a substantial and convincing nature, sufficient to support the charge as made against the defendant. "For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393.

[2] The next contention presented by defendant is stated by him as follows: "The Appellate Court will reverse a case where the evidence relied upon to uphold it is so inconsistent or improbable as to be incredible, amounting to no evidence at all." An extended review of the evidence given at the trial of defendant is unnecessary here. The alleged victim of defendant's attack was a boy of the age of eleven years. The defendant was a man over forty years of age. The alleged inconsistencies of which defendant complains involved in the main matters of time and place rather than facts as to the commission of the crime. In many instances these seeming inconsistencies were explained by the witness upon his further examination. The police officers who confronted defendant with the boy a short time after the attack was alleged to have taken place testified that defendant denied that he had ever seen the boy before the officers came with him. Defendant afterwards admitted that the boy had tried to sell him a magazine and that he was inside the store. This admission on the part of the defendant, considered in connection with his previous denial of knowledge of the boy, tended to substantiate the story of the boy as to the transaction. The evidence taken as a whole cannot be said to be so inconsistent or improbable as to be incredible or to amount to no evidence at all.

[3] The remaining question presented on this appeal is that the complaining witness was disqualified as a witness. The defendant limits this alleged disqualification by stating his position that the disqualification was "more particularly with reference to the qualifications going to the weight of the evidence rather than to the admissibility." The question thus presented is one of fact for the jury. "Mere contradictions of the testimony of a witness will not, standing alone, suffice to utterly destroy the credibility of such witness. It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses; and although impeaching evidence, in the nature of contradictions or otherwise, has been received, it is still not only the right but the duty of the jury to determine to what extent they will believe or disbelieve the testimony of the witness thus assailed." People v. Raich, 26 Cal. App. 286, 287, 146 P. 907, 908.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

123 Cal.App. 564

EL CENTRO GRAIN CO. et al. v. BANK OF ITALY NATIONAL TRUST & SAVINGS ASS'N et al.

Civ. 928.

District Court of Appeal, Fourth District, California.

May 19, 1932.

1. Judgment ⇐217.

"Judgment," as actually signed and entered, is the final determination of the court.

[Ed. Note.—For other definitions of "Judgment (In Law)," see Words and Phrases.]

2. Appeal and error ⇐854(1).

Appellate court will not review reasons which trial court gave for its judgment.

3. Appeal and error ⇐854(2).

If judgment in question is right upon any theory of law applicable to case, it must be sustained, regardless of considerations which may have moved trial court to its conclusion.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by the El Centro Grain Company and others against the Bank of Italy National

Trust & Savings Association, a corporation, and others. From the judgment, plaintiffs appeal.

Affirmed.

Harry W. Horton, of El Centro, for appellants.

Hickcox & Trude, of El Centro, for respondents.

SCOVEL, Justice pro tem.

This is an action wherein the plaintiffs seek to restrain foreclosure of a trust deed by defendants and asking the court for an accounting as to amounts paid upon the note secured by the deed of trust and sale of the property described in the deed of trust by a court commissioner. The case was tried upon an agreed statement of facts and submitted to the court for decision. Thereafter the court filed a document entitled "Directions for Findings and Judgment," wherein he stated that he thought the defendants were entitled to a stated amount upon the note and that he should appoint a commissioner to make the sale; that the defendants were entitled to judgment for the amount indicated; that the court appoint a commissioner to sell the property covered by the trust deed; that a period of 60 days be allowed for redemption; and that further proceedings under the trust deed be permanently enjoined. Defendants' attorney was requested to draw findings. Before findings were prepared or judgment entered, plaintiffs moved "to reopen the above entitled case for further proceedings and for the purpose of bringing in new and additional parties thereto, and filing the additional stipulation of facts served herewith." The motion was granted and the case reopened. Thereafter the court filed another document entitled "Memorandum Decision," in which he stated that he was satisfied the court had no power to limit the period of redemption to less than one year on foreclosure of a trust deed by action in which the sale is made by a commissioner named by the court, but that he did have power to allow a short period before sale in which to pay the amount due on the note; that judgment should be entered determining the amount due and allowing the plaintiffs 30 days within which to pay the same and decreeing that, if such payment were not made within the time limited, the injunction be dissolved and the sale proceed under the provisions of the trust deed. Counsel for defendants were requested to draw findings. Thereafter findings were waived and judgment was entered in accordance with the memorandum decision. From this judgment plaintiffs appeal, asserting that the judgment is erroneous for the reason that the court under the law had the right to allow any period for redemption after a sale by a court commissioner which in its judgment was reasonable and proper, not exceeding one year; that the judgment was given under a misapprehension as to the law and therefore erroneous.

[1] Counsel's contention is based upon the directions for findings and judgment first filed by the court, wherein he stated that he thought a period of redemption should be given after a court sale and the memorandum decision wherein the court states that it felt it had no power to permit such redemption period. We do not feel that a determination of the question as to whether the court had such power is necessary to a decision of this appeal. The judgment, as actually signed and entered, is the final determination of the court. No question is raised but that the court under the pleadings and stipulation of facts had authority to enter such a judgment and that the judgment is supported by these facts.

[2, 3] Appellants contend that the directions for findings and judgment are a final decision by the court, findings of fact having been waived, and that the judgment should have followed such directions. The motion to reopen the case, however, was not only for the purpose of bringing in new parties, but also for further proceedings. When the case was reopened, therefore, it was reopened for all purposes, and of necessity a new decision and judgment must have been rendered. Assuming that the court did have power to prescribe a redemption period after court sale of less than one year, contrary to the opinion of the court as set forth in the memorandum decision, still the final judgment as actually entered cannot be impeached. An appellate court will not review the reasons which the trial court gave for its judgment or order. If the judgment or order in question is right upon any theory of law applicable to the case, it must be sustained, regardless of the considerations which may have moved the trial court to its conclusion. It is judicial action and not judicial reasoning which is the subject of review. 2 Cal. Jur. 476.

In Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 74 P. 307, the appellant attacked the findings contending that the theory upon which the conclusions therein were reached was erroneous as shown by the written opinion of the judge who tried the case. On page 704 of 140 Cal., 74 P. 307, 309, the court states: "This opinion, of course, constitutes no part of the record; and, even if we were satisfied that the judge was in error in some of the views as to the law expressed therein, that fact would not avail plaintiff, for the findings of fact must stand or fall upon the evidence contained in the record."

In De Cou v. Howell, 190 Cal. 741, 214 P. 444, 448, the following very instructive language appears: "The law is definitely settled in this state by a long line of decisions that the opinion of the trial court is not a part of the record and cannot be considered by an ap-

pellate court as indicating what operated upon its mind in coming to a conclusion as to the ultimate facts of the case. It has been directly held that the opinion, though printed in the transcript, is no part of the record on appeal, and cannot be considered by the court in any manner or for any purpose. [Citing cases.] The deliberations of the court are conclusively merged in the judgment. * * * To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would open the door to mischievous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment."

We conclude that the judgment as actually entered must be sustained, even though the trial court might have been in error as to his construction of the law upon which the judgment was based.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 601

Ex parte WILSON.

Cr. 2226.

District Court of Appeal, Second District, Division 2, California.

May 20, 1932.

1. Habeas corpus ⊜92(3).

In habeas corpus after adjudication of contempt for nonpayment of alimony, court considers whether jurisdiction existed to make, and not reasonableness of, adjudication.

2. Habeas corpus ⊜92(3).

Finding of ability to pay alimony *held* conclusive on habeas corpus after adjudication of contempt for nonpayment.

3. Habeas corpus ⊜4.

Habeas corpus cannot be utilized to review, as though by appeal, adjudication of contempt, notwithstanding court may resort to record to ascertain jurisdiction.

4. Divorce ⊜269(2).

Court had jurisdiction to make adjudication of contempt for nonpayment of alimony, where appeal from order directing payment was not taken until after decision establishing contempt.

5. Divorce ⊜269(4).

Levy of execution to enforce alimony *held* not election of remedies precluding application for adjudication of contempt for nonpayment.

Levy of execution was not election of remedies, since a contempt proceeding is not a right primarily of a litigant, but a method of the court to compel obedience to, and punish disobedience of, its orders; and hence the doctrine of election of remedies has no application.

Application of Eric R. Wilson for a writ of habeas corpus directed to the Sheriff of Los Angeles County, to secure petitioner's release from custody under commitment for contempt for failure to pay alimony.

Writ discharged, and petitioner remanded.

Richard H. Cantillon and Henry G. Bodkin, both of Los Angeles, for petitioner.

George Acret and John Perry Wood, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The petitioner was adjudged guilty of contempt of court for willful failure to pay alimony, costs, counsel fees, and for failure to deliver possession of the family home to the wife. He asserts that the court was without jurisdiction to find him in contempt for the following reasons: (1) There was no evidence of his ability to comply with the order; (2) the trial court was divested of jurisdiction of the subject-matter of the order to pay alimony, suit money, and attorneys' fees by reason of an appeal to the Supreme Court from such order, filed after he was adjudged guilty of contempt but before the commitment was signed; and (3) that an execution had been levied upon the home of the parties, hence the plaintiff in the divorce action had elected her remedy and could not apply to the court to have petitioner cited for contempt.

[1-3] It is essential to bear in mind that in a habeas corpus proceeding we are precluded from inquiring into the reasonableness of the order for the payment of alimony. We are concerned solely with the question whether the court had the jurisdiction to adjudge the petitioner guilty of contempt. The court in the instant case found as a fact that petitioner was able to comply with the order which had been made in the previous month. In the case of Ex parte Levin, 191 Cal. 207, 215 P. 908, it is said that such "adjudication is conclusive on habeas corpus," citing a number of cases to which reference may be had. We are in accord with this statement as the general rule of law applicable in such cases. It is probably true that where there is an entire failure to establish the jurisdictional facts, or where the processes of the law have been simulated to give the appearance of a trial although in fact and in law there has been no trial of the issue, the record may

be resorted to for the purpose of showing the lack of jurisdiction in this particular. But the writ of habeas corpus may not be utilized to review, as though by appeal, the order of the trial court. The affidavit upon which the order directing petitioner to appear and show cause why he should not be punished for contempt expressly averred that he was able at all times subsequent to the making of the order to pay the sums of money ordered to be paid by the court. Furthermore, the case of In re McCarty, 154 Cal. 534, 98 P. 540, 542, is authority for the declaration that where the court has made its order, after due hearing directing the husband to make certain payments by way of alimony it is not incumbent upon the wife to affirmatively establish other than by the order his ability to pay. It is there said: "She makes a prima facie case at the hearing by producing the original order, and by proof of the refusal of her husband to make payment according to its terms, and, this being true, she is not required to set forth in her affidavit anything more than she is required to prove. The proceeding in contempt is designed to punish the delinquent husband for disobeying the order of the court and to enforce obedience to it, and at the same time an opportunity is given him to purge himself of contempt by presenting any legitimate excuse he may have, and, if his excuse is that since the making of the original order he has become unable to pay the alimony required by it, it is incumbent upon him to prove that fact. He is in the best position to show why for any reason he has not obeyed the order, and it is his duty to do so as a matter of defense. It is not necessary for the wife to allege his ability to comply with the original order. The court had originally found that he had such ability, and the only jurisdictional facts required to be stated in the affidavit were the making of the order and disobedience to it by refusal to pay."

The petitioner places particular reliance upon In re Leet, 99 Cal. App. 788, 279 P. 466. But the distinction between that case, the Levin Case, and the instant cause is apparent. In the first-named proceeding the order for the payment of alimony was based upon a stipulation of the parties which was incorporated in the interlocutory decree. There was no finding of ability to pay and no evidence offered to prove the jurisdictional fact. The only testimony upon the point came from the petitioner, who swore that he was without funds with which to pay the sums required by the stipulation and the order. A reading of Merritt v. Superior Court, 93 Cal. App. 177, 269 P. 547, will reveal that the order for the payment of alimony was also based upon a stipulation, and, further, that there was there no finding of the husband's ability to pay.

It has been suggested that the case of In re Chaus, 92 Cal. App. 384, 268 P. 422, is authority for the proposition of law that in a habeas corpus proceeding the court will review the evidence. In that case the question was presented whether the petitioner was guilty of one or two offenses. The trial court had concluded as a matter of law that he was guilty of two. To determine the court's jurisdiction to sentence him for the second offense in accordance with this conclusion of law it was necessary to review the facts constituting the offense. This is quite a different thing from reviewing the testimony to determine the sufficiency of the evidence.

[4] Petitioner's second argument is concluded by the case of Ex parte Cottrell, 59 Cal. 417, and by sound logic. The notice of appeal from the order for the payment of alimony was not given until after the trial court had announced its decision that petitioner was guilty of contempt. Obviously the disobedience for which he was ordered confined occurred prior to that time. Likewise it is patent that the order had not been stayed.

[5] The lack of merit in the third contention, that plaintiff in the divorce action had elected her remedy by causing execution to be levied on the home—although no order to sell had ever been given—is made apparent by calling attention to the fact that the proceeding to punish for contempt is not a right primarily of the party litigant but is a method pursued by the court to compel obedience to its orders and to punish the willful disobedience thereof. Hence the doctrine of election of remedies has no application here.

The order has heretofore been made discharging the writ and remanding the petitioner.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

123 Cal.App. 589

GAVEL v. GAVEL.

Civ. 8495.

District Court of Appeal, First District, Division 1, California.

May 20, 1932.

1. Divorce ⇐296.

Trial court has wide discretion in awarding custody of children.

2. Divorce ⇐303(3).

In proceeding to modify provision for award of child, movant must satisfy court conditions have so changed as to justify modification of original decree.

3. Divorce ⇐303(3).

In proceeding to modify provision for award of child in divorce decree, presumption favors reasonableness of original decree.

4. Divorce ⇐312.

In proceeding to modify provision for award of child in divorce decree, absent showing compelling different conclusion, appellate court cannot interfere with trial court's refusal to modify decree.

5. Divorce ⇐303(3).

In proceeding to modify provision for award of child in divorce decree, facts *held* insufficient to justify modification of decree so as to award custody of child to father.

The facts disclosed that since divorce father had remarried, and had a suitable home for his son near the high school which the boy attended, that the mother lived 28 miles from school, making it necessary for the boy to travel 56 miles daily in a school bus, and that at the time of the hearing the boy was about 16 years of age.

6. Divorce ⇐309.

Decree ordering payment of $40 monthly to divorced wife for support of son will not be modified on showing decrease of earnings, absent showing inability to pay, or sum was not reasonably necessary for son's support.

7. Divorce ⇐309.

Decree ordering payment of $40 per month to divorced wife for support of son will not be modified on mere showing son supported himself during summer vacation.

8. Divorce ⇐303(3).

In proceeding to modify provision for award of child in divorce decree, court need not make findings.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Claribel C. Gavel against Ralph R. Gavel. From an order dismissing an order to show cause for modification of final decree of divorce, defendant appeals.

Affirmed.

J. E. Light, of Los Angeles, for appellant.

Max B. Jamison, of Porterville, for respondent.

DOOLING, Justice pro tem.

In 1928 the plaintiff and respondent secured an interlocutory decree of divorce from defendant and appellant whereby the custody of their minor son was awarded to plaintiff, and defendant was required to pay plaintiff $40 per month for the child's support. In 1929 a final decree of divorce was made and entered containing the same provisions. In 1931 appellant filed a verified petition asking the court to modify the divorce decree so as to award him the custody of his son during the period of school terms and to decrease the amount of the award to respondent for his support. An order to show cause was issued and after a hearing was dismissed. From the order dismissing the order to show cause this appeal is taken.

[1-4] That the trial court has a very wide discretion in the matter of awarding the custody of children has been so often held that it will suffice on the point to cite only one recent opinion of the Supreme Court. Taber v. Taber, 209 Cal. 755, 290 P. 36. It should also be borne in mind that, upon a proceeding to modify a provision for the custody of a child, the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification. Every presumption is in favor of the reasonableness of the original decree, and, in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it.

[5] Appellant showed that he had been married in 1931 and had a home in Pasadena suitable for his son, and that the mother lived 28 miles from the high school which the son attended, as a consequence of which the boy had to travel 56 miles daily to and from school in a school bus. At the time of the hearing, the boy was about 16 years of age. These facts were not such as to compel the trial court to change the custody of the boy from the mother to the father. There was no attempt to show that the mother's home was not suitable or the mother in any way unfit, and the trip to and from school in the school bus was not shown in any manner to be harmful to the boy. While, all other things being equal, an older child and a son should by preference be awarded to the custody of the father, this is a mere rule for the guidance of the trial court, and may easily be outweighed by other circumstances.

[6] Appellant showed that since the entry of the decree of divorce his earnings had somewhat decreased, but the showing was not such as to compel the trial court to find that he was unable to pay $40 per month. He made no showing that that amount was not reasonably necessary for the boy's support.

[7] It appeared that during the preceding summer vacation the boy had earned money and supported himself for between two and three months. This afforded no basis for modifying the amount to be paid in the future.

[8] Finally appellant complains that the court made no findings. On this proceeding findings were not necessary. Simmons v. Simmons, 22 Cal. App. 448, 455, 456, 134 P. 791.

The order appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 537

Ex parte TELU SEKUGUCHI.

Cr. 1664.

District Court of Appeal, First District, Division 2, California.

May 19, 1932.

Rehearing Denied June 3, 1932.

1. Statutes ⇐184.
Statute should be construed with reference to its purpose.

2. Statutes ⇐184.
Language of statute will be interpreted, if possible, to aid Legislature's intent and effectuate evident purpose of law.

3. Statutes ⇐183.
In construing statutes, Legislature's intention must be ascertained, if possible, and given effect, even though it may be inconsistent with strict letter of statute.

4. Statutes ⇐205.
Division of statute into sections is artificial and unessential arrangement as regards construction of statute.

5. Statutes ⇐200.
Though punctuation may be considered in construing statute, it is never controlling, and may be disregarded when necessary to ascertain true intent and meaning.

6. Statutes ⇐200.
In construing statute, words or phrases may be changed, added, or stricken out, when necessary to effectuate legislative intent.

7. Statutes ⇐211.
To ascertain object of Penal Code section, court could examine chapter heading (Pen. Code, § 311, subd. 3).

8. Obscenity ⇐5.
One exhibiting obscene pictures *held* guilty of violation of statute prohibiting indecent writing and designing obscene pictures but not specifically prohibiting exhibition of such pictures (Pen. Code, § 311, subd. 3).

One exhibiting obscene pictures was guilty of violating Pen. Code, § 311, subd. 3, providing that every person who willfully either writes, publishes, distributes, or exhibits any obscene or indecent writing, or designs or otherwise prepares any obscene or indecent picture, is guilty of a misdemeanor, when such statute is interpolated to effectuate the legislative intention as evidenced by the title of the chapter headed: "Indecent exposure, obscene exhibitions, books and prints, * * *" although the statute does not specifically prohibit such exhibitions.

Application by Telu Sekuguchi for a writ of habeas corpus against the Sheriff of the City and County of San Francisco.

Writ denied.

Saburo Kido, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and William W. Murphy, Deputy Dist. Atty., both of San Francisco, for respondents.

Leo A. Cunningham, and Nicholas Barron, both of San Francisco, for Sheriff of City and County of San Francisco.

STURTEVANT, J.

This is an application for a writ of habeas corpus. A complaint was filed against the petitioner which charged that on the 18th day of April, 1932, the petitioner "did willfully, unlawfully, and lewdly distribute and exhibit obscene and indecent photographs and pictures." He was convicted, the judgment recites, of committing the offense described in the complaint.

[1-8] The provisions of Penal Code § 311, are as follows: "§ 311. *Lewd Conduct.* Every person who willfully and lewdly, either: * * * 3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or * * *." Before attempting to construe the foregoing provision, the following rules should be borne in mind: Every statute and Code section should be construed with reference to its purpose and the objects intended to be accomplished by it. The language will

be so interpreted, if possible, as to aid the design and intent of the Legislature and to effectuate the evident objects and purposes of the law. 23 Cal. Jur. 764. Accordingly, the primary rule of statutory construction to which every other rule as to interpretation of particular terms must yield is that the intention of the Legislature must be ascertained, if possible, and, when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute. 23 Cal. Jur. 726. The division of a statute into sections is a purely artificial and unessential arrangement. 23 Cal. Jur. 762. No doubt punctuation may be considered in reading a statute, but punctuation is never a controlling factor of interpretation, and it may be entirely disregarded when necessary to ascertain the true intent and meaning. 23 Cal. Jur. 733. When it is necessary to effectuate the legislative intent, it is equally clear that words or phrases may be changed, added, or stricken out. 23 Cal. Jur. 737. To ascertain the object of section 311 of the Penal Code, we may examine the chapter heading. 23 Cal. Jur. 772. That heading is "Indecent exposure, obscene exhibitions, books and prints and bawdy and other disorderly houses."

Moreover, picking up the statute by its four corners, it will be noticed that it is divided into five subdivisions, each of which is addressed to the prohibition of a different exhibition. Returning to the first clause of subdivision 3, it will be conceded at once that it prohibits exhibitions and distributions of the writings there mentioned. As to the second clause and the third clause, exhibitions and circulations are not specifically prohibited. The petitioner therefore claims that he committed no offense. To accept his claim is to assume that the Legislature created a chapter prohibiting exhibitions, and did so as above mentioned until it came to pictures and figures, and that then it merely prohibited the making of them in one's most secret apartment. To adopt that conclusion is to reach an absurdity because next to real life nothing has been the medium of so many lewd acts as pictures, prints, and engraved figures. If the semicolons in the body of that subdivision of section 311 of the Penal Code are stricken out, no real ambiguity remains. The real meaning then is, "Every person who willfully and lewdly * * * distributes, exhibits, designs, or paints any obscene or indecent picture is guilty of a misdemeanor." As so interpreted, the object, shown by the title of the chapter and the body of the act, is given full force and effect. Again, if we do not disturb the punctuation, but insert at the beginning of the second clause and at the beginning of the third clause the words "exhibits or distributes," the third subdivision will then read as follows: "3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper or book; or exhibits, distributes, designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or exhibits, distributes, molds, cuts, casts, or otherwise makes any obscene or indecent figure." With these interpolations the statute restricts the exhibition of pictures as it does writings—no more, no less. It will be conceded at once that it is a general rule that in interpreting a statute the function of a court is not to strike out nor add to the words used by the Legislature. However, that rule is not without well-defined exceptions. In this state the cases are numerous in which the court has in effect read words into a statute. It will suffice to cite a few. People v. Craycroft, 111 Cal. 544, 44 P. 463; Pool v. Simmons, 134 Cal. 621, 66 P. 872; 23 Cal. Jur. 737. The reason for the rule is very clearly set forth by the Court of Appeals of Kentucky in the case of Commonwealth v. Barney, 115 Ky. 475, 74 S. W. 181. At page 184 of 74 S. W., 115 Ky. 475, the court said: "It is argued for appellee that the very vagueness and uncertainty of the true legislative intent to be gathered from this act warrant its rejection by the court, to the end, at least, that the Legislature may provide more clearly what it meant to prohibit. But such is not the rule of construction, and cannot be. It is for the Legislature to choose its subjects, and its own mode of expression. It is for the court to interpret the language employed so as to carry into effect the legislative purpose, so far as it may not be unquestionably at variance with the Constitution. It may be said that the work of interpretation must be confined to the construction of the words of the act. But that manifestly falls short of the true office of the courts. The Legislature has used certain language to express its purpose. It is the purpose, then, that must be sought for. It will be presumed at the beginning of such an inquiry that the language used will probably best show that purpose. But if it undoubtedly does not, then to stop further inquiry is to probably misapply the legislative will, falling short of its purpose, and, maybe, work a positive and unthought-of public evil. The courts, with due regard to the prerogatives of a co-ordinate branch of government, approach this duty with caution, and with a proper appreciation of the distribution of the powers of the government. But statutes of doubtful meaning must be interpreted, or be subject to final interpretation, in event of controversy as to their true meaning, by the courts established by the organic law for that purpose. The evil to

be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject, are all properly considered by the courts in arriving at the legislative intention, because the Legislature must have resorted to the same means to arrive at its purpose. As, in construing a contract, its context is considered from the standpoint and surroundings of the parties when they made it, so, in construing an ambiguous act of the Legislature, the court will, so far as possible, consider the matters in hand as if situated with respect thereto as that body was. This may result sometimes in the words used in a statute being transposed, or in some of them being omitted or ignored, or in an interpolation of others where necessary to effect the manifest legislative purpose."

In Baker v. Jacobs, 64 Vt. 197, 23 A. 588, the Supreme Court of Vermont was considering a statute that prohibited a party from treating a juror to "any victuals or drink." The court held that such language, considering the object of the statute, prohibited the giving of a cigar. In its decision the court says: "In construing a statute of this kind, as was said in Ryegate v. Wardsboro, 30 Vt. 746, we are to 'look to the whole and every part of a statute, and the apparent intention derived from the whole, to the subject, to the effects and consequences, and to the reason and spirit of the law, and thus ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the word.' In that case the court quoted with approval from an old book the following summary of the rules of construing statutes: 'In some cases the letter of an act of parliament is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter. In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the lawmaker present, and that you have asked him this question: "Did you intend to comprehend this case?" Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statutes; for while you do no more than he would have done you do not act contrary to the statute, but in conformity thereto.'" It thus appears that it is our duty to construe subdivision 3 as hereinabove set forth.

It follows that the petition for a writ should be denied. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 607

LLEWELLYN IRON WORKS v. REED et al.

Civ. 4547.

District Court of Appeal, Third District, California.

May 20, 1932.

Rehearing Denied June 18, 1932.

1. Payment ⟸16(1).

Acceptance of note for debt, in absence of agreement that it shall operate as a payment thereof, does not extinguish the debt.

To constitute the giving of a note as a payment for a debt, there need not be express words or writing that the note is taken in payment, but the circumstances and the conduct of the parties may show that the note is taken in satisfaction of a debt or estop the creditor from claiming the contrary.

2. Mechanics' liens ⟸281(1).

Evidence *held* to show that party installing elevators in hotel accepted assignments of interest in secured notes as a payment on agreed price.

3. Mechanics' liens ⟸315.

Surety on contractor's bond is liable for labor performed and material furnished in performance of contract between contractor and third party.

4. Mechanics' liens ⟸315.

Surety on contractor's bond *held* not liable for installation of elevator in hotel not authorized by contract between contractor and hotel company (Civ. Code, § 2836).

Civ. Code, § 2836, provides that a surety cannot be held beyond the express terms of his contract, nor can it be extended by implication.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by the Llewellyn Iron Works against William G. Reed and others. From the judgment, plaintiff appeals.

Judgment modified, and, as modified, affirmed.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

Homer C. Mills and Denio & Hart, all of Long Beach, and Joe Crider, Jr., John M. Martin, and Frank L. Martin, Jr., all of Los Angeles, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

Appellant states in its opening brief that, although in form this appeal is from the whole of the judgment, it is in fact directed only to so much of said judgment as denies

appellant any recovery against respondents William G. Reed, Breakers Hotel Company, and Metropolitan Casualty Insurance Company. The action was commenced originally by appellant to foreclose mechanics' liens and also to recover from the surety on the bond executed by said Metropolitan Casualty Insurance Company. This case was consolidated, for trial, with numerous other cases. Those cases have been disposed of, and the only matter to be considered on this appeal is the personal liability of the three respondents heretofore named.

The facts are as follows: On September 25, 1925, the Breakers Hotel Company entered into a contract, hereafter referred to as the original contract, with William G. Reed, as contractor, for the erection of a hotel building in the city of Long Beach, the contract price being $847,269.20, of which all except $105,000 was to be paid in current funds, and, for the remaining $105,000, five promissory notes were to be executed secured by deed of trust on the Breakers Hotel property, same to be subject to a deed of trust and chattel mortgage for $1,150,000 in favor of Fred B. Dunn. At the same time the said insurance company executed a labor and material bond in the sum of $650,000. Appellant, on February 6, 1926, entered into a written contract with Reed to furnish the labor and material for, and install, four elevators in the said hotel building for the agreed price of $48,900, of which $43,900 has been paid, leaving a balance unpaid, as claimed by appellant, of $5,000.

On April 21, 1926, the Breakers Hotel Company entered into a contract with appellant for the installation of an additional passenger elevator in said hotel building at an agreed price of $3,200, $1,200 to be paid when the elevator was in running order, ready for power, and the remaining $2,000, commencing at the same time, to be taken in the form of a legal note, to run for one year, and to be signed by the Breakers Hotel Company and indorsed by Fred B. Dunn.

The complaint contains three counts, the first being for the $5,000 and $67.38 extras; the second for the said sum of $3,200, and the third for $144.50 for extras furnished under the original contract.

Judgment was rendered in favor of appellant against the Metropolitan Casualty Insurance Company for the sum of $67.38 on the first cause of action and for $144.50 on the third cause of action and against the Breakers Hotel Company for $1,200 on the second cause of action, and foreclosing appellant's mechanic's lien for the $1,200. From this judgment appellant prosecutes this appeal.

Appellant contends that the court erred in its findings to the effect that the $5,000 alleged to be owing it from respondents has been paid, and that it is estopped from now claiming that it is unpaid.

The original contract between the Breakers Hotel Company and Reed was filed for record on October 2, 1925. Said contract provided that: "Eighteenth: Except as expressly agreed to the contrary in this paragraph, all payments hereunder from the Owner to the Contractor shall be in current funds. It is understood and agreed, however, that the Owner shall pay the Contractor and the Contractor will accept, in lieu of payments in current funds above provided for, five (5) promissory notes of the Owner, totaling, in principal amount, One Hundred Five Thousand Dollars ($105,000.00), secured by a deed of trust from the owner, as Trustor, to the Pacific-Southwest Trust & Savings Bank of Long Beach, California, as Trustee."

The bond of the Metropolitan Casualty Insurance Company, which was recorded on October 2, 1925, recites the fact that, of the contract price of $847,269.20, $105,000 thereof was to be paid by promissory notes of Reed. The contract of appellant and Reed provided that the payments should be made as follows: "Ninety per cent (90%) of all labor and material to be paid on or before the 15th of the following month, making a total of $43,900.00. The balance, or last payment, of $5,000.00, when the elevators are in running order, or ready for power, and to be taken in the form of a second mortgage note, running two (2) years, at seven per cent (7%) per annum, signed by the Breakers Hotel Corporation. Said mortgage note to be secured by the property of the Breakers Hotel."

[1] Respondents claim that, for the purpose of complying with the terms of this contract, Reed delivered to the appellant five $1,000 assignments of interest in and to the second deed of trust notes referred to in the original contract, and these second deed of trust notes were, by order of the court, deposited with a trustee, for the use and benefit of appellant and other holders of beneficial interest therein. The law is established in this state that the acceptance of a note for a debt, in the absence of an agreement that it shall operate as a payment thereof, does not extinguish the debt. National Lumber Co. v. Whalley, 162 Cal. 224, 121 P. 729; 20 Cal. Jur. 920.

This general rule does not require, however, that, in order to constitute the giving of a note as a payment, there shall be expressed words or writing that the note is taken in payment. The circumstances and the conduct of the parties may show that the note is taken in satisfaction of a debt, or estop the creditor from claiming the contrary. 20 Cal. Jur. 925; Kress v. Tooker-Jordan Corp., 103 Cal. App. 275, 284 P. 685; Taylor v. King, 102 Cal. App. 361, 282 P. 1017; Swan v. Smith, 102 Cal. App. 541, 283 P. 829.

The said assignments were delivered to appellant on October 21, 1926, and were received and retained by it until the time of the trial. On December 20, 1926, two months after their receipt by appellant, it wrote the following letter to the Breakers Hotel:

"In reply to your letter of December 18, we wish to advise that Mr. William G. Reed gave us five assignments of beneficial interest of $1000.00 each, making a total of 5/35 interest in trust deed note dated September 25, 1925, due on or before June 15, 1928, signed by Breakers Hotel Co., payable to the order of William G. Reed or order, bearing seven per cent interest from June 15, 1926.

"As far as we can ascertain at the present time, besides the above assignments which have not been accepted by the Pacific Southwest Trust & Savings Bank, Trustee, our records show that Mr. Reed's account has been paid in full on this job.

"Yours very truly,

"Llewellyn Iron Works, by H. C. Cranfill

"H. C. Cranfill, Auditor."

[2] The court found that appellant had actual and constructive notice of the terms and provisions of the original contract at the time it entered into the contract with Reed, and knew that a portion of the price agreed upon for the construction of the hotel building was to be paid for in secured notes, and with that knowledge accepted and retained the said assignments of interest in said notes to the amount of $5,000 as a payment on the agreed price for the installation of the four elevators. We are of the opinion that these findings are sufficiently supported by the evidence.

The second cause of action is for the installation of one elevator at the agreed price of $3,200. The court found that $2,000 of the contract price was received by appellant during the latter part of 1926 in the form of a note; that said note was delivered to and received by appellant as payment on said contract in the sum of $2,000.

Respondents rely for support of this finding upon the language used in this contract for the single elevator, which is to the effect that $1,200 will be paid when the elevator is in running order and the remaining $2,000 to be taken in the form of a legal note commencing at the same date and to become due in one year, said note to be signed by Breakers Hotel Company and indorsed by Fred B. Dunn.

It also provided that appellant should retain the title and possession of the machinery used in carrying out this contract until final payment shall have been made. We are of the opinion that there is not sufficient evidence to support this finding of the court, nor any facts proved from which any reasonable deductions can be made that this note was taken as a payment. Respondents contend, and the court so found, that this contract between appellant and the Breakers Hotel Company was an independent contract between said parties, in no manner forming a part of the original contract; that this contract, which was entered into between appellant and the hotel company about two and a half months after appellant had contracted with Reed for the four elevators, was made without the knowledge or consent of Reed or the said surety company.

The original contract between Reed and the hotel company called for four elevators only, and appellant's contract with Reed was for these four elevators. Without consulting Reed and without his knowledge or consent, appellant contracted with the hotel company for this additional elevator, nor did Reed install nor assist in, nor authorize, its installation.

Appellant concedes that one who furnishes material to a subcontractor cannot recover from the general contractor, for in such case there is no contractual privity which would fix the obligation upon the general contractor (citing Kruse v. Wilson, 3 Cal. App. 91, 84 P. 442), but it contends that one furnishing material in such cases is entitled to recover from the general contractor's statutory surety (citing Hammond Lumber Co. v. Willis, 171 Cal. 565, 153 P. 947, and Williams v. Tingey, 26 Cal. App. 574, 147 P. 584). In both of these cases the labor and material were furnished in carrying out the requirements of the contract.

[3, 4] While it is true that a surety on the contractor's bond is liable for the labor performed and the material furnished in the performance of the contract, in the case under consideration there were no provisions in the original contract for the installation of this fifth elevator, and the authority for its construction was not agreed upon or authorized by the parties to the original contract. The conditions of the contractor's bond were to the effect that Reed should perform all of the work contracted to be performed by him under the contract and pay or cause to be paid all persons performing labor upon or furnishing material to be used in such work. The labor and material furnished in the installation of this fifth elevator was not performed under the original contract, formed no part of it, and was entirely separate and independent matter. Such being the case, neither the contractor nor his surety was liable for the labor performed or material furnished in the construction of this fifth elevator.

Section 2836 of the Civil Code provides that a surety cannot be held beyond the express terms of his contract, nor can it be extended by implication. Roberts v. Security T. & S. Bank, 196 Cal. 557, 238 P. 673.

It is ordered that the judgment be modified

so as to decree that appellant shall have judgment against the Breakers Hotel Company for $3,200 on its second cause of action, and as so modified the judgment is affirmed. Appellant to recover costs of appeal from the Breakers Hotel Company.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 568

CARROLL v. PACIFIC COAST AUTOMOBILE ASS'N, Inc.

Civ. 752.

District Court of Appeal, Fourth District, California.

May 19, 1932.

Rehearing Denied June 15, 1932.

1. Embezzlement ⇐4.

Gist of crime of embezzlement is agent's appropriation of principal's property to purpose not in due and lawful execution of his trust (Pen. Code, § 504).

2. Embezzlement ⇐8.

Insurance company's branch manager, authorized to pay his commissions from moneys intrusted to him, was not guilty of embezzlement in taking money collected for company as part payment of commissions due (Pen. Code, §§ 504, 511).

3. Malicious prosecution ⇐71(2), 72(2).

Court should determine question of probable cause for prosecution as matter of law, where facts are undisputed, but where they are controverted should instruct jury as to whether facts, if found in designated way, amount to probable cause.

4. Malicious prosecution ⇐71(1).

Whether plaintiff in action for malicious prosecution appropriated defendant's money openly under claim of title or right in good faith or with criminal intent *held* for jury (Pen. Code, § 504).

5. Malicious prosecution ⇐71(1).

Whether defendant in action for malicious prosecution for grand theft in taking money, which plaintiff claimed to be due him from defendant, knew of indebtedness to plaintiff, *held* for jury (Pen. Code, § 504).

6. Malicious prosecution ⇐71(4).

Whether defendant in action for malicious prosecution fairly disclosed all facts to district attorney *held* for jury.

7. Appeal and error ⇐1067.

Failure to instruct jury, in action for malicious prosecution, that conceded facts of plaintiff's employment by defendant, receipt of money payable to latter, and payment of commissions and expenses therefrom were true, *held* not prejudicial to defendant.

8. Malicious prosecution ⇐64(2).

Evidence in action for malicious prosecution *held* to show lack of probable cause for prosecution of plaintiff on charge of grand theft.

9. Malicious prosecution ⇐32.

Malice may be inferred from want of probable cause for prosecution.

10. Malicious prosecution ⇐64(2).

Evidence *held* sufficient to sustain jury's finding of malice in action for malicious prosecution.

11. Malicious prosecution ⇐69.

Verdict of $5,254 damages for malicious prosecution, preventing plaintiff from obtaining employment, injuring his reputation and compelling him to leave city with family, *held* not excessive.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by W. H. Carroll against the Pacific Coast Automobile Association, Incorporated. Judgment for plaintiff, and defendant appeals.

Affirmed.

Howard S. Lewis, of Los Angeles, and Martin C. Thuesen, of Fresno, for appellant.

F. W. Docker and Claude Minard, both of Fresno, for respondent.

SCOVEL, Justice pro tem.

The complaint in this action charges the defendant with malicious prosecution. It appears that during the year 1929 plaintiff was employed by defendant in the city of Fresno as a membership and insurance solicitor. During the month of September, 1929, he was transferred to Bakersfield and given the position as general manager of defendant's branch there. Besides soliciting memberships and insurance, plaintiff had supervision over all of defendant's agents working from the Bakersfield office, collected all moneys, depositing them in his own name in the bank and paying all expenses, including commissions earned by the various salesmen. Plaintiff himself was working on a commission basis. Two or three times a week the balance remaining after the payment of expenses and salesmen's commission was forwarded to the San Francisco office of defendant by plaintiff. Plaintiff sometimes deducted his own commissions before forwarding the balance to the San Francisco office and sometimes forwarded the entire balance, the San Francisco office then sending him a check for his commissions. However, it appears that by the month of January, 1930, defendant was indebted to

plaintiff in the sum of $1,421 for commissions. During the month of January plaintiff endeavored to get defendant to pay this amount but was unable to do so. On February 1 he had on deposit in his account in Bakersfield the sum of $354, consisting of collections made for the company in the usual course of business during the preceding days. On February 1 plaintiff severed his connections with defendant, drew a draft payable to himself for the sum of $354 as payment to himself on account of commissions earned. He returned to Fresno and placed the draft in escrow pending a settlement with defendant. Subsequently the defendant filed a complaint in the justice's court in Bakersfield, charging defendant with grand theft; the basis of the complaint being an alleged embezzlement of the foregoing sum of $354. At the preliminary examination the action was dismissed for lack of evidence. Thereafter the complaint in this action was filed charging the defendant with malicious prosecution in reference to the criminal complaint filed in the justice's court in Bakersfield. The case was tried by a jury and a judgment of $10.254 rendered. Upon motion for new trial the verdict was reduced to $5.254 by the court and the motion for new trial denied. From this judgment the defendant appeals.

[1, 2] Appellant's first contention is that its motion for nonsuit and motion for an instructed verdict should have been granted, asserting that the evidence shows the plaintiff to have been in fact guilty of grand theft as charged in the criminal complaint, claiming that the $354 taken by plaintiff was moneys actually owned by the defendant and that it was merely withheld by plaintiff as an offset or to pay a demand of his against defendant; that such withholding, under section 511 of the Penal Code, is not a defense to a charge of embezzlement. The evidence shows, however, that plaintiff's authority as general manager of defendant's Bakersfield branch embraced the right and duty of paying obligations of defendant, including the payment of commissions earned. During the several months he was in charge, payment of all agents' commissions under him was made by him through his office. Penal Code, § 504, provides that "* * * every * * * agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust * * * is guilty of embezzlement." The gist of the crime consists in the appropriation to a purpose not in the due and lawful execution of the trust. People v. McMahill, 4 Cal. App. 225, 87 P. 404. The taking herein, however, was for a purpose within the lawful execution of the trust, to wit for the purpose of paying an obligation of the defendant to the plaintiff, whose authority as agent of defendant included the power to pay obligations of the defendant, and plaintiff, having been empowered by defendant to pay himself his commissions from moneys entrusted to his care, could not be guilty of embezzlement for so doing.

[3] The court instructed the jury that if they should find from the evidence that the plaintiff was employed by defendant as manager, and as such manager he received all moneys payable to defendant and deposited the same in his own name with authority to draw checks against the same in payment of commissions and other expenses of the office, and if they should further find that on February 1, 1930, plaintiff claimed certain moneys were owing to him from defendant and had in his possession the sum of $354 collected during his employment and which he appropriated openly and avowedly under a claim of title and color or right in good faith, and if they should further find that these acts were done by plaintiff without any criminal intent, and if they should find that with such knowledge the defendant filed a criminal complaint charging plaintiff with grand theft and procured a warrant for the arrest of plaintiff to be issued thereon, and if they should further find that in filing said complaint defendant did not fully, fairly, and truly state to the district attorney all the material facts known to defendant, and should further find that defendant had reasonable grounds for believing other facts existed which would tend to exonerate the plaintiff from the charge and did not in good faith make further inquiry with reference to the facts and circumstances and communicate the information to the district attorney, and that if they should further find that with its knowledge the defendant did not make the charge against plaintiff in good faith, there was want of probable cause for the prosecution as a matter of law. Appellant attacks this instruction, contending that the question of lack of probable cause is always one for the court and that the court should have instructed the jury directly that there was or was not want or lack of probable cause. The law in this state as to the question is laid down in Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am. St. Rep. 174. The rule there enunciated is that where the facts are undisputed the court should determine as a matter of law whether there was lack of probable cause, but that where the facts are controverted the jury should be instructed that if they find the facts to be in a designated way, such facts when so found do or do not amount to probable cause. See, also, Franzen v. Shenk, 192 Cal. 572, 221 P. 932.

[4-6] Was there any conflict in the evidence as to the facts included within the foregoing instruction? Defendant contended that it was not indebted to plaintiff but that in

fact the plaintiff was indebted to it in the sum of $19 over and above the $354 in dispute. From this the jury might have found that the appropriation of the money by plaintiff was not "openly and avowedly under a claim of title and color or right in good faith." Upon this disputed testimony there also devolved the question of criminal intent in the taking. It was also a question for the jury as to whether or not the defendant knew that it was indebted to plaintiff. Defendant's evidence as to the disclosure of facts to the district attorney is subject to an inference either of fairness or of concealment. Mr. Bisbee, division manager of defendant, who signed the criminal complaint, testified that he told the district attorney that all records of the company, together with the sum of $354, had been taken from the Bakersfield office by plaintiff, and while he did testify that at that time he presented to the district attorney all of the facts which he had in regard to the matter, it nowhere appears that the district attorney was informed that plaintiff had the right to pay commissions or that defendant was indebted to plaintiff. If the jury found that such indebtedness existed and that plaintiff's authority was extensive enough to permit the payment of commissions, they might well have determined that a full and fair disclosure of all facts in the possession of Mr. Bisbee was not made, even though he had testified to the contrary. It also appears in evidence that after the first consultation of defendant's representatives with the district attorney or one of his deputies that a letter was written by the deputy, being plaintiff's exhibit No. 10, in which the defendant was advised that the case was not a proper one for a criminal complaint. In answer thereto defendant wrote a letter, being Plaintiff's Exhibit No. 8, in which it is stated that plaintiff was indebted to the defendant. Approximately one week later another letter was written by defendant to the district attorney stating that additional evidence in the matter had been received which would be laid before him. It does not appear in the transcript that such additional evidence was ever so presented. The deputy who conducted the preliminary examination, and who moved for a dismissal, testified that he told the judge at the time that the prosecution had made certain statements to him and "hadn't backed them up with the testimony." From this evidence the jury might have found that the defendant had additional information regarding the situation which it concealed or did not investigate and that the charge was therefore made against plaintiff in bad faith.

[7] It is true that there was no conflict as to certain of the facts set forth in the instruction. For instance, it was conceded that plaintiff was employed by defendant as manager; that he received all moneys payable to defendant, deposited them in his own name with authority to draw checks against the deposit for payment of commission and other expenses. Upon all of the other facts upon which the jury were instructed to find, there was a conflict in the evidence. It would perhaps have been better practice to have instructed the jury that the conceded facts were true. However, the error worked no prejudice to any substantial right of the defendant and we do not feel that such error would justify a reversal.

[8] Assuming, as we must, that the jury found in favor of plaintiff on these disputed matters, there was a lack of probable cause for the prosecution.

[9, 10] As to the question of malice, it may be inferred from want of probable cause. McKenna v. Heinlen, 128 Cal. 97, 60 P. 668. It further appears that after the district attorney advised defendant in his letter introduced as Plaintiff's Exhibit No. 10 that the case was not a proper one for criminal complaint, the defendant insisted upon filing a complaint. Later the defendant was advised by the deputy district attorney, that "they have no show in getting a conviction. It wasn't a case for prosecution." As heretofore set forth, upon moving for a dismissal of the complaint the district attorney told the court that the defendant had made certain statements regarding the matter that it had not produced any evidence to support. Before the complaint was filed defendant stated to plaintiff that he had "better turn the money over immediately" and that if he didn't they would have him arrested and "put in the penitentiary where he belonged." This evidence, together with the inference of lack of probable cause, is amply sufficient to sustain the jury's finding of malice.

[11] The last contention of appellant is that the verdict of $5,254 is excessive. The evidence shows that plaintiff, a man 50 years of age, had lived in Fresno for 15 years; that during this period of time he had worked for numerous concerns; that, after the filing of the criminal complaint, in seeking employment with such concerns he was told that "they didn't want anybody in their employ that was getting away with money." Considerable publicity was given the matter, both in Bakersfield and Fresno. One of the plaintiff's friends living in Fresno stated that several people asked him if he knew that plaintiff had been arrested for embezzlement; that he had heard it discussed easily 100 times; that he had heard it stated that "Carroll went bad"; and that he had been referred to as a "jail-bird." Plaintiff testified that defendant, through its officers, "spread the propaganda about promiscuously and called me a thief"; that they stated publicly "they had Carroll where they wanted him and it would serve him right to be sent to San Quentin where he

belonged." By reason of the publicity, plaintiff was unable to obtain any employment and was compelled to leave Fresno with his family.

It is of course impossible to accurately measure in dollars and cents the actual damage that a man's reputation or character will suffer by having an unfounded charge of felony filed against him. The judge who tried the case had all of the witnesses before him and was in a position to judge the apparent fairness, candor, and truthfulness of their statements. While the judgment, even as reduced by him, remains substantial in amount, we are unable to say that considering the evidence of damage to defendant's reputation the verdict is the result of passion, prejudice, or corruption, or grossly disproportionate to any compensation reasonably warranted by the facts. 8 Cal. Jur. 834.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 550

HOWE v. OWSLEY.

Civ. 4332.

District Court of Appeal, Third District, California.

May 19, 1932.

1. Appeal and error ⇐977(3).

Appellate tribunal will not disturb order granting new trial absent abuse of discretion.

2. Malicious prosecution ⇐7.

Facts sworn to in complaint by defendant in malicious prosecution action respecting plaintiff's obtaining accommodations at his house without paying therefor did not charge plaintiff with crime (Pen. Code, § 537).

The complaint, sworn to before justice's court, stated that person named unlawfully obtained accommodations at house of complainant and thereafter surreptitiously removed his bed and baggage without paying for such accommodation, all of which was contrary to form, force, and effect of statutes in such case made and provided, and complainant prayed that warrant be issued for arrest. Pen. Code, § 537, provides that any person who obtains accommodation at hotel, inn, restaurant, boarding house, lodging house, or furnished apartment house without paying therefor, with attempt to defraud proprietor, is guilty of misdemeanor.

3. False imprisonment ⇐3.

That action for false imprisonment might be maintained did not make defendant liable for malicious prosecution.

4. Malicious prosecution ⇐7.

If, without charging criminal offense, person states true facts, and magistrate or district attorney erroneously concludes that crime has been committed and issues warrant, no basis is laid for malicious prosecution action.

5. New trial ⇐66, 70.

In malicious prosecution action, court properly granted new trial on ground of insufficiency of testimony and that verdict was against law.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by E. L. Howe against George W. Owsley. Judgment for plaintiff, and from an order granting a new trial, plaintiff appeals.

Affirmed.

Frank McGowan and Blaine McGowan, both of Eureka, and H. B. Churchill, of Santa Rosa, for appellant.

James W. Henderson, of Eureka, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in this action against the defendant in the sum of $8,000, based upon a charge of malicious prosecution. After the entry of judgment upon the verdict returned in said cause, the defendant's motion for a new trial was granted, the order of the court being based upon insufficiency of the testimony, and that the verdict was against the law. From the order of the court granting a new trial the plaintiff has appealed.

The record shows that on or about the 29th day of October, 1928, the plaintiff obtained accommodations in a five-room house owned by the defendant and remained there until on or about the 13th day of November, 1928, when he removed therefrom without having paid for such accommodations. That the value of the accommodations furnished the plaintiff by the defendant was the sum of about $15. The house where the plaintiff obtained accommodations from the defendant is situate in the city of Eureka, county of Humboldt.

It appears from the record that the plaintiff removed what household effects he had with him and used in the house just referred to, to the city of Santa Rosa. The record further shows that the plaintiff made no effort to communicate with the defendant at the time of his departure from the city of Eureka, nor after leaving therefrom, made any attempt to communicate with the defendant, or to pay for the accommodations referred to, until after the institution of this action.

On or about the 16th day of November, 1928, the defendant, after having consulted with the district attorney of the county of Humboldt and obtained from him a criminal complaint, went before a justice's court of Eureka township, in the county of Humboldt, and swore to such complaint, which is in the words and figures following, to wit (omitting the title): "Personally appeared before me this 16th day of November, 1928, George W. Owsley, of Eureka, in the County of Humboldt, who, first being duly sworn, complains and says: That said E. L. Howe, on the 29th day of October, 1928, at and in the County of Humboldt, State of California, did then and there wilfully and unlawfully obtain accommodations at the house of one George W. Owsley, and thereafter surreptitiously remove his bed and baggage, without paying for such accommodation. All of which is contrary to the form, force and effect of the statutes in such case made and provided, and against the peace and dignity of the State of California. Said complainant therefore prays that a warrant may be issued for the arrest of said E. L. Howe, and that he may be dealt with according to law."

Following the filing of this complaint in the justice's court just referred to, a warrant was issued which, so far as material here, is in the following words and figures (omitting title): "To any sheriff, constable, marshal or policeman of said State: Information, on oath, having been this day laid before me, Frank E. Niskey, a Justice of the Peace of the township of Eureka, said County and State, by George W. Owsley, that the crime of defrauding an innkeeper has been committed, and accusing the defendant thereof, you are hereby commanded forthwith to arrest above named defendant and bring him before me forthwith at my office in said township, or in case of my absence or inability to act, before the nearest and most accessible magistrate in this county."

Acting upon this warrant the plaintiff was arrested, detained for two days, admitted to bail, and the cause subsequently dismissed.

To sustain the action of the trial court, the defendant calls our attention to conflicting testimony given upon the trial, and, further, to the fact that the complaint sworn to by the defendant does not state any facts sufficient to establish any criminal charge; that the complaint filed with the justice simply states the facts; that if a warrant of arrest was improperly issued directing the arrest of the plaintiff on the charge of having defrauded an innkeeper, it was the mistake or act of the justice of the peace; and that while the defendant might be liable for false imprisonment for procuring the justice to issue a warrant of arrest based simply upon a statement of acts not constituting a crime, and upon an information not charging the plaintiff with a crime, no basis is laid upon which an action for malicious prosecution could be predicated.

That there is a direct conflict in the testimony is clearly apparent by the following excerpts which we take from the testimony of Mr. Metzler, the district attorney, and the testimony of the defendant Owsley:

Mr. Metzler testified as follows:

"Q. Did Mr. Owsley, at that time and place, tell you the character of the building that he said the tenant had removed from? A. He did.

"Q. What kind of a building did he say it was? A. He told me it was a furnished apartment.

"Q. That it was a furnished apartment? A. He did. And we discussed what a furnished apartment was; we discussed whether or not an apartment that was partly furnished would be considered to be furnished apartment, and I remember stating to Mr. Owsley I did not know what constituted a furnished apartment; that that was a question of fact, and not one of law. An apartment may be furnished with a stove and other articles of furniture, and might be considered a furnished apartment when all the furniture was not there necessary to constitute a completely furnished apartment.

"Q. But he at that time told you that this was a furnished apartment? A. He did.

"Q. Did you, or did you not at that time tell him that if this were an ordinary dwelling house, he could not get a warrant, legally? A. I don't know whether I did or not."

As to his conversation with Mr. Metzler and the advice obtained from him, Mr. Owsley, the defendant, testified as follows:

"A. I says to Mr. Metzler, 'I came to see you as to what can be done in the way of collecting house rent from a man who goes away and agreed to pay it and pay for breaking of the garage door, and does not do it.' He says: 'What kind of a house?' I says, 'It is a five-room cottage at 2711 B Street.' He says, 'I can do nothing for you about the garage door, but the other is different.' So he called Walley Strong (a stenographer) and said to me to take a seat in the front room, which I did.

"Q. How long were you in Mr. Metzler's private office? A. A very few minutes.

"Q. Did Mr. Metzler at any time while you were talking with him, ask you if the house that you rented to Mr. Howe was an apartment house? A. He did not. I had already told him that it was a five-room cottage, and where it was located. I told him it was a furnished five-room cottage and asked him what could be done. Then he proceeded to get Mr. Strong and made out the papers."

Mr. Owsley further testified that he was not actuated by any malice.

The wording of the complaint prepared by

Mr. Metzler and sworn to by the defendant strongly corroborates the testimony of the defendant, and is in direct conflict with the testimony of Mr. Metzler. The court heard this testimony, and more along the same line, not necessary to be set forth herein, had the opportunity of observing witnesses, and under such circumstances we cannot say that any abuse of discretion has been shown.

[1] Upon the motion for new trial in this cause the trial court had the opportunity to again review all the testimony, and if in its sound judgment and discretion it appeared that the verdict was contrary to the evidence, that the defendant had made a full and complete disclosure of all the facts and circumstances surrounding the cause, to the district attorney, and that the district attorney had wrongfully advised the defendant, and made out a paper such as we have set forth herein, for the defendant to sign, then and in that case it does not lie within our power to order a reversal. A review of the testimony set out in the transcript shows a direct conflict between the testimony of Metzler and that of the defendant as to matters vital to a correct determination of this cause, and under such circumstances we cannot say the court abused its discretion in granting a new trial. The law is so well settled that an appellate tribunal will not disturb an order of the trial court in granting a new trial unless there appears to be an abuse of discretion, that the citation of authorities seems unnecessary. However, we may refer to 20 California Jurisprudence, page 111 et seq., where what we have said is set forth in the text, and supported by numerous decisions.

[2] On November 16, 1928, at the time the defendant swore to the complaint referred to herein, section 537 of the Penal Code read as follows: "Any person who obtains any food or accommodation at an hotel, inn, restaurant, boarding house, lodging house, or furnished apartment house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an hotel, inn, restaurant, boarding house, lodging house or furnished apartment house by the use of any false pretense, or who, after obtaining credit, food or accommodation at an hotel, inn, restaurant, boarding house, lodging house, or furnished apartment house absconds or surreptitiously removes his baggage therefrom without paying for his food or accommodations is guilty of a misdemeanor."

There is nothing in the complaint just referred to, charging the plaintiff with defrauding an innkeeper, nor is there anything in the complaint specifying or alleging that the plaintiff was guilty of any crime whatsoever. The acts alleged by the defendant to have been performed by and on the part of the plaintiff charge only such acts as would raise a civil responsibility. The complaint set forth matters showing only a civil liability on the part of the plaintiff, and contained nothing whatever from which the inference could be drawn that the defendant was charging the plaintiff with a criminal offense.

In the particulars which we have mentioned the complaint filed with the justice of the peace of Eureka township by the defendant differs from almost every other case involving malicious prosecution which has been called to our attention or which we have been able to find. In practically all the cases where it is held that a defective statement in a complaint, or, rather, the statements in the complaint are not sufficient to support a criminal prosecution, the complaint, nevertheless, in some portions thereof, charges a criminal offense. The complaint under consideration does allege the conduct of the plaintiff as contrary to law, which, of course, was true. The concluding portion of the complaint praying that a warrant for the arrest of the plaintiff, and that he be dealt with according to law, might furnish the basis for an action against the defendant as an actor in bringing about an unlawful and false imprisonment of the plaintiff.

[3] Again, the complaint in this action does not allege that any of the statements contained in the complaint filed by the defendant with the justice of the peace of Eureka township are false. It simply charges that the acts performed by the defendant were done maliciously and without reasonable or probable cause therefor. Nor has our attention been called to any testimony in the transcript where the truth of the allegations contained in the complaint filed by the defendant is questioned, and nothing of the kind has come to our attention in the examination thereof. At least, no such testimony is printed in the briefs or as an appendix thereto. In this action, damages for malicious prosecution only are sought, and the questions of false imprisonment and civil liability are not involved. Hence, even though it might be conceded that the act of the defendant laid the basis for an action alleging false imprisonment or civil liability, it does not assist the plaintiff herein.

In Hahn v. Schmidt, 64 Cal. 284, 30 P. 818, 819, the questions which we are considering were before the court, and it was there held that one who makes an affidavit before a committing magistrate, stating facts conceded to be true, which a magistrate erroneously believes to constitute a crime, and issues a warrant of arrest accordingly, is not liable in damages to the person arrested in an action alleging malicious prosecution. It is further said in the opinion in that case, quoting from the case of Cohen v. Morgan, 6 Dowl. & R. 8: "There is nothing in the defendant's conduct to show that he was influenced by mal-

ice. To support the averment of malice it must be shown that the charge is willfully false. But here, according to the evidence, the defendant merely related his story to the magistrate, leaving it to him to determine whether the facts amounted to felony." And further: "It is clear from that and other cases, and upon principle, that a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceeding should be erroneous or without jurisdiction." And further citing other cases in the opinion we find the following: "But, in order to constitute a defense to an action for malicious prosecution, the facts stated in the complaint, if they do not constitute a crime, must nevertheless be true."

In Krause v. Spiegel, 94 Cal. 370, 29 P. 707, 15 L. R. A. 707, 28 Am. St. Rep. 137, the case of Hahn v. Schmidt, supra, was approved, and the rule of responsibility stated in these words (we quote from the syllabus): "The arrest and imprisonment of a person on a charge which did not constitute a criminal offense, such as a charge of slander, cannot be made the basis of an action for a malicious prosecution, although it might warrant an action for false imprisonment." The opinion in this case cites a number of authorities supporting this statement of the law.

[4] The case of Harrington v. Tibbet, 143 Cal. 78, 76 P. 816, relied upon by the appellant, is readily distinguishable from the facts presented in this cause. A quotation from the syllabus in the Harrington Case discloses that the judgment of the court was based upon an entirely different state of facts. It is there said: "An action for damages for a malicious prosecution will lie where the defendant maliciously and without probable cause procured the arrest and imprisonment of plaintiff for felony under a false charge of having obtained money under false pretenses, notwithstanding it appears that the complaint for arrest did not state facts sufficient to constitute a public offense, for the reason that the false pretenses and promises charged related to future events, and not to past or existing facts." Here, it clearly appears that the ruling was had upon the theory that the charge made was false, not that the complaint set forth facts which were true, and which were erroneously, by the magistrate or by the district attorney, held to show a criminal offense. It further appears in the opinion in the Harrington Case that the defendant charged the plaintiff with the crime of obtaining money under false pretenses. The facts set forth did not sustain the charge. The court, in the opinion in the Harrington Case, further approves the following statement of the law: "There is no doubt that if a person truly states to a judge, and the judge thereupon does an act which the law will not justify, the party who made the statement is not liable, because in that case the grievance complained of arises not from the false statement of the party, but from a mistake of the judge. It would be strange if where a court is put in motion by a false and malicious statement, it should depend upon a nice question of law whether there was a remedy or not." Here, the distinction is pointedly set forth between a true statement and a false statement. If the statement is false, it of course furnishes the basis for the conclusion that it has been made maliciously and without probable cause. In other words, the holding of these cases is to the effect that if one makes an affidavit falsely charging another with a crime, and then sets forth facts insufficient to sustain the charge, a liability for damages is thereby fixed upon the person, irrespective of the legal sufficiency of the complaint; while on the other hand, if, without charging any criminal offense, a person simply states the true facts, and the magistrate or the district attorney erroneously concludes that a crime has been committed, and issues a warrant, no basis is laid for an action charging malicious prosecution. As said in Krause v. Spiegel, supra, the fact that an action for false imprisonment may be maintained does not affect the question of liability in an action seeking damages only for malicious prosecution.

In the notes to the case of Ross v. Hixson, 26 Am. St. Rep. 129, we find the following statement of the law supported by numerous authorities: "If the charge made by the prosecutor is true, but the legal conclusion drawn from it is erroneous and cannot be sustained and the prosecution must therefore fail, no action against him can be maintained, as where he correctly stated the facts upon which he relied, and the magistrate erroneously regarded them as criminal and issued his warrant thereon." (Without listing the cases, we refer simply to the note.)

In the case of Cochran v. Bones, 1 Cal. App. 729, 82 P. 970, the facts set forth in the opinion show that the defendant charged the plaintiff with petty larceny, and caused the plaintiff's arrest therefor, but that the facts stated in the affidavit or complaint were insufficient to support the charge. Here, the false conclusion of law and the false charge were contained in the affidavit or complaint. The case did not involve a true statement of facts without a charge of criminal act, and then, an erroneous conclusion by district attorney or by a magistrate. If the affidavit filed with the magistrate charges the commission of a criminal offense, and the facts show a colorable cause, which means acts which, in connection with other acts, might constitute a crime, then and in that case the weight of authority holds that an action for malicious prosecution may be maintained. Thus, as in the case of George v. Williams, 26 Ariz. 91, 222 P. 410, the defendant filed a

complaint charging the plaintiff with having committed a misdemeanor, to wit, false personations (as follows, to wit), and then set forth certain facts insufficient to support the charge. It was held that an action could be maintained. The opinion in this case cites a number of authorities to the same effect. All of these cases, as we have said, however, are readily distinguishable from the facts presented for our consideration in the case at bar. No crime is charged; the facts stated were and are insufficient to show any offense, or even the color of any criminal act. They simply established a civil liability.

[5] As to whether the complaint can be amended so as to maintain an action for false imprisonment, we express no opinion; but under the circumstances presented in this case, if it be shown that the statements contained in the affidavit were true—and as we have stated, the complaint does not allege their falsity, nor has our attention been called to any testimony questioning their truthfulness—the action of the trial court in granting a new trial should be affirmed on both grounds stated therefor. And it is so ordered.

I concur: R. L. THOMPSON, J.

123 Cal.App. 506

In re HARRIS' ESTATE.

GORHAM v. TINCHER.

Civ. 7954.

District Court of Appeal, Second District, Division 1, California.

May 17, 1932.

Appeal and error ⇐332.

Where administratrix had died when attorney filed notice of appeal, court was without jurisdiction (Code Civ. Proc. §§ 938, 941, 984).

Court was without jurisdiction under Code Civ. Proc. § 938, providing that any party aggrieved may appeal, since the purported appellant never existed, and in view of such fact, sections 941 and 984, saving the right of appeal to an attorney in case of death of his client, being without application.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Eugene E. Tincher, executor of the last will and testament of Mary Harris, deceased, filed an account, report, and petition for distribution of the estate, opposed by Minnie A. Gorham, as administratrix of the estate of Bird W. Gorham, deceased. From the judgment, Minnie A. Gorham, as administratrix of the estate of Bird W. Gorham, appeals.

Appeal dismissed.

Benjamin W. Shipman, Henry O. Wackerbarth, and Wheeler & Wackerbarth, all of Los Angeles, for appellant.

Eugene E. Tincher, of Long Beach, for respondent.

TAPPAAN, Justice pro tem.

A petition was filed by respondent, praying that the will of Mary Harris, deceased, be admitted to probate. Bird W. Gorham, the adopted son of decedent, then filed a contest of said will; but when the contest was called for trial the contest was dismissed and the will was admitted to probate.

During the administration of the estate, which continued for some six years, Bird W. Gorham died, and Minnie A. Gorham was appointed administratrix of his estate. Minnie A. Gorham died on March 16, 1928, never having qualified as the administratrix of the estate of Bird W. Gorham. At the hearing had upon the first and final account, report, and petition for distribution of the estate of Mary Harris, held November 7, 1929, one of the attorneys, who had been representing Minnie A. Gorham, appeared before the court and objected thereto on her behalf. It appears that said attorney at that time had no knowledge of her death. Thereafter, on November 12, 1929, the court made and entered an order in said estate distributing said estate as follows: An undivided two-thirds thereof to Bird W. Gorham, and an undivided one-third to the First Christian Church of Long Beach, Cal. Thereafter, on December 9, 1929, the same attorney filed a notice of appeal from said decree of distribution on behalf of said Minnie A. Gorham, as administratrix of the estate of Bird W. Gorham, deceased. On January 25, 1932, one Maud Avila was appointed the administratrix of the estate of Bird W. Gorham, deceased, and duly qualified as such. On February 29, 1932, a stipulation was filed with this court signed by the attorneys for the appellant of record, attorney for respondent, and Maud Avila, administratrix of the estate of Bird W. Gorham, deceased, undertaking to waive any question as to the validity of the appeal, and requesting a decision on the merits.

The fact is admitted that at the time the hearing was had, and when the decree was made and entered, as well as when the purported notice of appeal was filed, there was no such person in being as the administratrix of the estate of Bird W. Gorham. Under our system "any party aggrieved may appeal."

Code Civ. Proc., § 938. Here the purported appellant never existed. There was no such person who could be aggrieved. For this reason, the nonexistence of an appellant, sections 941 and 984, Code of Civil Procedure, saving the right of appeal to the attorney in case of the death of his client, have no application. This court is without jurisdiction to act, there admittedly being no valid appeal present here.

The appeals are dismissed.

We concur: CONREY, P. J.; HOUSER, J.

123 Cal.App. 489

PEOPLE v. LESSER.

Cr. No. 2152.

District Court of Appeal, Second Appellate District, Division 1, California.

May 16, 1932.

Rehearing Denied May 28, 1932. Hearing Denied by Supreme Court June 13, 1932.

1. False pretenses ⇐15.

Defendant's representation that it was impossible to buy corporate stock while at very time he was purchasing stock for less than one-fourth price at which he was selling it *held* false statement of fact sufficient to support conviction for grand theft.

2. False pretenses ⇐49(4).

Jury's finding defendant was acting with knowledge of untruthfulness of his statements regarding corporate stock which he was selling *held* justified.

3. Licenses ⇐40.

Owner has right to make bona fide sale of corporate stock for price obtainable in fair barter (St. 1929, p. 1251, § 2, subds. 10, 11 (c) 3).

4. Licenses ⇐7(1).

Statute regulating sale of property *held* void in so far as regulation takes away right of owner to sell stock (St. 1929, p. 1251, § 2, subds. 10, 11 (c) 3).

5. Courts ⇐90(1).

Appellate court *held* bound by precedent established in state.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

S. B. Lesser was convicted of grand theft and of violation of the Corporate Securities Act, and he appeals.

Affirmed as to the conviction of grand theft and reversed as to conviction of violation of the Corporate Securities Act.

George E. Stoddard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

TAPPAAN, Justice pro tem.

The defendant was charged in an information filed by the district attorney with the commission of seven felonies. The first count of the information alleged the crime of grand theft, while the remaining six counts charged defendant with a violation of the Corporate Securities Act, in that he acted as a broker in the sale of stock of the Hollywood Business Properties, a corporation, without being licensed by the commissioner of corporations as a broker. The defendant was found guilty by the jury of the charge of grand theft and on five of the six counts of violation of the Corporate Securities Act. From the judgment entered upon the verdicts, and from the order of the court denying defendant's motion for a new trial, defendant appeals.

The evidence, as introduced at the trial, discloses the following facts: The complaining witnesses were mother and daughter residing together. The mother was a woman in her seventies, and the daughter had been a teacher of physical education. The defendant called upon the mother and daughter, ostensibly in reference to certain property owned by the mother in San Diego county. During the course of the conversation, defendant introduced the subject of the stock of the Hollywood Business Properties, the sale of which stock forms the basis of the charges made against defendant. He at this time stated to the complaining witnesses that this corporation was "one of the most outstanding successes in California, they earned such tremendous dividends, it is impossible to buy any of the stock. * * * It just so happens at the present time that I have $50,000.00 worth, which I am re-selling for a man to whom I sold it originally when the company was organized. * * * I did not come here to sell you any stock, in fact, I am only going to permit my old clients to participate in that." Other like statements were made by defendant at this interview and at the subsequent conversations had with complaining witnesses. The daughter testified that defendant told them that the company was about to sell some of its property for a large sum, and that the man for whom he was selling the stock had to sell because of a divorce proceeding. In one instance, the testimony is to the effect that defendant would repurchase one-half of the stock sold when he received his soldier's bonus. At another time, he told the witnesses that he could not make a written agreement to repurchase the stock because he was a broker. Defendant sold stock to the complaining witnesses upon three dif-

ferent dates; the six counts for violation of the Corporate Securities Act involve these sales. The sale on the last date to the mother was for the sum of $2,112.25, and is the basis of the charge of grand theft. The fact of the sale of the stock and that defendant had no license as a broker is not questioned.

The prosecution introduced evidence that defendant had purchased this stock at various times before and after he had his transactions with the complaining witnesses at prices from $5 to $11 per unit. He sold the stock to complaining witnesses for $42.24 to $50 per unit. The corporation went into the hands of a receiver within a few weeks of the time defendant made the sales complained of here. Defendant denies that he represented himself as a broker in the transaction had, and contends that he but sold his own stock.

[1, 2] Defendant's first specification of error is as to the charge of grand theft. As to this he contends that the evidence is insufficient to support the finding of the jury, in that it fails to prove that he made any false statement of past or existing fact. An examination of the record fails to sustain defendant in this position. But one instance is necessary to illustrate this: His representation that it was impossible to buy the stock because of its tremendous earnings, while at the very time he was in fact purchasing the stock for a price that was less than one-fourth the price at which he was selling it to the complaining witnesses. There is evidence to justify the jury in finding that defendant was acting in bad faith and with knowledge of the untruthfulness of his statements. The statements were more than mere matters of expression of opinion, when considered as a whole. People v. Jordan, 66 Cal. 10, 4 P. 773, 56 Am. Rep. 73.

Defendant's contention as to the five counts charging him with a violation of the Corporate Securities Act, in that he acted as a broker in the sale forming the basis of the charges, is that the sales were sales of his own stock, and that his act in selling such stock was therefore not criminal. The statute, under which defendant was charged in so far as material here, reads as follows (St. 1929, p. 1251, et seq., Deering's Gen. Laws Supp. 1927–29, p. 3288):

"10. The word 'broker' includes every person or company, other than an agent, who shall, in this state, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security not exempt under the provisions of this act issued by others, or of underwriting any issue of such securities, or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public.

"11. * * * (c) Except as hereinafter expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * *

"3. The sale in a bona fide way of any security by an owner who is not the issuer or an underwriter thereof, who sells the same for his own account; and not for the purpose of evading the provisions of this act."

[3] There is no question that an owner of property such as here is involved has a right to make a bona fide sale of it for such price as he can obtain in fair barter. Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; People v. Pace, 73 Cal. App. 548, 238 P. 1089, 1091; Pollak v. Staunton, 210 Cal. 656, 659, 293 P. 26.

The evidence sustains defendant in his contention that he was the owner of the stock involved in the various transactions which form the basis of the charges of violation of the Corporate Securities Act. That he sold the same to the complaining witnesses is also unquestioned. Defendant cites and relies upon the case of People v. Pace, supra, the facts of which case are very similar to the case at bar. The act at the time the case of People v. Pace was decided contained the following language exempting the owner of securities from the operation of the act: "Any owner of any security who is not the issuer or underwriter thereof, who sells or exchanges the same for his own account: *Provided, that such sale or exchange is not made in the course of repeated and successive transactions of like or similar character by him.*" The court held, as to that part of the law as then in effect, which is italicized in the above quotation, that it placed an unconstitutional limitation on an owner's right of property. Counsel for respondent contends, upon this appeal, that as this objectionable part of the act has been omitted from the act as it now reads, after its amendment, that the remaining portions are constitutional. With this contention we cannot agree. The case of People v. Pace, supra, states a principle which has a very much broader application of constitutional rights than that referred to and commented upon by respondent here. At page 559 of 73 Cal. App., 238 P. 1089, 1094, the court makes use of the following language which well illustrates this point: "But nowhere in the authorities sustaining the regulation of the business of brokers do we find authority to sustain the contention made here, that the police power under the guise of general welfare may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law."

On page 560 of 73 Cal. App., 238 P. 1089, 1095, the court quotes the language of Ex parte Quarg, supra, as follows: "The constitutional guaranty securing to every person

the right of 'acquiring, possessing, and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter."

[4, 5] Though in other jurisdictions courts have announced rules that may be at variance with the rule established by our courts in this regard, we are bound by the precedent here established. The act under which defendant is charged is one avowedly seeking to regulate the sale of property, and, in so far as the regulation takes away the right of the owner to sell his own property, it is void. The fact that the defendant here may have infringed some rights of the complaining witnesses in effecting the sale, may give rise to some other actions on their part, or on the part of the state under some other law, but this does not justify the proceeding here instituted. Under the guise of "regulation," a long-established constitutional right, such as is here involved, may not be abridged. The other points raised upon this phase of the appeal are but correlative of the matters we have just discussed, and no good purpose would be subserved by further comment upon them here.

The judgment appealed from as to the charge of grand theft and the order of the court denying defendant's motion for a new trial upon that charge are affirmed. The judgments entered upon the charge of violation of the Corporate Securities Act and the orders denying defendant's motion for a new trial upon such charges are reversed.

We concur: CONREY, P. J.; HOUSER, J.

123 Cal.App. 545

PEOPLE v. DASKAM.

Cr. 2140.

District Court of Appeal, Second District, Division 1, California.

May 19, 1932.

1. Robbery ⇨24(1).

Evidence *held* sufficient to support conviction for robbery.

2. Criminal law ⇨829(18).

Refusing instruction requiring guilt to be established beyond reasonable doubt *held* not error, where jury were fully instructed on subject.

3. Criminal law ⇨798(1).

Refusing instruction that defendant was entitled to individual opinion of every member of jury, and that no member should vote for conviction because of opinion of other members, *held* not reversible error.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Francis Daskam was convicted of robbery, and he appeals.

Affirmed.

Morris Wolfman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn and Seibert L. Sefton, Deputy Attys. Gen., for the People.

CONREY, P. J.

[1] The defendant was convicted on two counts of an information charging the crime of robbery; count 1 stating an offense committed on the 16th day of April, 1931, and count 2 an offense committed on the 7th day of April, 1931. In each instance the fact of the robbery and identification of the defendant as the person who committed the crime were clearly and positively established by the testimony of the man who was robbed. There is no merit in the contention made by appellant that the evidence is insufficient to support the verdict.

[2] Appellant further contends that the court erred in refusing to give to the jury two instructions requested by him. The first of these proposed instructions relates to the rule requiring that the guilt of the defendant be established beyond a reasonable doubt. The other is an instruction stating in another form the same doctrine. In each instance the instruction was by the judge "refused except as given in other instructions." The jury was plainly instructed that the defendant in a criminal action is presumed to be innocent until the contrary is proved, and that where there is a reasonable doubt of his guilt he is entitled to an acquittal.

[3] Appellant complains that the court erred in refusing to instruct the jury that "the defendant in this case is entitled to the individual opinion of every member of the jury, and no member of this jury should vote for a conviction of the defendant because of the opinion of the other members of the jury as long as he himself has reasonable doubt as to the guilt of the defendant." Such an instruction is a statement of an obvious fact which may be classified as common knowledge, and which does not need to be

fortified by an instruction that this is a requirement of the law. Beers v. Cal., etc., Co., 87 Cal. App. 440, 466, 467, 262 P. 380. While such an instruction is commonly given, we do not think that the refusal to give it furnishes in itself a sufficient ground for setting aside a verdict. Points 5 and 6 of appellant's brief relating to alleged misconduct of the judge and of the district attorney are not supported by the facts contained in the record.

The judgment and order are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

123 Cal.App. 560

BAINBRIDGE v. LACHENMAIER.

Civ. 748.

District Court of Appeal, Fourth District, California.

May 19, 1932.

1. Appeal and error ⇨1071(6).

Where plaintiff's claim for digging well was based on oral contract, and defendant's counterclaim was based on prior written agreement and oral modification, failure to find concerning execution of written agreement *held* harmless, where court found for plaintiff.

Failure to find execution of written agreement was harmless, because the court found that the work was done under oral agreement as claimed by plaintiff, and finding that written agreement had been executed could not in view of its subsequent abandonment, affect the judgment.

2. Appeal and error ⇨1071(6).

Where findings that agreement set up in counterclaim was not entered into and that plaintiff was not guilty of alleged negligence were supported by evidence, failure to find that alleged agreement had been superseded by new agreement *held* harmless.

Failure to so find was immaterial because finding that alleged, but nonexistent, agreement had not been superseded as claimed by plaintiff in special defense to counterclaim, would not affect judgment for plaintiff on defendant's counterclaim.

3. Appeal and error ⇨1071(1).

Where record does not show that findings were prepared by plaintiff at court's direction, whether they were served on defendant before signature and filing *held* immaterial.

It was immaterial whether such findings were served on defendant, because it is necessary to serve findings on a party only where they have been prepared by opposite party at court's direction.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Minnie M. Bainbridge against Sam Lachenmaier. From judgment for plaintiff, defendant appeals.

Affirmed.

Rowen Irwin, of Bakersfield, for appellant.

Alfred Siemon, of Bakersfield, for respondent.

SCOVEL, Justice pro tem.

The complaint in this action alleges that on March 3, 1931, defendant employed plaintiff to drill a water well at a specified price per lineal foot, the defendant to furnish all pipe and casing; that the well was drilled to a depth of 423 feet, but that defendant refused to pay for the same. Defendant filed his answer and a pleading designated a cross-complaint, admitting that the contract for drilling the well had been entered into, but alleging that the contract was in writing dated December 15, 1930, and providing for completion of the well not later than March 5, 1931; that under and pursuant to such contract plaintiff started the drilling of a well on or about February 7, 1931, drilling the same to a depth of 246 feet; that said well was drilled in such negligent and careless manner that plaintiff was forced to discontinue the drilling thereof, and that on March 3, 1931, the written contract was modified by an oral agreement wherein plaintiff agreed to drill a new well under the same terms and conditions set forth in the written contract. It was further alleged that by the terms of the oral agreement plaintiff should pull the casing placed in the first well, and that the same should be used in the second well, but that the cost of all casing which could not be withdrawn should be credited to defendant upon the cost of drilling the second well, which amount defendant alleged to be $469.78. In the so-called counterclaim defendant alleged an agreement dated December 15, 1930, wherein plaintiff agreed to drill a well to a depth of not less than 300 feet; that thereafter defendant commenced the drilling of such well, but drilled the same in a careless and negligent manner, and was thereby compelled to abandon the same at a depth of 246 feet; that by reason thereof defendant was prevented from securing irrigating water, damaging a potato crop in the sum of $2,000. It is not alleged that the agreement relied upon in the counterclaim or cross-complaint was in writing. Plaintiff filed an

answer to the counterclaim as a cross-complaint, denying all of the allegations therein, and alleging that she was compelled to abandon the first well by an unavoidable accident, and that it was thereupon mutually agreed between plaintiff and defendant that the well should be abandoned; that neither party should have any claim against the other party in relation thereto, and that plaintiff should immediately commence the drilling of a new well upon the terms and conditions set forth in plaintiff's complaint; that the written contract for drilling the first well was thereby annulled; and that the second well was drilled under the foregoing oral agreement.

The court found that all the allegations of plaintiff's complaint were true; found that defendant's answer was untrue, excepting that it failed to make any finding as to the execution of the written agreement alleged therein. The court further found that the allegations in the counterclaim were untrue, but failed to make any finding upon the special defense in plaintiff's answer to the counterclaim or cross-complaint, wherein she alleged a substitution of the oral agreement for the written agreement or a novation. Judgment was entered in favor of the plaintiff in accordance with the prayer of the complaint. Defendant has appealed, and bases his appeal upon the failure of the court to find upon the issue as to the execution of the written agreement set forth in the answer and the issue of novation pleaded in the answer to the counterclaim or cross-complaint.

The evidence, which is substantially uncontradicted, shows that a written agreement was entered into by the parties in November or December, 1930, for the drilling of a well upon defendant's lands; that pursuant thereto a well was drilled by plaintiff to a depth of 249 feet; that at that depth a part of the drilling equipment broke, and that the well was abandoned; that thereafter a second well was drilled to completion. There is considerable conflict in the evidence as to whether or not the second well was drilled under an oral agreement superseding the written agreement, the evidence of plaintiff tending to show that it was so drilled, the evidence of defendant showing that the work was done pursuant to an extension or modification of the written agreement.

[1] It will be noted that defendant's claim for the cost of casing was based upon a provision in the oral agreement providing for a credit thereof against the cost of drilling the second well. Plaintiff, however, denied any such provision in the oral agreement, and testified directly that no such provision entered into the agreement. The court found in favor of the plaintiff upon this issue. It is therefore immaterial whether or not the alleged written agreement was ever entered into, inasmuch as no liability on the part of plaintiff is claimed thereunder. A finding in favor of the defendant upon the issue as to the execution of the written agreement would not affect the judgment, and failure to find thereon is therefore harmless error. Delannoy v. Quetu, 73 Cal. App. 627, 239 P. 71; Janke v. McMahon, 21 Cal. App. 781, 133 P. 21.

[2] As to the counterclaim or cross-complaint, the court found that the parties did not enter into the agreement alleged therein. In support of his allegation in the cross-complaint, plaintiff introduced a written agreement dated December 15, 1930, providing for the drilling of a water well and fixing a date for completion thereof as March 5, 1931. The defendant testified that she had signed a written agreement for the drilling of a water well, but denied that it was dated, or that it contained any date for completion of the well. If her statement be true, then the agreement alleged by defendant in his counterclaim was not the one actually executed by the parties, and the finding of the court in reference thereto is supported by the evidence. Furthermore, the counterclaim or cross-complaint is based upon negligence in the drilling of the first well. The testimony of plaintiff shows that there was no negligence, but that the well was abandoned by reason of an unavoidable accident, to wit, the breaking of a bailer. The finding of the court, therefore, that the defendant was not damaged by any negligence on the part of plaintiff in drilling the well is also supported by the evidence. The special defense pleaded by plaintiff to the effect that the agreement for the drilling of the well has been superseded by a subsequent agreement is therefore immaterial, and a finding thereon in favor of the defendant would not affect the judgment of the court in favor of the plaintiff on the counterclaim or cross-complaint. As above set forth, the failure of the court to find upon an issue which would not affect the judgment, even if a finding thereon were made in favor of the complaining party, is harmless error.

[3] From the record it appears that the findings were not served upon appellant prior to their being signed and filed. The record, however, does not show that the findings were prepared by either party by the court's order. Findings need be served on the parties to the action only where the court directs a party to prepare the findings. Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 P. 177.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

CRAIG v. BOYES et al.

Civ. 8086.

District Court of Appeal, First District, Division 2, California.

May 20, 1932.

Rehearing Denied June 18, 1932. Hearing Denied by Supreme Court July 18, 1932.

1. Statutes ⇐199.

Meaning of "the" depends on context and purpose of statute in which it is found.

[Ed. Note.—For other definitions of "The," see Words and Phrases.]

2. Statutes ⇐199.

Vehicle act providing that in actions by or on behalf of guests plaintiff must establish that driver's gross negligence was "the" proximate cause of death, injury, or damage *held* not to mean sole cause (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

3. Negligence ⇐136(1).

In action based on negligence, all circumstances shown by evidence should be considered by jury.

4. Trial ⇐54(1).

Evidence of host's intoxication, though introduced by cross-defendant, could be considered in determining host's liability for injuries to guest, where no motion to limit such evidence was made except by request for instruction at close of case.

5. Trial ⇐54(1).

Where no request was made to limit testimony in action by guest, against host, who filed cross-action against codefendant motorist colliding with host's car, instruction evidence was applicable to complaint and cross-complaint *held* not error.

6. Appeal and error ⇐877(2).

Where defendant host filed cross-complaint against codefendant motorist, instruction applicable to cross-action cannot be complained of on host's appeal from judgment for guest.

Automobile guest brought action against host and another motorist who had driven car against host's car when latter made left turn. Court instructed jury that driver of an automobile was bound to use reasonable care to anticipate presence on highway of other persons having equal rights, and that it was duty of driver to see persons on the street in front of him where his view was unobstructed.

7. Appeal and error ⇐882(12).

Where, in action and cross-action, record did not show by whom instruction complained of was asked, defendant cross-complainant could not complain.

Defendant cross-complainant could not complain because a party cannot claim that trial court erred in giving an instruction which was requested by such party, and because one who claims error must produce a record which shows error, and, in absence of showing to contrary, it will be presumed that an erroneous instruction was given at request of the party complaining.

8. Trial ⇐252(7).

Where there was no proof concerning distances within which car traveling in excess of 30 miles an hour could be stopped, refusal of instruction stating such distances, with others, was proper (St. 1917, p. 545, § 94, as amended by St. 1929, p. 530, § 36).

9. Appeal and error ⇐712.

Alleged formula used by Legislature in arriving at distances within which cars traveling at speeds up to 30 miles an hour may be stopped could not be considered where not in the record (St. 1917, p. 545, § 94, as amended by St. 1929, p. 530, § 36).

10. Appeal and error ⇐216(1).

Where plaintiff did not claim that defendant's brakes were defective, and defendant testified that her brakes were good, and failed to ask for pertinent instruction, she cannot complain on appeal.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Gloria Craig against Suzie A. Boyes and W. A. Taylor, wherein W. A. Taylor filed cross-complaint against his codefendant. From judgment for plaintiff against both defendants and against cross-complainant, each defendant appeals.

Affirmed.

Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, for appellant Suzie A. Boyes.

Cooley & Crowley and Cooley, Crowley & Supple, all of San Francisco, for appellant W. A. Taylor.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, and Jesse E. Nichols, of Oakland, for respondent.

STURTEVANT, J.

On the 5th day of June, 1930, the plaintiff was riding as the guest of W. A. Taylor. He was driving a Willys-Knight automobile. Shortly before the accident hereinafter mentioned Mr. Taylor was driving from Warm Springs north toward Irvington in Alameda county. Mrs. Suzie A. Boyes at about the same time was driving south on the same road from Oakland toward San Jose. The road on which both parties were traveling was a paved highway. A short distance below Irvington a gravel road intersects the highway from the west. As the two automo-

biles were approaching the gravel road, Mr. Taylor made a left-hand turn attempting to enter the gravel road. As he did so Mrs. Boyes' automobile approached from the north, collided with Mr. Taylor's automobile, and the plaintiff was injured. Thereafter she commenced this action against both drivers. In her complaint she charged Mr. Taylor with gross negligence. He appeared, filed an answer and also a cross-complaint against Mrs. Boyes. The cross-complaint was answered by Mrs. Boyes, and the issues so framed were tried before the trial court sitting with a jury. The jury returned a verdict against Mr. Taylor on the cross-complaint and in favor of the plaintiff against both defendants. Each defendant has appealed. They have brought up one typewritten transcript, but have filed two separate sets of briefs.

Appeal of W. A. Taylor.

[1, 2] The defendant asserts that the gross negligence of this defendant was not the sole proximate cause of plaintiff's injury, and therefore she has no right to recover against him. He calls to our attention that he asked an instruction to that effect which was refused and that the trial court gave an instruction as follows: "In order to hold one liable for negligence, it is not necessary that his or her omission be the sole cause of the injury suffered. Where injury results from two separate and distinct causes by different persons operating simultaneously and concurrently, both are the proximate cause and recovery may be had against either or both of the responsible persons, notwithstanding the fact that one of the acts may have been wanton and the other manifest only a lack of ordinary care." It is not controverted but that the foregoing instruction was formerly the law of this state. Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 506, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Sawdey v. Producers' Milk Co., 107 Cal. App. 467, 290 P. 684; Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 739, 268 P. 951. However, the defendant calls attention to the language used by the Legislature in 1929 (St. 1929, p. 1580) when enacting section 141¾ of the California Vehicle Act. In particular he quotes: "* * * Provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such * * * gross negligence was *the* proximate cause of such death or injury or damage." (Italics ours.) Thereupon he emphasizes the word italicized, and argues that his negligence was not the sole proximate cause, but, if anything, it was only one of the causes of plaintiff's injury. He cites many cases and quotes dictionaries to the effect that the word "the" is a definite article. He cites authorities to the effect that, when the definite article "the" is used, the courts may not construe the statute as though the indefinite article "a" had been used. He quotes extensively from Wastl v. Montana Union Ry. Co., 24 Mont. 159, 61 P. 9, 16. It is somewhat in point. Other cases have been cited by the defendant, and still others could be cited. The defendant does not quote the dissenting opinion in the Wastl Case, which was written by Mr. Justice William H. Hunt while an associate justice of the Supreme Court of Montana. In that dissenting opinion Mr. Justice Hunt said: "I think, though, that the definite article 'the,' as used in the instruction held bad, particularized the subject of proximate cause which was being spoken of by the court, without going to the extent of limiting the jury to the consideration of one, and only one, proximate cause within the several proximate causes embraced in the general subject so particularized; that is to say, while I believe the jury were directed to the subject of proximate causes by the instruction, still there was no one special limitation within the bounds of that subject by which they were exclusively concluded." The language used by Judge Hunt will be found supported by as many authorities as those cited by the defendant. In the case of Noyes v. Children's Aid Society, 70 N. Y. 481, at page 484, the Court of Appeals was considering a statute regarding allowances to be made in probate. The statute used the words "the party." There, as here, the specific words used in the statute were urgently relied on. The court held that the word "the" is not always used to mean but one. On page 484 of 70 N. Y., the court said: "Take the well-worn and well-wearing quotation: 'The man that hath not music in himself, is fit for treason, stratagem, and spoils.' The meaning of the article is not exhausted, when one man is found with no music in himself. 'The man,' means there, 'any man.' So, in this statute, 'the party * * * entitled,' means 'any party entitled.'" Many cases may be found in the books reaching the same conclusion that the New York Court of Appeals reached. In the case of Anundsen v. Standard Printing Co., 129 Iowa, 200, 105 N. W. 424, the Supreme Court of Iowa was considering the meaning of the words "the property," as used in some of its statutes. The court quotes the dictionaries and authorities pro and con, then, on page 426 of 105 N. W., 129 Iowa, 200, the court said: "And there seem to be no settled rules for its construction. Much must of necessity be left to the context, and to the objects and purposes of the statute in which it is found." The rule just cited is the particular rule which we think is applicable in this case. Picking up the California Vehicle Act by its four corners, there is not a word in it to the effect that the rule heretofore existing re

garding the liability of joint tort-feasors is to be changed except that it used the word "the" instead of the word "a" as hereinabove quoted. No decision in this state has so held. In the case of Krause v. Rarity, 210 Cal. 644, 293 P. 62, the Supreme Court was called upon to construe section 141¾. Numerous attacks had been made. Those attacks consisted of the claim that the right to maintain certain actions was annihilated by virtue of the adoption of the amendment. Commencing on page 654 of 210 Cal., 293 P. 62, 66, Mr. Justice Shenk, speaking for the court, said: "The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery. * * * It must therefore be concluded that the enactment of section 141¾ did not repeal section 377 of the Code of Civil Procedure in whole or in part, but simply changed the degree of negligence required to permit a recovery. * * * Here no driver has been relieved absolutely of liability to the heirs of his deceased guest, but is still liable, dependent on the degree of his negligence under the proof." For the reasons stated we think the trial court committed no error in construing section 141¾.

[3, 4] The cross-defendant introduced some evidence hinting at the intoxication of Mr. Taylor. No objection was made. No request was made limiting the use of that testimony. However, at the end of the case the defendant asked, and the trial court refused, an instruction to the effect that said testimony should not be considered by the jury in determining whether the defendant W. A. Taylor had been guilty of gross negligence. The defendant claims that the trial court erred, nevertheless he cites no authority that is directly in point. It is the settled law of this state that in determining an action based on a charge of negligence all of the circumstances are relevant and should be considered by the jury in arriving at a verdict. Pruitt v. San Pedro, L. A., etc., R. Co., 161 Cal. 29, 38, 118 P. 223, 36 L. R. A. (N. S.) 331; 45 C. J. 689. No authority is cited to the effect that a different rule applies when the plaintiff's theory is that gross negligence was committed. It has been held that the rule is the same. Missouri, K. & T. Ry. Co. v. Zuber, 76 Okl. 146, 184 P. 452, 455, 456, 7 A. L. R. 840. We think, therefore, that the circumstance of intoxication, if any, toegther with all of the other circumstances connected with the accident, were proper for the consideration of the jury.

[5] Of its own motion the court, after having given a very full and complete set of instructions, stated orally: "Now, of course, the evidence introduced is applicable both to the complaint and the cross-complaint." As stated above, no request was made at any time limiting any portion of the testimony, and no reason whatever appears showing that the trial court committed any error in giving said instruction.

[6, 7] The defendant complains because the trial court gave an instruction worded as follows: "Aside from the mandate of the California Vehicle Act, as to speed, the driver of an automobile is bound to use reasonable care to anticipate the presence on the highway of other persons having equal rights with himself to be there. It is the duty of the driver of an automobile to see persons on the street in front of him where his view is unobstructed." A bare reading of that instruction shows that this plaintiff was not a party within the scope of that instruction. When it is remembered that a cross-action was also on trial and which involved the duty owing from the driver of one to the driver of the other of the two automobiles, it is perfectly clear that the instruction was addressed to them and to them alone. Turning to the other instructions, which were given, that view is reinforced. The care this defendant owed to the plaintiff was the subject of several other instructions. (Tr. 252.)

Before closing, it should be said that it is the settled law of this state that no one may claim the trial court erred in giving an instruction which such person requested, and that one who claims error must produce a record which shows the error. It is also the settled law that in support of the judgment, in the absence of a showing to the contrary, it will be presumed that an erroneous instruction was given at the request of the party complaining. Except as hereinabove stated, the record before us does not show that the defendant Taylor did not request the instructions to which he objects, nor does it show that the alleged requested instruction was asked by him.

Appeal of Suzie A. Boyes.

[8-10] Mrs. Boyes claims that the trial court erred in refusing an instruction which she requested. That instruction was as follows:

"I charge you that under the law of this state every motor vehicle operating upon the public highways is required to be equipped with brakes adequate to enable the driver of said vehicle to bring the same to a stop when operated upon dry asphalt or concrete pavement surface where the grade does not exceed one per cent and when operating at speeds set forth in the following table, within the distances as follows: When the vehicle is being operated at ten miles per hour it must be equipped with brakes adequate to bring it to a complete stop within a distance of 9-3/10ths feet; at fifteen miles an hour

within 20-9/10ths feet; at twenty miles an hour in 37 feet; at twenty-five miles an hour in 58 feet; at thirty miles an hour in 83-3/10ths feet; at thirty-five miles an hour in 113 feet; at forty miles an hour in 148 feet.

"If, therefore, you find from the evidence that the automobile of defendant Suzie Boyes was equipped with brakes adequate and sufficient to bring it to a complete stop within a distance of 148 feet while such automobile was being driven at a speed of 40 miles per hour or greater upon a dry asphalt or concrete pavement where the grade did not exceed one per cent, then I charge you that such automobile of defendant Suzie Boyes was equipped with brakes meeting the requirement and provision of the law."

The witnesses for the plaintiff testified that Mrs. Boyes was traveling from fifty to sixty miles an hour. Mrs. Boyes was called as a witness by the plaintiff under section 2055 of the Code of Civil Procedure, and testified that she was traveling thirty or thirty-five miles an hour. If the car was traveling over thirty miles an hour, there was no evidence introduced as to the distance within which it could have been stopped. Section 94 of the California Vehicle Act (as amended by St. 1929, p. 530, § 36) sets forth a table of ten, fifteen, twenty, twenty-five and thirty miles per hour, and gives the stopping distance for each. As to how that table was compiled, the statute is silent. Conceding, without deciding, that in so far as section 94 determines the facts therein recited, it is conclusive on the courts (Smith v. Mathews, 155 Cal. 752, 756, 103 P. 199), nevertheless it is clear that section 94 contains nothing purporting to determine the distance within which a car can be stopped if it is traveling over thirty miles per hour. It follows that all that was contained in the instruction purporting to state stopping distances in excess of thirty miles per hour was not responsive to any evidence introduced in the case. In her brief Mrs. Boyes purports to state the formula used by the Legislature in compiling the table set forth in section 94, and thereupon the brief purports to state an extended table showing stopping distances for speeds, one to fifty miles per hour. While it is quite interesting, it is comprised of facts not contained in the record, and therefore may not be used. Furthermore, it was the theory of the plaintiff, pleaded in her complaint, restated in plaintiff's opening statement to the jury, and followed up by an examination of the witnesses, that at the time of the accident Mrs. Boyes was driving at an excessive speed. No claim was made that her brakes were defective. True it is that while a witness on the stand she was asked the question and without objection was allowed to answer that she thought her brakes were in good condition. If it had been her contention that the adequacy of her brakes was in issue, she should have asked a pertinent instruction addressed to that subject. She did not do so and she may not complain.

The jury returned a verdict for $10,000. On a motion for a new trial, the trial court reduced the amount to $6,500. Mrs. Boyes still contends that the amount is excessive. She does not set forth why she is of that opinion. Nevertheless, we have examined the evidence as to plaintiff's injuries, and we are quite unable to state that the verdict as modified was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment. Smith v. Brown, 102 Cal. App. 477, 487, 283 P. 132.

We find no error in the record. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 542

Ex parte FOSS.

Cr. 1666.

District Court of Appeal, First District, Division 2, California.

May 19, 1932.

1. Habeas corpus ⇐79.

Facts recited in order committing husband to jail for contempt in failing to pay alimony must be taken as true, in absence of record of oral testimony.

2. Divorce ⇐269(13).

Facts stated in order committing husband to jail for contempt in failing to pay alimony *held* to show that he willfully refused to do so, though able to.

The order of commitment recited entry and continued effectiveness of order to pay alimony and judgment in divorce action, service of order to show cause on husband, two continuances of hearing on his request, his failure to appear on last date set for hearing, his personal knowledge of order and judgment, and his willful failure and refusal to pay sums due thereunder, though he had ability and means to do so.

3. Divorce ⇐269(10).

Affidavit on which order to show cause in proceeding for contempt in failing to pay ali-

mony was based *held* sufficient (Code Civ. Proc. § 1211).

The affidavit alleged that several orders directing husband to show cause why he should not be punished for contempt were issued after notice to him of order to pay alimony; that he appeared and testified on some occasions, but failed to appear on others; that he was earning regular salary and able to comply with order; that he divested himself of two parcels of realty to avoid payment; and that he failed to make payment, though often admonished by court to do so.

4. Divorce ⇨269(1).

Divorced husband, not appearing on day for hearing of order to show cause in contempt proceeding for nonpayment of alimony and refusing to pay sums due, though able to do so, *held* guilty of contempt.

Application by James C. Foss for a writ of habeas corpus to the Sheriff of the City and County of San Francisco.

Writ discharged, and petitioner remanded to custody.

A. H. Crook, of San Francisco, for petitioner.

Waldo F. Postel, of San Francisco, for respondent.

Leo A. Cunningham, of San Francisco, for sheriff and city and county of San Francisco.

SPENCE, J.

Petitioner was adjudged guilty of contempt and ordered confined in the county jail for failure to pay the sums which he was ordered to pay by the terms of an order and judgment in a divorce action. He seeks his release on habeas corpus.

In the affidavit upon which the order to show cause herein was issued, it was alleged, among other things, that the order and judgment in the divorce action were entered on June 17, 1931; that, after petitioner had notice of the entry of the same, several orders were issued directing petitioner to show cause why he should not be punished for contempt for failure to comply with said order and judgment; that on occasions petitioner appeared in response to said orders and testified; that on other occasions petitioner failed to appear and orders for the attachment of his person followed; that petitioner was earning a regular salary and had the ability to comply with the order and judgment; that since the entry of the order and judgment he had divested himself of two parcels of real property for the purpose of avoiding payment; that petitioner had ample ability to comply with the order and judgment, but that he had failed and refused to make any payment thereon, although often admonished by the court to do so.

The order to show cause herein was issued on March 23, 1932. Petitioner filed his affidavit by way of answer. He did not deny knowledge of the order and judgment or their contents, but claimed inability to comply. He admitted that shortly prior to the entry of the order and judgment he sold one piece of real property and paid other creditors with the proceeds. He further admitted, without specifying the time, that he had conveyed another piece of property to his daughter and son, but claimed that this was done in repayment of money loaned to him by them. He alleged that he had been unemployed during part of the time since the entry of the order and judgment. He admitted being employed at the time of signing the affidavit, but claimed that his income was required for the support of himself and his daughter and son.

The order of commitment recites the essential facts including the entry of order and judgment and the fact that these were still in full force and effect. It shows, among other things, that the order to show cause was served upon petitioner, and that upon his request the hearing was continued to April 18, 1932; that petitioner again appeared on April 18, and the cause was continued for further hearing to April 25; that petitioner failed to appear on April 25; that petitioner had personal knowledge of the order and judgment and the contents thereof at the time of the making of the same and had appeared in said court on many occasions and testified with respect thereto; that petitioner had not complied in whole or in part with said order and judgment; that he had willfully failed and refused to pay the sums due and payable thereunder; that he had at all times since the making thereof had the ability and means to pay the sums required.

[1-3] No record of the oral testimony taken upon the hearings upon the order to show cause is before us in this proceeding. The order of commitment recites the facts upon which it was based and those facts must be taken as true. Ex parte Ewell, 71 Cal App. 744, 236 P. 205. In our opinion there is no merit in petitioner's contention that the facts stated in the order of commitment are insufficient. From these facts it appears that petitioner, with full knowledge of the order and judgment, willfully refused to comply therewith, although he had the ability so to do. Nor is there any merit in petitioner's claim of insufficiency of the affidavit upon which the order to show cause was based. We are of the opinion said affidavit sufficiently set forth "the facts constituting the contempt" within the meaning of section 1211 of the Code of Civil Procedure, including peti-

tioner's knowledge of the order and judgment. Even if it may be said that the affidavit was "inartificially drawn" or that the facts alleged merely "squinted" at a substantive statement of the offense, it would be sufficient on this proceeding. Ex parte Ah Men, 77 Cal. 198, 19 P. 380, 11 Am. St. Rep. 263; In re Kaster, 52 Cal. App. 454, 198 P. 1029; In re Stambaugh (Cal. App.) 4 P.(2d) 270.

[4] From the record before us it is clear that the trial court had jurisdiction of the petitioner and of the subject-matter. Taking as true the facts found by the court, it is equally clear that petitioner was guilty of contempt and is not entitled to his release.

The writ is discharged, and the petitioner is remanded to custody.

We concur: NOURSE, P. J.; STURTEVANT, J.

In re EDWARDS' ESTATE.*

Civ. 8267.

District Court of Appeal, Second District, Division 2, California.

May 23, 1932.

Rehearing Denied June 22, 1932. Hearing Granted by Supreme Court July 21, 1932.

1. Trusts ⇐12.

Spendthrift trusts are valid.

2. Trusts ⇐152.

Trustee of spendthrift trust was not entitled to offset against payments due certain beneficiaries judgments obtained against them on account of transactions with testator after execution of will creating trust.

The trust was created for benefit of testator's widow and children. One-half of income was to be paid to wife for life and one-eighth to each of four children. In no possible event were payments of income to be liable for debts of beneficiaries or any other person. After execution of will, three sons became indebted to testator on promissory notes, and testator also indorsed for one of them. Indebtedness of the three exceeded $25,000, which trustee had reduced to judgment.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

First accounting and report of the County National Bank & Trust Company, as trustee, of trust created by will of Alfred Edwards, deceased. From an order disallowing objections to trustee's account, John B. Edwards and others appeal.

Reversed, with directions.

Raymond Hails and Newby & Newby, all of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant.

Heaney, Price & Postel, of Santa Barbara, (Norman W. Ambrose, of Santa Barbara, Dryer, Castle & Richards, of Los Angeles, Griffith & Thornburgh, of Santa Barbara, and Bruce Wallace, of Los Angeles, of counsel), for respondents.

FRICKE, Justice pro tem.

The deceased died in 1926, leaving a will providing that the residue of his entire estate should go to Commercial Trust & Savings Bank of Santa Barbara, Cal., in trust, the income to be paid as follows: "One-half part thereof to my wife, Mabel R. Edwards, for and during the term of her natural life; one-eighth part thereof to my son, Alfred R. Edwards; one-eighth part thereof to my daughter, Elizabeth Edwards Ryon; one-eighth part thereof to my son, John B. Edwards; one-eighth part thereof to my son Richmond A. Edwards, during their respective lives. Each and all of such payments are made for the sole and separate uses of the beneficiaries, and the same are not to be deemed or held liable in any possible event for the debts, control or engagements of such beneficiaries, or any other person, and are to be free from the control of any husband, and are not to be subject to any transfer, mortgage, pledge or assignment by them or either or any of them." The will was admitted to probate February 1, 1930, and the estate distributed to Security First National Bank as trustee of the trust aforesaid. On May 16, 1930, this trustee resigned and was discharged by the court, and County National Bank & Trust Company was appointed successor trustee and received the trust estate. It further appears that, subsequent to the execution of the will, John B. Edwards became indebted to the decedent on a promissory note, which was reduced to a judgment in the amount of $4,302.30 by the executor. Similarly the executor recovered a judgment against Richmond A. Edwards for $4,770.25 on a note given by him to the deceased subsequent to the date of the will. Alfred R. Edwards also had given a note to the deceased subsequent to the will, and decedent had also indorsed certain notes for the benefit of Alfred R. Edwards, which were paid by the estate. The foregoing transactions were reduced to a judgment against Alfred R. Edwards in the amount of $17,996.36, in an action by the executor.

The parties to this action agree that the above-quoted provision of the will created what is commonly known as a "spendthrift trust." The question raised on this appeal is whether the trustee had the right to withhold payments due under the trust to John B. Edwards, Richmond A. Edwards, and Alfred R. Edwards, and apply the same toward

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 17 P.2d 116.

the payment of the respective judgments. The appeal is from the order of the trial court, following a hearing of the first account and report of the County National Bank & Trust Company, as trustee, and the objections thereto, by which order such offsets or retainer are authorized and approved. The trial court also found the trust to be one for the maintenance of the widow and four children.

The cases cited in the briefs of respondents recognizing the general right of an executor or trustee to set off a debt owing by the beneficiary of an estate against the distributive share of such beneficiary are not analogous to or determinative of the case before us, which involves the additional factor that the payments under the trust "are for the sole and separate uses of the beneficiaries, and the same are not to be deemed or held liable *in any possible event* for the debts, control or engagements of such beneficiaries." (Italics ours.) As to the authorities cited to the effect that debts of the beneficiary can be offset against his distributive share even though barred by the statute of limitations, they are inapplicable, for the further reason that they are contrary to the rule laid down in this state. Estate of Schaeffer, 53 Cal. App. 493, 495, 200 P. 508. See, also, Estate of Cates, 195 Cal. 319, 232 P. 972; In re Clary's Estate, 71 Cal. App. 22, 234 P. 851.

[1, 2] Spendthrift trusts are recognized and held valid in this state. Seymour v. McAvoy, 121 Cal. 438, 442, 53 P. 946, 41 L. R. A. 544; McColgan v. Walter Magee, Inc., 172 Cal. 182, 186, 155 P. 995, Ann. Cas. 1917D, 1050. There remains, therefore, only the question of interpretation of the above-quoted provision of the will. It is difficult to see how the language "each and all of such payments * * * are not to be deemed or held liable in any possible event for the debts, control or engagements of such beneficiaries" could have been made more positive or more inclusive. No room is left which will permit the reading into this provision of the words "except debts due to me" or their equivalent, and to sustain the contention of respondents the clause would have to be construed as though it contained such an exception. Furthermore, the provision is apparently one for the maintenance of decedent's wife and children, and it appears to have been the intent of the testator to provide a sum for the support of each of his children without offset or retainer in any possible event. When the testator consented to his sons becoming indebted to him he did so in the light and knowledge of his testamentary provision that their distributive shares under the trust for which he had made provision in his will would not be subject to being diminished by reason of their debts "in any possible event," and the additional fact that after the note transactions above referred to no change was made in his will further indicates the intent of the testator that there be no exception to the exemption of the distributive shares from any reduction by reason of any indebtedness. The question involved in this appeal appears to have come before an appellate court in only one instance, the case of Matter of Temple, 36 Misc. Rep. 620, 74 N. Y. S. 479, 480. In that case the testatrix left a trust fund of $3,000 to a beneficiary who was indebted to her in the sum of $1,363.90, and the provision against set-off or retainer was "without being subject in any degree to the intervention or order of any creditor" of the beneficiary of the spendthrift trust created by the will, language which the court declares "not only makes her intention more unmistakable, but, in effect, it declares that the income of said $3,000 shall be beyond and above the reach of her estate as a creditor of the beneficiary." The will before us evidences a similar intent on the part of the testator.

The order appealed from is reversed, and the trial court is directed to make new findings and a new order in accordance with the opinion herein expressed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

EPPLY v. LOS ANGELES CREAMERY CO. et al.*

Civ. 7019.

District Court of Appeal, Second District, Division 1, California.

May 18, 1932.

As Modified on Denial of Rehearing June 16, 1932. Hearing Granted by Supreme Court July 14, 1932.

1. Evidence ⇐553(1).

Hypothetical questions were properly allowed where there was some evidence to sustain each fact stated in such questions.

2. Trial ⇐260(8).

Court need not indulge in repetitions in instructions on subject of negligence, where all legal questions that jury could properly consider were covered by instructions given.

3. Appeal and error ⇐1004(1).

Judgment for amount of damages found by jury being sustained by sufficient evidence cannot be disturbed by reviewing court.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Rono Carl Epply against the Los Angeles Creamery Company and another.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 664.

From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Chase, Barnes & Chase, of Los Angeles, for appellants.

Charles A. Thomasset, of Los Angeles, for respondent.

YORK, J.

Plaintiff sustained certain injuries in an automobile accident, and, upon trial of the action wherein he demanded damages therefor, he was awarded by verdict of the jury the sum of $19,750. It is now claimed by the appellants that the judgment based upon such verdict is not sustained by the evidence, in that it appears on the face of the verdict that it was rendered by reason of passion, prejudice, or corruption on the part of the jury. Appellants also claim that the court erred in admitting into evidence certain testimony as to possible present and future injuries, and effects in similar cases in such way that the jury was misled, and resulted in passion and prejudice on the part of the jury against the appellants. Appellants also urge error on the part of the court in failing to instruct the jury, as requested by appellants, upon the subject of negligence, which, they claim, materially prejudiced the defense of appellants. They also claim they were materially prejudiced by instructions given on the subject of contributory negligence, and the failure to give instructions requested by them; also that the court erred in erroneously instructing the jury, and in failing to instruct the jury upon material issues with respect to the damages sustained by respondent.

[1] An examination of the transcript discloses sufficient evidence upon which the jury could have properly predicated the judgment for the amount awarded as damages—$19,750. It is true that the evidence is somewhat conflicting, and that it is more or less speculative as to the amount of damages sustained by the plaintiff by reason of the injuries suffered. The hypothetical questions objected to were properly allowed by the court, as there was some evidence to sustain each fact stated in such questions.

[2] The court sufficiently instructed the jury on the subject of negligence, and it was not necessary for the court to indulge in repetitions in such instructions, so long as all the legal questions that could properly be considered by the jury, in view of the evidence introduced, were sufficiently covered by the instructions given. We find no error in the instructions given to the jury.

[3] It was the duty of the jury to determine, under all the facts and circumstances of the case, first, if the appellants were responsible for the injuries sustained; and, second, if so responsible, to fix the amount of the damage. There being sufficient evidence in the record to sustain the verdict and judgment for the amount of the damages found by the jury, this court cannot substitute its decision therefor in lieu of that of the jury.

There is the usual conflict here as to the extent of the injuries and the amount of the damages sustained by reason thereof, as is ordinarily present in cases of this kind. The evidence shows a conflict in the opinions of the experts as to the effect of a head injury of the kind and character suffered by the plaintiff. The court allowed this to be fully presented to the jury, and, after being properly instructed by the court, the jury upon such evidence fixed the amount of damages sustained by the plaintiff by reason of such injury.

The judgment appealed from is therefore affirmed.

CONREY, P. J. (concurring).

I concur in the judgment, although I have found some difficulty in arriving at this conclusion. The evidence very clearly establishes the plaintiff's right to recover some amount in damages for the injuries which he received as a result of the negligence of appellants. With reference to the instructions of the court to the jury, and considering the same separately and in their entirety, they constitute a satisfactory statement of the law of the case. I do not find in the instructions, or in the court's refusal to give requested instructions, any error of such prejudicial character that it would justify a reversal of the judgment. But I have been strongly tempted to insist that the judgment should be modified by reducing the amount thereof to a sum very much less than the $19,750 given by the jury. There appears to be no doubt that the plaintiff received quite severe and painful injuries, including a slight concussion of the brain, but he recovered his health and strength to such an extent that after ten weeks he returned to his regular employment, where he so continued at least until the time of trial of this action, more than one year later.

The answer of respondent to appellants' claim that the damages awarded are excessive turns upon certain evidence in addition to that hereinabove stated with respect to the injuries caused by the accident. By this evidence plaintiff sought to prove, not only a concussion of the brain, but also that there was a basal fracture of the skull, accompanied by a bruising of the substance of the brain; and that these additional injuries were of a much more permanent and serious nature, so that there is a reasonable certainty that certain mental disturbances and nervous disorders will continue to affect the life of the plaintiff for a long time to come. It is contended by appellants that the testimony

of the physicians who were witnesses at the trial does not establish the fact of a skull fracture, but goes no further than to indicate a speculative probability of such fracture. On examining the testimony of the several physicians I find that they showed considerable hesitation before committing themselves positively on the subject. The testimony of Dr. Spear will serve as an example. He examined the plaintiff at the receiving hospital just after the accident. He first said: "I found that he had a possible basal skull fracture." Later, when asked: "Is it your opinion that he was suffering from a basal skull fracture?" he answered: "That was my opinion at the time I examined the patient." I have been unable to discover that this witness ever got any closer to the question. The witness Dr. Flamson, who had charge of the plaintiff at the Santa Fé Hospital, testified that he "thought the man probably had a basal skull fracture in addition to the abrasions and contusions of his right knee and back." Then he was asked: "Now from the evidence you had Dr. Flamson, is it your opinion the man has a basal skull fracture? A. Yes, sir." It was stipulated that certain X-ray pictures taken of the patient's head had not shown any fracture of the skull. There is other testimony from other witnesses confirmatory of Dr. Flamson's opinion that there was some slight fracture which might be classified as a basal skull fracture. There is also expert testimony to the effect that there was, together with the skull fracture, an injury to the brain substance to the extent of a contusion; and that from such fracture and injury there had resulted irritability of the patient, also headaches, nervousness, and "fits of anger." The witnesses were very shy about committing themselves on the question of reasonable certainty of future continuance of the injury and of the effects thereof. Thus, in the instance of the witness Dr. Mann, when asked to state with reasonable certainty what effects are reasonably likely to appear in the future, he replied with a somewhat appalling list of things "we very frequently have"; and that "in a case of this kind we have to think of" certain other serious results; and so on. It was only after a motion to strike this testimony had been made, and under the guidance of further questioning, that the witness finally assented that he had been testifying to "what is reasonably certain to follow in the future."

In view of the evidence shown in the record, and of which I have given only a slight and partial sketch, I feel obliged to concede that there was some evidence from which the jury had a right to infer that the plaintiff's injuries were of a serious and permanent character, and reasonably certain to carry with them into the future a continuance of abnormal nervous symptoms and distress. Likewise, in view of this same evidence, I conclude that, under the limitations of review by a court of appellate jurisdiction, we are not justified in saying that the verdict is so excessive as to show that it was the result of passion and prejudice rather than of a consideration of the evidence on its merits.

For the foregoing reasons I concur in the judgment.

I concur: HOUSER, J.

BENEFICIAL LOAN SOC., Limited, v. HAIGHT, State Com'r of Corporations.

S. F. 14405.

Supreme Court of California.

May 16, 1932.

As Amended June 15, 1932.

1. Usury ⇐42.

Usury Law established maximum rate of interest for all loans, whether secured or unsecured, and regardless of amount or nature of security (Usury Law [St. 1919, p. lxxxiii]).

2. Statutes ⇐162.

In absence of manifest legislative intention to contrary or unless irreconcilably inconsistent, special statute is not repealed by general statute.

3. Pawnbrokers and money lenders ⇐2.

Statute regulating personal property brokers and authorizing 24 per cent. interest *held* repealed pro tanto by Usury Law allowing only 12 per cent. interest (St. 1909, p. 969, § 2, as amended by St. 1911, p. 978, § 1; Usury Law [St. 1919, p. lxxxiii]).

4. Statutes ⇐208.

Unconstitutional part of statute may be examined to ascertain scope and effect of valid parts.

5. Statutes ⇐217.

If construction of statute is uncertain, court may resort to arguments submitted to voters at time it was adopted as initiative measure.

6. Statutes ⇐35½.

Usury Law, adopted as initiative measure, cannot be amended except by reapplying to people of state for their consent (Usury Law [St. 1919, p. lxxxiii]; Const. art. 4, § 1).

7. Pawnbrokers and money lenders ⇐2.

Provisions of personal property brokers' act authorizing charge of 3½ per cent. per month on certain loans of $300 and less *held* invalid because in plain conflict with Usury Law adopted as initiative measure (Usury Law [St. 1919, p. lxxxiii]; St. 1909, p. 969, §§ 2, 3, as amended by St. 1931, p. 558, §§ 1, 2; Const. art. 4, § 1).

8. Usury ⇐53.

Usury Law does not purport to fix or limit legitimate expense or service charge that may properly be borne by borrower (Usury Law [St. 1919, p. lxxxiii]).

9. Pawnbrokers and money lenders ⇐2.

License provisions of personal property brokers' act *held* valid (St. 1909, p. 969, §§ 7-10, as added by St. 1931, pp. 559, 560, §§ 4-7).

In Bank.

Proceeding in mandate by Beneficial Loan Society, Limited, against Raymond L. Haight, as Commissioner of Corporations of the State of California.

Writ issued.

Sullivan, Roche, Johnson & Barry, of San Francisco, for petitioner.

L. J. Styskal, of Los Angeles, amicus curiæ for petitioner Southwest Ass'n of Finance Companies.

Walter S. Hilborn, of New York City, amicus curiæ for petitioner Russell Sage Foundation.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

Charles W. Rollinson, of Los Angeles, Hugh K. McKevitt, of San Francisco, George W. Lupton, Jr., and Peck, Bunker & Peck, all of Oakland, Chapman & Chapman and Ward Chapman, all of Los Angeles, Charles W. Haswell, of San Francisco, Lee Roy Brigham, of Los Angeles, and Arnold C. Lackenbach, Julian D. Cohn, Willard L. Ellis, Goldman & Altman, Louis E. Goodman, and Louis H. Brownstone, all of San Francisco, amici curiæ for respondent.

PRESTON, J.

The underlying purpose of this proceeding in mandate is to test the validity of certain provisions of the Personal Property Brokers Act, as amended by the Legislature in 1931 (Stats. 1931, p. 558), particularly the provisions of sections 2 and 3 thereof, which are alleged to be in conflict with the provisions of the Usury Law (Stats. 1919, p. lxxxiii).

Petitioner is a personal property broker, engaged in the business of loaning or advancing money in sums of $300 and less and taking as security for such loan or advance a chattel mortgage, bill of sale, or other obligation involving the forfeiture of rights in or to personal property, the use or possession of which is retained by another than the lender, and also engaged in the business of loaning or advancing money or other thing, taking in whole or in part as security therefor a lien on, assignment of, or power of attorney relative to, wages, salary, earnings, income or commissions.

Pursuant to sections 7, 8, 9, and 10 of said act (Stats. 1931, pp. 559, 560, §§ 4–7), petitioner duly applied to the commissioner of corporations of this state for a license to do business, paying the required fee, posting a bond, and otherwise complying fully and in every respect with all the provisions of said act relating to his said application. The commissioner, however, refused to issue the license because of doubt and uncertainty respecting various questions as to the extent and validity of the act. Petitioner being thus deprived of the right to pursue his regular occupation and business after expending large

sums of money in connection therewith, and fearing irreparable loss through delay, filed his petition for mandate herein, praying that respondent be directed to issue a license to him in accordance with the provisions of said act, and that the rights and duties of the parties hereto be declared, and that the construction and validity of the act also be determined.

Petitioner alleged his intention to charge, receive, or collect the full benefit or percentage allowed by said sections 2 and 3 of the act, which read: "Such personal property broker may charge, receive and collect a benefit or percentage upon money or other thing advanced, or for the use and forbearance thereof, of three and one-half per centum per month on remaining unpaid balances on sums loaned up to and including the sum of three hundred dollars, where such loan or advance is made upon security properly falling within the scope of business as set forth in section 1 hereof." Section 2. "No further or other charges either for recording, insuring or examining the security or property, or for the drawing, executing or filing of papers, or for any services or upon any pretext whatsoever beyond the aforesaid charge for interest or discount shall be asked, charged, or in any way received, where the same would thereby make a greater charge for the money or thing advanced than the aforesaid rate and where made, all such charges shall be considered and be of the same effect as so much added interest." Section 3.

The above sections, respondent claims, purport to authorize a charge of 3½ per cent. per month, or 42 per cent. per annum, on certain loans of $300 and less, and hence they are obviously in conflict wtih the provisions of the Usury Law, which latter statute makes it unlawful for any "person, company, association or corporation" to "* * * directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year. * * *"

Further, respondent argues that, if sections 2 and 3 of the Personal Property Brokers Act were valid, then the provisions of the Usury Law would be modified, and to that extent superseded and repealed by it. But the Usury Law is an initiative measure, and the Constitution (article 4 § 1) provides that "* * * no act * * * adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors; * * *" hence, the Usury Law may not be held to be modified by said sections 2 and 3 and they are therefore invalid.

[1] Lying at the base of this inquiry is the effect of the Usury Law upon sections 2 and 3 of the Brokers Act of 1909 (Stats. 1909, p. 969), as amended in 1911 (Stats. 1911, p. 978, §§ 1, 2). This is so because sections 2 and 3 of the act of 1931 above quoted are substantially re-enactments of sections 2 and 3 of the act of 1909 and differ only in the rate that may be charged on the loans and the number of parties that will be affected thereby. This question, in reality, is settled by our holding in In re Washer, 200 Cal. 598, 254 P. 951. We there plainly held that the Usury Law established the maximum rate of interest for all loans, whether secured or unsecured, and this, too, regardless of the amount or the nature of the security. It is impossible for the Washer Case to stand and at the same time to permit an arbitrary charge by a certain group of personal property brokers of a greater amount. It is true that we held that the Corporate Securities Act (Deering's Gen. Laws 1923, part. 1, p. 1407, Act 3814), together with its amendatory and supplementary provisions, the Public Utilities Act (Deering's Gen. Laws 1923, part. 2, Act 6386, p. 2683) and the Bank Act (Deering's Gen. Laws 1923, part. 1, Act 652, p. 153), were not affected by the Usury Law, but this is justified upon the ground that the transactions governed by those acts are in reality not loans at all within the meaning of the said Usury Law. We indorse the discussion of this question found in the case of Crooks v. People's Finance, etc., Co., 111 Cal. App. 769, 292 P. 1065, recently decided by the Appellate Division of the Superior Court of Los Angeles County, opinion by Judge Hartley Shaw, from which we quote the following:

[2] "Appellant contends that the act of 1909 was not affected by the usury law, relying on the rule which is stated in Riley v. Forbes, 193 Cal. 740, 745, 227 P. 768, 770, as follows: 'Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions.'

"It is perhaps impossible to reconcile the many decisions on this point, but the decision of each case must depend largely on the provisions of the particular statutes involved. In Riley v. Forbes, supra, it was held that a statute authorizing the state board of accountancy to collect and keep certain fees and to use them in payment of its expenses was not repealed by a later statute requiring all 'moneys belonging to the state' collected by any board to be paid into the state treasury; the court saying that 'We find no irreconcilable inconsistency between the two acts,' and

that the fees collected by the board were not money belonging to the state within the meaning of the later act. The language first quoted from Riley v. Forbes was there quoted from Bateman v. Colgan, 111 Cal. 580, 586, 44 P. 238, 240. In Bateman v. Colgan, the court said there was no inconsistency between the acts under consideration, and further said, quoting with approval from a New York decision (Van Denburgh v. Greenbush, 66 N. Y. 3): 'It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would be taken strictly, and, but for the special law, include the case or cases provided by it.'

"In Home for Inebriates v. Reis, 95 Cal. 142, 148, 30 P. 205, 207, the court held that a statute directing fines imposed by the San Francisco police court on charges of drunkenness to be paid to the plaintiff was not repealed by a later statute providing that all fines imposed by said court should be paid into the city treasury. The court here called attention to the fact that the later statute was but a re-enactment of an older one which antedated the special statute, and quoted with approval from Endlich on Interpretation of Statutes, the following: 'A general act is to be construed as not repealing a particular one,—that is, one directed towards a special object or a special class of objects. * * * Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature has been turned to the special act, and that the general one was intended to embrace the special cases within the previous one.'

"On the other hand, there are many California cases where a later general statute has been held to repeal a prior special statute. Among these cases are: People v. Grippen, 20 Cal. 677; People v. Burt, 43 Cal. 560; People v. Sargent, 44 Cal. 430; Pennie v. Reis, 80 Cal. 266, 22 P. 176, 177; People v. Henshaw, 76 Cal. 436, 440, 18 P. 413, 415; Kennedy v. Board of Education, 82 Cal. 483, 492, 22 P. 1042; Ex parte Ah You, 82 Cal. 339, 22 P. 929; Miller v. Curry, 113 Cal. 644, 647, 45 P. 877, 878.

"In People v. Henshaw, supra, the court held that a special act providing a police court for the city of Oakland was repealed by a later act providing for police courts in all cities of a certain size, which included Oakland. The court said: 'Where, as in the present case, the latter statute is repugnant to the former, and both cannot stand together, the latter will repeal the former.'

"In Pennie v. Reis, supra, the court said that a repeal by implication 'takes place whenever by subsequent legislation it becomes apparent that the legislature did not intend the former act to remain in force.'

"In Miller v. Curry, supra, the court said that the rule referred to by appellant 'has its limits, and means no more than that in arriving at the intent of the legislature, which is always to govern, and in endeavoring to deduce that intent from the acts themselves, unless there be plain and explicit terms of repeal in the later act, or unless the provisions of the two acts be so inconsistent as that both may not stand, it will be assumed that the legislature, in making general provision for all cases, did not mean to destroy the effect of a rule laid down with explicit care and directness, and applicable to a particular class of cases. But this, after all, is but a method of arriving at the legislative intent when other and better means are not available. * * * The rules that we have been considering apply only in a case where a repugnancy between the two acts is not manifest. If such a repugnancy exists, then it is well settled that the earlier act must fall. End. Interp. St. § 206. Only so far as the two acts are not in their terms incompatible with each other is the earlier act allowed to stand.'

"In the Washer Case, 200 Cal. 598, 254 P. 951, the Supreme Court applied the rule mentioned by appellant to the Usury Act so far as to hold that it does not affect or repeal statutes respecting the control of corporate securities, public or private, but said in that connection: 'We are not here deciding what may be the effect of the act upon existing statutes regulating the business of pawnbrokers and other personal property brokers.' Page 607 of 200 Cal., 254 P. 951, 955.

[3-5] "Comparing now the two statutes here involved, we find that the act regulating personal property brokers * * * as amended in 1911 * * * defines the term 'personal property broker' to include 'every person or corporation engaged in the business of loaning or advancing money or other thing' on the security of any chattel mortgage or other contract hypothecating personal property, the use or possession of which is not to be in the lender, or on the security of a lien upon, assignment of, or power of attorney relating to 'wages, salary, earnings, income or commissions.' Section 1. It further provides that 'such personal property broker may charge, receive and collect a benefit or percentage upon money or other thing advanced, or for the use and forbearance thereof, of two per centum per month where such loan or advance is made upon security properly falling within the scope of business as set forth in

section 1 hereof' (section 2); that such brokers shall not make or receive any further charges for any services or on any pretext in connection with the loan if such charges plus the interest would amount to more than 2 per cent. per month, except certain fees necessary to give legal effect to a mortgage (section 3); that no contract made by a personal property broker in his business shall be valid 'if there is therein or thereon directly or indirectly charged, accepted or contracted to be received' a greater benefit, discount or interest than at the rate of two per cent. per month, and if interest at any greater rate is 'directly or indirectly advanced or paid' upon such a contract, the excess above 2 per cent. per month may be recovered by the person who paid it (section 4).

"The Usury Law provides: 'No person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods, or things in action than at the rate of twelve dollars upon one hundred dollars for one year. * * * Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest' (section 2); that every person who pays interest at a rate exceeding 12 per cent. per annum may recover treble the interest paid; and that a violation of section 2 of the act is a misdemeanor (section 3). Also in section 3 there is a provision regarding secured loans to which we shall refer later.

"Reducing these statutes to their lowest terms, the act of 1909 provides that personal property brokers may take interest on a loan at the rate of 24 per cent. per annum, and the Usury Law provides that no lender may take interest at a rate greater than 12 per cent. per annum. It appears to us that there is a plain and irreconcilable repugnancy between these two provisions; and, although the Supreme Court in the Washer Case, supra, declined to decide the question now before us, we think the conclusion we have just stated is foreshadowed by that part of the opinion in that case wherein the court said: 'The inevitable conclusion from these views is that sections 1 and 2 of the act known as the Usury Law are, in all respects, valid and cover both secured and unsecured obligations' (page 608 of 200 Cal., 254 P. 951, 955), and by the following statement made by the court while holding unconstitutional the provision of section 3, which we will quote in our next paragraph: 'It would appear, therefore, that the draftsman of the Usury Law statute in California undertook to broaden the provision respecting personal property loans so as to include secured obligations of all kinds on real and personal property, except corporate bonds, municipal and other public bonds, without realizing that *the preceding sections of the act fully covered secured loans.*' (Italics added by us.)

"Applying the rule concerning the implied repeal of a special statute by a general statute, as declared in the authorities previously cited, we find a clear indication that the attention of the lawmaking power when enacting the usury law was turned to the act regulating personal property brokers, and that the repeal of the last-mentioned act was intended, in the following part of section 3 of the Usury Law, which describes in detail the business of a personal property broker and denounces as a misdemeanor acts which he is permitted to do by the act of 1909: 'Any person, company, association or corporation, who shall ask, demand, receive, take, accept or charge more than twelve per centum per annum upon the sum of money actually loaned for the forbearance, use or loan thereof, when the repayment of the money loaned shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, receipt or other evidence of debt, except corporation bonds, and municipal and other public bonds, upon property, real or personal or by assignment of wages * * * shall be guilty of a misdemeanor.'

"This provision was, it is true, held unconstitutional in the Washer Case, supra, because it excepted certain classes of securities from its ban, but this holding was coupled with the declarations already quoted that other parts of the act had the same effect; and even an unconstitutional part of a statute may be examined for the purpose of ascertaining the scope and effect of the valid parts thereof. Ex parte Fedderwitz, 62 P. 935, 940, 6 Cal. Unrep. Cas. 562, 572; 36 Cyc. 1131, 1132.

"If there were any uncertainty as to the construction of the Usury Law on this point, which we do not concede, it would be proper to resort, in aid of its interpretation, to the arguments submitted to the voters at the time it was voted upon and adopted as an initiative measure. Story v. Richardson, 186 Cal. 162, 165, 198 P. 1057, 18 A. L. R. 750; Yosemite L. Co. v. Industrial Acc. Com., 187 Cal. 774, 781, 204 P. 226, 20 A. L. R. 994. On examining the pamphlet containing these arguments, we find there officially listed, among the provisions which will be repealed by the proposed Usury Law, that part of the act of 1909 which permits personal property brokers to charge interest at the rate of 2 per centum per month; and the respective arguments, while not mentioning the act of 1909, proceed on the assumption that it will be affected by the proposed Usury Law. In view of these facts it is clear that the voters who read these pamphlets understood that the proposed law would limit the rate of interest to be charged by personal property brokers.

"Our conclusion is that the Usury Law has

repealed pro tanto the act regulating personal property brokers, and such brokers may not charge or receive interest at a rate exceeding 12 per cent. per annum."

[6] Further discussion might be indulged, as this cause has been presented most earnestly by lengthy and able briefs, supplemented by briefs of amici curiæ, but the effort seems unnecessary further than to say that we have been mindful of the asserted economic value that might accrue through an exception to the Usury Law allowing a greater rate of interest than 1 per cent. per month on loans of $300 or less, and that such a change would probably be just both to the lender and to the borrower. Nor are we unmindful of the fact that a statute substantially similar to the act of 1931 here under review is successfully operating in each of some twenty-five or more states of the Union, due largely to the philanthropic efforts of the Russell Sage Foundation of New York. The answer is that the Usury Law is adamant and has the force of a constitutional provision. It cannot be amended except by reapplying to the people of the state for their consent.

[7] If the Usury Law displaces sections 2 and 3 of the act of 1909, it follows that sections 2 and 3 of the act of 1931, here under review, must fall, being likewise and for the same reasons in plain conflict with the Usury Law itself. Further comment might be made to the effect that, in order to uphold said sections of the act of 1931, it would be necessary to hold that the entire subject of charges and regulations of personal property brokers of all classes was intentionally omitted from the operation of the Usury Law. But the act of 1931 only proposes to affect one group of this class of lenders. What, then, we may ask, becomes of the remainder of the group? Under petitioner's contention, pawnbrokers (Pen. Code, §§ 338–340) are likewise unaffected by the Usury Law. We would then have one class and part of another without the Usury Law and part of one class only under it. Many other impossible difficulties might arise were exceptions to the Usury Law created.

Whether or not there is any substance left in sections 4, 5, and 6 of the act of 1909 (St. 1909, p. 970), as amended in 1911 (St. 1911, p. 978) and 1931 (St. 1931, p. 558), is not a question directly here involved.

We may add that we were to some extent impressed for a time with the contention that the 3½ per cent. per month rate could be subdivided into an interest rate of 1 per cent. per month and a service and expense charge of not to exceed 2½ per cent. per month. And we have been pointed to the case of Koen v. State, 162 Tenn. 573, 39 S.W.(2d) 283, 285, where a statute was held valid which read as follows (Code of Tennessee, 1932, Williams Shannon Harsh, p. 1512, § 6733): "Every person, licensed hereunder, may lend any sum of money not exceeding in amount the sum of three hundred dollars, and may contract for, charge and receive thereon interest not to exceed six per cent. per annum; provided, however, that the licensee may charge and receive for investigating the moral and financial standing of the applicant, investigating the security, titles, etc., and for other expenses and losses of every nature whatsoever, and for closing the loan, a fee not above three per cent. per month of the principal sum lent over the term of the loan, both interest and fee to be computed on the unpaid balance of the principal due at the end of each month over the life of the loan." This statute was upheld because the lender could charge the actual service and expense outlay, but could not in any event exceed the 3 per cent. per month. In this behalf the court said: "Nor does the act violate article 11, § 7, of the Constitution, requiring the Legislature to fix an equal and uniform rate of interest. It fixes the uniform rate at 6 per cent. per annum, and limits the maximum service fees that the lender may impose for investigating the moral and financial standing of the applicant and the nature and value of the assurance for repayment of the loan and other necessary expenses and losses for closing the loan to a maximum charge of 3 per cent. per month. By thus prescribing the maximum expense fee, the Legislature did not intend to fix it as a definite charge in addition to the interest. * * * The Legislature could not authorize the lender to arbitrarily fix a monthly expense fee of 3 per cent. in addition to the annual interest on loans and did not intend to do so. As stated, the object was to fix a maximum service charge beyond which the lender could not go without making a conclusive case against him resulting in the forfeiture to the borrower of the entire loan, together with the charges thereon. It left the loan company and the borrower free to agree upon a reasonable service charge which in no event could exceed the maximum of 3 per cent. per month."

We are unable to construe sections 2 and 3 of the act before us as having the same meaning as the above-quoted Tennessee statute. These sections fix an arbitrary amount that may be charged regardless of the actual value of the service or expense and regardless of the fact that there may be no service or expense.

[8] We are not intending to hold that the Usury Law prevents a classification, as made by the act, of brokers according to the amount involved and the nature of the security taken. We recognize that similar segregation has been held valid in several other states of the Union. Nor are we intending to hold that a statute which allows the legal rate fixed by the Usury Law and yet limits the service or expense charges to the actual outlay, and not to exceed a definite limit, would be in conflict

with other provisions of the Usury Act. The Usury Law does not purport to fix or limit the legitimate expense or service charge that may properly be borne by the borrower. Wallace v. Zinman, 200 Cal. 585, 589, 254 P. 946, 62 A. L. R. 1341; Haines v. Commercial Mortgage Co., 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A. L. R. 725.

[9] Notwithstanding the above holding, as under authority of the case of In re Halck (Cal. Sup.) 11 P.(2d) 389, this day decided, the license provisions contained in the said act have been sustained, no sufficient ground exists for respondent's refusal to issue a license to petitioner.

Let the writ issue as prayed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; SHENK, J.; SEAWELL, J.; CURTIS, J.

215 Cal. 577

THOMPSON v. DUBOIS et al.

S. F. 13928.

Supreme Court of California.

June 2, 1932.

Rehearing Denied July 2, 1932.

1. Bills and notes ⇐493(1).

Consideration for unqualified indorsements on note will be presumed (Code Civ. Proc. § 1963; Civ. Code, §§ 3144, 3148).

2. Bills and notes ⇐518(1).

Evidence supported finding that consideration was given where note was indorsed and delivered as part of sale and delivered in closing sale, notwithstanding contract did not mention them as consideration (Code Civ. Proc. § 1963; Civ. Code, §§ 3144, 3148).

3. Bills and notes ⇐405.

Mailing demand to pay notes to absent maker at last-known residence, and leaving copy and presenting notes at place of payment, *held* sufficient.

4. Bills and notes ⇐420.

Telephoning and giving notice of dishonor by messenger to indorsers immediately after demand upon maker *held* sufficient to charge them.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Herbert S. Gans, Judge.

Action on promissory note by William G. Thompson against Louise Dubois and others. From an adverse judgment, defendants A. Galtier and H. Vergnes appeal.

Affirmed.

A. P. Dessouslavy and P. A. Bergerot, both of San Francisco, for appellants.

Walter McGovern, of San Francisco, for respondent.

SHENK, J.

This is an appeal by the defendants Galtier and Vergnes from a judgment against them in an action on two promissory notes made by the defendant Dubois and indorsed by the appealing defendants, the latter being referred to herein as the defendants.

The defendants had been the owners of the furniture, furnishings, and tenants' leasehold interest in the Benedict Apartments, located at 1678 Sacramento street, San Francisco. They were partners in the apartment house business. About one month prior to the execution of the notes involved herein they sold the Benedict Apartments to the defendant Dubois and received as a part of the purchase price a promissory note in the sum of $11,775 secured by a chattel mortgage on the property sold. On September 14, 1927, this note was canceled, the mortgage satisfied of record, and in lieu thereof two notes were executed by the defendant Dubois to Galtier and Vergnes in the sum of $7,500 and $4,275, respectively, each secured by a chattel mortgage on the property sold. The plaintiff had been the owner of the furniture, furnishings, and tenant's leasehold interest in the Marian Apartments, located at 2159 Mission street, San Francisco. On September 15, 1927, the plaintiff and the defendants consummated a transaction whereby the plaintiff sold to the defendants the Marian Apartments for the consideration of $4,100 cash, a note executed by the defendants in the sum of $4,125, secured by a chattel mortgage on the Marian Apartments, and the two Dubois notes of $7,500 and $4,275, respectively, secured as above stated by a chattel mortgage on the Marian Apartments, making a total consideration to the plaintiff for his Marian Apartment house property of $20,000. The securities on the Benedict Apartments were thereupon transferred to the plaintiff by an assignment of the chattel mortgage to him by the defendants and by a transfer of the two Dubois notes to the plaintiff, accompanied by an unqualified indorsement thereof by Galtier and Vergnes. These notes were payable in installments of $65 per month on the larger note and $35 per month on the smaller one, with interest, etc. Each note contained the usual acceleration clause. Interest was paid until September, 1928, but none of the installments of principal was ever paid. On June 25, 1928, the plaintiff notified the defendants by letter that Mrs. Dubois had failed to pay any of the installments of principal. On July 12, August 13, September 13, and October 13, 1928, the plaintiff notified the defendants by mail that demand had been made on

Mrs. Dubois for the payment of past-due installments, but that payment had been refused. On Saturday, October 20, 1928, the plaintiff went to the Benedict Apartments and found a party in possession thereof referred to as a "well-known apartment house hijacker," and that Mrs. Dubois had left for parts unknown. An apartment house hijacker is stated to be one who takes possession of an insolvent or abandoned apartment house business, collects as much rent as possible in advance, and pays no bills of any kind, thus seriously affecting, if not destroying, the good will of the business. On Monday morning, October 22, 1928, the plaintiff went to Mr. Galtier and informed him that the hijacker was in possession; that Mrs. Dubois could not be located, and notified him that, if the unpaid installments were not paid by 1 o'clock p. m. of that day, he would start proceedings. Payment was not made as demanded. On the same day the plaintiff exercised his option to declare the whole sum of the principal and accrued interest on said notes to be due and payable. Notice of such election was given by the plaintiff by addressing a letter to the maker, Mrs. Dubois, and leaving the same by special messenger at her last-known address and by presenting the notes for payment at the office of A. T. Sprague and Co. in the Pacific Building, where the notes by their terms were made payable, and by delivering a copy of the letter to the defendants. The messenger then, on the same day, took the notes to Mr. Galtier at the Marian Apartments, exhibited the same to him, and demanded payment thereof. Galtier responded by wagging his head and saying "no." Later on the same day this action was filed, charging the defendant Dubois as maker and the defendants Galtier and Vergnes as indorsers. The defendant Dubois answered, but later abandoned her defense, and judgment was entered against her for the full amount. The defendants Galtier and Vergnes also answered, and after trial the court found for the plaintiff for the amount due on said notes on October 22, 1928, to wit, the sum of $10,475 and interest, and entered judgment accordingly.

At the trial the defendants presented three affirmative defenses: (1) That there was no consideration for their indorsements on said note; (2) that there was no presentment to the maker for payment; and (3) that notice of dishonor was not given to them. The trial court found against the defendants on all three of the issues presented. On this appeal it is contended that the findings are not supported by the evidence.

[1, 2] The argument upon the point that there was no consideration for the indorsements is based in the main on the form and content of a document signed only by A. F. Sprague Company, the broker, on September 7, 1927. After the date the document proceeds in substance: Received of A. Galtier and H. Vergnes $500 as deposit and part payment of the furniture, furnishings, and leasehold of the Marian Apartments under the following conditions: (a) The full price is to be $20,000; (b) I am to assign my mortgage of $11,875 on the Benedict Apartments over to W. G. Thompson. Said mortgage I will have made in two mortgages; (c) $3,500 more than deposit in cash upon the consummation of the deal; (d) I will give back a mortgage of $4,125 on the Marian Apartments; and (e) the lease must be satisfactory to said A. Galtier and H. Vergnes. If the terms and conditions are not accepted by September 14, 1927, the deposit is to be returned to A. Galtier and H. Vergnes.

It is contended by the defendants that this document constituted an agreement of purchase binding on the plaintiff and the defendants as of its date, and nothing more was to be done thereafter but to carry out the terms thereof, which was done, so it is claimed, on the 15th day of the same month; that the defendants agreed only to assign the mortgage on the Benedict Apartments and did not agree to indorse the note secured thereby, and that therefore the indorsements of the substituted notes sued on were without consideration. It is observed that the document is not signed by either the plaintiff or the defendants. Assuming that it would be binding on the plaintiff, if accepted by him orally, it is fairly inferable from the writing itself that the details in completing the transaction were not all fully and finally set forth therein. The terms of the lease on the Marian Apartments were to be scrutinized by the defendants, and they might refuse to conclude the deal if the terms thereof were not satisfactory to them. The execution of the documents of transfer in proper form was thereafter to be brought about. When that time arrived, the necessary papers were signed. Included therein was the transfer of the notes sued on by the indorsements thereof. This was done by the defendants without objection on their part, and the defendant Galtier testified at the trial that the notes were indorsed and transferred as a part of the transaction in hand, and that the same constituted a part of the consideration for the transfer to the defendants of the plaintiff's interest in the Marian Apartments. It is conceded that, if the defendants had qualified their indorsement, the situation would have been different. Being unqualified, the indorsements must be given the legal effect, which their form denotes, and consideration for the indorsements will be presumed. Section 1963, Code Civ. Proc.; sections 3144, 3148, Civ. Code. We find ample evidence in the record to support the finding of consideration.

[3, 4] The proper and effectual election by the plaintiff to declare the whole sum due is not disputed. Demand for payment on the

maker then became necessary in order to hold the defendants as indorsers. The plaintiff was confronted with a situation wherein the maker had gone from her place of residence or was deliberately in hiding, and personal demand could not be made upon her. Under the circumstances, the plaintiff did all that he could be expected to do. He mailed a document to the maker's last place of residence and left a copy thereof at the place where the notes were payable. We think this was sufficient. Notice of dishonor was immediately given to the defendants by telephone and by messenger in writing. On this record the findings of the court of demand and notice of dishonor are sufficiently supported. We find no abuse of discretion on the part of the trial judge in permitting an amendment to the complaint to be filed.

No other points required discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; SEAWELL, J., CURTIS, J.; PRESTON, J.; LANGDON, J.

215 Cal. 555

THOMAS HAVERTY CO. v. PACIFIC INDEMNITY CO. et al.

L. A. 11780.

Supreme Court of California.

May 27, 1932.

1. Damages ⇐124(4).

Where contractor's default prevented subcontractors from performing contract, subcontractors could recover contract price, plus reasonable value of extra services, less amount of subcontractors' obligations assumed and paid, amount paid subcontractors, and cost of completion.

2. Principal and surety ⇐66(2).

In action for damages for breach of subcontractors' contract, finding for subcontractors exonerated subcontractors' surety.

3. Principal and surety ⇐166.

In action for damages for breach of subcontractors' contract, finding for subcontractors entitled subcontractors' surety to costs.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by the Thomas Haverty Company against the Pacific Indemnity Company and others, in which Joe Proper and others filed a cross-complaint. From a judgment in favor of defendants Joe Proper and Henry Schrubbe, and awarding the Pacific Indemnity Company its costs, plaintiff appeals.

Affirmed.

Superseding opinion in 4 P.(2d) 214.

Culver & Nourse and Richard J. O. Culver, all of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent Pacific Indemnity Co.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondents Proper & Schrubbe.

WASTE, C. J.

Plaintiff appeals from a judgment entered in favor of the defendants in an action for damages for alleged breach of contract.

Under the terms of a contract with the city of Santa Monica, the plaintiff agreed to perform the labor and furnish the materials necessary to construct a concrete pipe sewer along the ocean front. The defendants Proper & Schrubbe, doing business as copartners, entered into a subcontract with the plaintiff by which they agreed to perform and complete within seventy-five days all the work of excavating, cutting, and placing of sidewalks, timbering, etc., essential to the construction of the sewer. By the terms of the subcontract plaintiff was required to furnish and lay the pipe on the subgrade as prepared by the subcontractors, and was to "do all the pumping necessary to dewater the ground." The defendant Pacific Indemnity Company is the surety on the subcontractor's "faithful performance" bond.

Alleging that the subcontractors had failed to complete their work within seventy-five days as agreed, that they had completed only 40 per cent. of the work within the designated period, that the work was performed in an unskillful and unworkmanlike manner, and that the subcontractors had abandoned the job, plaintiff prayed for judgment against them in the sum of $20,165.63, and against the surety in the sum of $14,000, the amount of its bond.

By way of answer and cross-complaint the subcontractors denied all charges of default and unskillfulness, and affirmatively alleged that they were prevented from fully and seasonably performing their part of the contract solely by reason of the plaintiff's failure and neglect to keep the ground and ditches reasonably free from water as it had covenanted to do. The answer of the surety is substantially the same, with the addition of a defense of material alteration of the subcontract without its knowledge or consent.

The cause was tried by the court sitting without a jury. At the conclusion of the trial detailed findings were made which amply

cover the many issues raised by the pleadings. Among other things, the court below found that the plaintiff, by failing to faithfully perform that part of the contract requiring it to keep the ground and ditches reasonably free from water during the progress of the work, had prevented the defendant subcontractors from performing their part of the work; that the defendant subcontractors had completed 53 per cent. of the work in a workmanlike manner; that the plaintiff thereupon took charge of the work and ousted the defendant subcontractors against their will and without their consent; and that, by reason of the plaintiff's failure to comply with the terms of the contract, the defendant subcontractors had been damaged in the sum of $3,089.42, for which amount judgment was entered in their favor. It is also found that the parties to the subcontract had materially modified the same without the knowledge or consent of the defendant surety, for whom a judgment for costs was entered.

Plaintiff appeals from the whole of the judgment, contending, principally, that the evidence fails to sustain the findings of the court below. Each of the many detailed findings is singled out and challenged as being without support in the evidence. We have examined the record, and find no merit in plaintiff's claim.

[1] The record is replete with evidence tending to show that plaintiff's failure to keep the ditches reasonably free from water during the progress of the work precluded the subcontractors from performing their part of the work as agreed. Other findings, too numerous to mention, are also sustained by the evidence. That the subcontractors should be compensated for all damages sustained by them as a result of plaintiff's breach of contract goes without saying. We perceive no error in the trial court's computation of such damages. Under the provisions of their contract, the subcontractors were to receive $14,000 for their portion of the work. It is found, upon competent evidence, that the subcontractors had performed certain extra services for the plaintiff, the reasonable value of which was $1,061.50. These two sums total $15,061.50, of which amount the plaintiff had paid to the subcontractors $6,450, and had assumed and paid obligations of the latter aggregating $1,460.58. It is also found that the subcontractors, if permitted, could have completed the work at a cost of $4,061.50. These latter three amounts total $11,972.08, which sum, when deducted from the $15,061.50 above referred to, leaves a balance due and owing to the subcontractors in the sum of $3,089.42, for which amount, as already stated, judgment was duly entered in their favor.

[2, 3] The finding that the defendant subcontractors were not in default, and that plaintiff alone was guilty of a breach of contract, not only released the subcontractors of liability, but also served to exonerate their surety, for whom a judgment for costs was properly entered. This being so, it is unnecessary to consider the further finding and conclusion that the surety is not answerable on its bond because of the material change or alteration made in the terms of the subcontract without its knowledge or consent. Because of the nonliability of the principal, the surety is necessarily exonerated, and the finding as to the alteration in the terms of the contract becomes mere surplusage.

It is asserted rather generally and without much force that the court below erred in numerous instances in its rulings touching the admission and rejection of evidence. Appellant's briefs fail to designate wherein these "numerous" errors may be found in the transcript. However, our examination of the record satisfies us that it is free of anything approximating prejudicial error.

We find nothing requiring further discussion.

The judgment is affirmed.

We concur: SEAWELL, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; LANGDON, J.; TYLER, Justice pro tem.

215 Cal. 548

BAILEY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13519.

Supreme Court of California.

May 26, 1932.

1. Divorce ⇐269(9).

Husband unable to obey alimony decree cannot be adjudged in contempt, unless he has voluntarily created disability to avoid payment.

2. Divorce ⇐269(13).

Jurisdiction to make contempt order for nonpayment of alimony may be successfully attacked unless order contains finding of ability to comply with alimony decree.

3. Divorce ⇐311.

That deputy clerk entered minute order not containing finding of husband's ability to comply with order for support of children *held* not to prevent subsequent entry of order signed by judge containing such finding (Pol. Code, § 4178).

4. Divorce ⇐311.

Finding divorced husband had ability to pay for support of children *held* supported.

5. Divorce ⇐311.

Divorced husband's motortrucks constituted assets which could be applied to payment of obligation to support children, notwithstanding trucks were exempt from execution (Code Civ. Proc. § 690).

6. Divorce ⇐308.

Order requiring husband obtaining divorce to make payments to wife for maintenance of home for children while husband had custody of children *held* unobjectionable.

The order was not objectionable as being in fact an order granting alimony to the divorced wife, which, in view of fact that divorce had been secured by husband on ground of wife's fault, was void, since the order on its face stated that such sum was to be paid for maintenance of home for children, and, as such, was a reasonable provision for purpose of stabilizing the home life of the children.

7. Divorce ⇐309.

Proper procedure for party unable to comply with order for support of children is to seek modification.

In Bank.

Petition by Lansing B. Bailey for a writ of prohibition against the Superior Court of Los Angeles County, Georgia Bullock, Judge, to prevent the respondent court which had adjudged the petitioner guilty of contempt for failure to make payments required by an interlocutory divorce decree from imposing punishment therefor.

Writ denied.

Superseding opinion of the District Court of Appeal in 6 P.(2d) 565.

W. W. Kaye, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, Frank P. Doherty, and William R. Gallagher, all of Los Angeles, for respondents.

CURTIS, J.

This is a proceeding in prohibition begun originally in the District Court of Appeal, Second Appellate District, Division 1, which after decision by that court was transferred to the Supreme Court for hearing.

The object of the petition is to restrain the Superior Court of Los Angeles County from enforcing an order adjudging petitioner in contempt in failing to pay the sum of $175 for the support and maintenance of his two minor sons, and directing that he be incarcerated until he complies with said order. In March, 1930, petitioner herein, as plaintiff, secured an interlocutory decree of divorce from his wife, Lucille McCabe Bailey, on the ground of extreme cruelty. The custody of the two minor children of the couple, both boys, of the ages of approximately six and nine years, was given to the mother with the provision that their father should have their custody during their school vacation season, provided he provided a suitable place to take them and properly care for them, and the following order with respect to their support was made: "It is further hereby ordered, adjudged and decreed that, until further order of the court, the plaintiff shall pay to the defendant for the support and maintenance of the said children and for their clothes and education the sum of one hundred and seventy-five and 00/100 ($175.00) Dollars per month so long and while the said children are in her custody and care, the first of which payments shall begin on the 1st day of May, 1930, and that while the children shall be in the custody of the plaintiff, he shall pay for the maintenance of the home for the children the sum of Eighty-seven and 50/100 ($87.50) Dollars per month on the 1st day of each month, and also he shall pay all reasonable bills for medical services and dental services for said children which may be required in their proper care." In May, 1930, the court reduced the payment to $150 per month, and in November, 1930, further reduced the payment to $125 per month. In April, 1931, the final decree of divorce was entered. Since the entry of the interlocutory decree the children have been residing with their mother in the city of Los Angeles with the exception of the months of July and August in 1930, and July and August in 1931 when, pursuant to said decree, the two children visited their father and remained with him on a ranch which he had leased at Arvin, Kern county, Cal. Petitioner has refused to pay to his divorced wife the sum of $87.50 for each of the months of July and August, 1931, the period of time during which the children were in his care. Thereafter, his divorced wife sought to have him declared in contempt of court for his failure to pay the total sum of $175. At the hearing upon the charge for contempt, the failure to pay was admitted by petitioner, but he attempted to excuse such failure upon the ground that he did not have the present ability to make such payments. In this behalf he testified that he had been engaged in farming operations at Arvin, Cal.; that he had leased a ranch of about 350 acres and had planted it in seed potatoes, cantaloupes, and Persian melons; that due to a cloudburst which occurred in August, 1931, his crops had been wholly destroyed; that he was in debt to the extent of $90,000, of which he owed $32,000 to his sister and her husband and the rest to general creditors; that his only assets consisted of a new Auburn automobile which had been bought under a conditional sales contract, a pipe line which had cost him $2,377 and was situated on leased property,

and some trucks used in his farming operations. He also testified that he had employed a foreman for $250 per month, and that he had paid him for July, but not for August. The wife testified that the house rent, which included water and garden care, cost her $45 per month; that she paid for the lights and gas in addition; that she had been working at a circulating library for $15 per week for a few months; that her mother sent her about $25 a month, and that she would have to give up her position with the library as the younger boy, "Happy," had developed acute diabetes and she could not give him the required care and continue to work away from home. She explained that this boy required a special diet and expensive medical treatments. Upon this hearing an order was made declaring petitioner to be in contempt, punishment to be held in abeyance, contingent upon plaintiff paying the back rent (due upon the rented house) within 10 days and all the amounts in arrears within 30 days. This order was entered as a minute order by the deputy clerk, and subsequently an order prepared by the attorney for the wife was signed by the judge and filed. The latter order contained an express finding of petitioner's ability to pay. Petitioner thereupon sought and secured a writ of prohibition issued by the District Court of Appeal, Second Appellate District, Division 1, based upon the ground that the finding of the trial court as to petitioner's ability to pay was wholly without support in the evidence.

[1-3] It is, of course, well settled in this jurisdiction that a husband who is unable to obey a decree for the payment of alimony cannot be adjudged in contempt for not obeying such decree, unless he has voluntarily created the disability for the purpose of avoiding such payment. And it is also well settled that the jurisdiction of the court to make an order for contempt may be successfully attacked unless the said order contains upon its face a finding of ability on the part of the person charged with contempt to comply with the original order. In the instant case the order signed by the judge and filed contained such an express finding. There is absolutely no merit in the claim that the court was without power to file such order by virtue of the fact that a minute order had already been entered by the deputy clerk which did not contain such an express finding. Section 4178 of the Political Code provides that one of the duties of the county clerk is to "enter a synopsis of all orders, judgments, and decrees proper to be entered, unless the court shall order them to be entered at length," and the fact that the deputy clerk, pursuant to said requirement, has entered such synopsis will not prevent the subsequent entry of an order signed by the judge.

It is next urged by petitioner that the determination of the trial court of petitioner's ability to pay finds no support in the evidence, and that, therefore, the trial court was without jurisdiction to enter its order of contempt, which error should be corrected by the issuance of a writ of prohibition to restrain the trial court from proceeding to carry out its erroneous order. Respondents reply that the error, if any, of the trial court in the determination of the question of petitioner's ability to pay is, at most, only an error in the exercise of its admitted jurisdiction of the persons and subject-matter, and that, therefore, this finding is conclusive, and a writ of prohibition which tests only the jurisdiction of the trial court is not available.

[4, 5] We cannot agree with the contention of petitioner that the finding of the trial court is wholly without support in the evidence, and it is, therefore, unnecessary for us to discuss what would be the proper procedure of this court if the contention had been well founded. It may be conceded that the question of petitioner's ability to pay was a close one. The fact that petitioner is deeply in debt and has no present income is not, however, determinative of his ability to pay this particular sum. Payment for the support of his minor children is as truly a legal obligation as the repayment of his loans or payment of his other business debts, and it is not necessary that payment for their support be made out of his net income, or assets which he may possess in excess of his debts. It may be a hardship, as petitioner contends, to require petitioner to apply his meager assets to the payment of this particular obligation rather than permit him to apply them toward the rehabilitation of his business, if such rehabilitation be possible. But the question of the advisability of requiring him to apply his assets, if any, to the payment of such obligation was, in the first instance, a matter for the determination of the trial court, and we are not inclined to disturb its conclusion. An examination of the assets of the petitioner as set out in his testimony discloses the fact that, although most of the assets cannot be disposed of, as, for instance, the new Auburn automobile which was being purchased under a conditional sales contract, and the pipeline which had been installed on the leased property, the petitioner is the owner of "some trucks" used in his farming operations. We are not in accord with petitioner's contention that the trucks are exempt from execution, and, therefore, in a "legal sense," he does not have the ability to provide for the support of his minor children. The underlying purpose of the statute exempting from execution certain property is to provide for the support and welfare of the family of the person claiming exemption. The two children, although living apart from the petitioner, are a part of his family, and the property has been expressly reserved from the payment of other debts for their

support. The reason for refusing to require the sale of a homestead and the application of the proceeds to the payment of alimony, as was held in Ex parte Silvia, 123 Cal. 293, 55 P. 988, 69 Am. St. Rep. 58, relied upon by petitioner, does not, we think, apply with equal force to the support of minor children. Moreover, it is to be noted that the petitioner is the owner of "some trucks," not just one truck, and no proof was offered that all of petitioner's equipment was worth less than $1,000. Code Civ. Proc., § 690. It follows from the fact that the record discloses some assets which can be applied to this payment of this obligation that there is at least a conflict in the evidence, and the judgment of the trial court should be upheld.

[6, 7] Petitioner further insists, however, that the order embodied in the interlocutory decree of divorce requiring him to pay the sum of $87.50 per month to his wife during the months in which the two boys were in his care and custody was in fact an order granting alimony to his divorced wife, which, in view of the fact that the divorce had been secured by him on the ground of her fault, was void, and that disobedience to a void order cannot constitute contempt. McKannay v. McKannay, 68 Cal. App. 701, 705, 230 P. 214; Andrews v. Superior Court, 103 Cal. App. 360, 365, 284 P. 494. The order on its face states that such sum is to be paid for the maintenance of a home for the children. This seems to be a reasonable provision for the purpose of stabilizing the home life of the children. It can readily be seen that for the mother each summer to be compelled to give up the house which she is renting and store the furniture for two months would probably result in a constant change of neighborhoods and schools which would be detrimental to the children's welfare. The fact that the mother may indirectly benefit by such provision does not ipso facto render the order one for the payment of alimony. The father's duty of support for his children does not end with the furnishing of mere necessities if he is able to afford more. It would appear from the terms of the order of the interlocutory decree that the father, at the time of the entry of the decree, was fairly prosperous, and, if this be a fact, the requirement for the establishment of a permanent home was not unreasonable. If petitioner's circumstances have since changed so that the order places upon him an intolerable burden, he is not remediless. The trial court entering the decree still retains jurisdiction to modify its orders if circumstances warrant the change, and the proper procedure for a party who is unable to comply with an order for the payment of alimony or the support of his minor children is to seek a modification of the order—not to resist its enforcement, thereby subjecting himself to contempt proceedings.

We are of the opinion, therefore, that the judgment of the trial court upon the hearing of the charge of contempt against petitioner for failure to pay $175 then due, based upon a finding of petitioner's ability to pay, which finding is supported by evidence, is a valid order within the jurisdiction of the court making it. It follows that the application of petitioner for a writ of prohibition should be, and it is hereby, denied.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

123 Cal.App. 697

STEINBRUN v. SMITH.

Civ. 8021.

District Court of Appeal, First District, Division 1, California.

May 26, 1932.

1. Appeal and error ⇨1068(4).

In action for damages, instruction authorizing consideration of items unauthorized by evidence did not warrant reversal, in view of reduction in judgment.

2. Damages ⇨131(1).

$884.95 for nonpermanent personal injuries received in automobile accident, there being no fractures or broken bones, *held* excessive by $300.

Plaintiff testified to having suffered two scalp wounds, badly crushed thumb, cut and bruise on right index finger, cut on left leg below knee and on right knee, general soreness, soreness in elbow, and aching muscles, and testified that immediately after the accident he went to the hospital, where he was treated by a physician, without remaining all night, and then went home, and thereafter called at physician's office every day for a week, and thereafter every two or three days for about three weeks.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Harry J. Steinbrun against Sherman Smith. Judgment for plaintiff, and defendant appeals.

Modified and, as modified, affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Harold Jos. Haley, of San Rafael, for respondent.

ROBINSON, Justice pro tem.

This case comes to us on appeal from the judgment based on a verdict growing out of the property damages and personal injuries in an automobile accident. The evidence is conflicting on the question of negligence, but we will not review it. The verdict awarded $1,500. On motion for a new trial the court reduced it to $1,200. Appellant claims there was not a sufficient reduction. He also complains that certain instructions given were erroneous.

We are not able to determine from the order denying the motion for a new trial and reducing the judgment whether the reduction was on account of general or special damages. The reduction was consented to by appellant.

It is conceded that the damage to the automobile was $300, less salvage of $15, which would leave $285. Plaintiff claims damage by a tearing of his suit of clothes, but no specific amount of damage was proven. There was a towing charge of $15.15. There is a claim for $30 for services rendered by a physician, but there is no proof of the reasonableness of the charge nor that it was paid, and the doctor testified that he had rendered no bill and had not entered up any exact charge. Loss of wages for two days was claimed, amounting to $14.90, making a total of $345.05. Deducting the $30 for physician's services leaves the total special damage $315.05.

Counsel in their briefs seem to concede that the $300 reduction by the court was on account of general damage, and argue that $300 property damage would leave a $900 judgment herein.

Plaintiff testified to the following personal injuries: Two scalp wounds; badly crushed thumb; right index finger cut and bruised; cut on left leg below knee and on right knee; was sore all over; elbow sore; every muscle in his body ached; immediately after the accident he went to the hospital where he was treated by a physician, without remaining all night, and then went home; thereafter called at physician's office every day for a week, and thereafter every two or three days for about three weeks. He testified that he went to the scene of the accident on the first and second days after the accident and took measurements and photographs and returned to work on the morning of the third day, as a motorman engineer for the Northwestern Pacific Railroad Company. He further testified that the index finger on his right hand was still sore and painful; that all the physician did was to apply mercurochrome and bind up the cuts; and that they healed within three weeks. The physician testified that plaintiff had the tip of the right thumb partly crushed, *just the tip of the finger*, and the skin broken; small lacerations on the index finger of the right hand; two small lacerations in the scalp; lacerations on the left knee and a bruised right knee; it was just skinned, and general contusions and abrasions; that the patient called at his office seven times after the hospital treatment; was under his treatment 14 days; that he complained of no other injuries during that period, simply those from the injury, and a shaking-up. The doctor was asked this question: "And you cannot state whether that last mentioned injury would be a permanent one or otherwise?" His answer was: "I don't think so, unless there would be some other current disturbance coming on, complicating it." There was no testimony as to any such disturbance.

It appears from this testimony that the injury was not very serious, and certainly there was no proof to any reasonable certainty of any future disability.

[1] Appellant complained of the following instruction: "You are instructed that if you find that the plaintiff is entitled to recover, you may award such damages, within the amount claimed, which is $2,939.80, as in your opinion will compensate him for the injuries he has sustained; and in estimating such damages, you may consider what, before the accident, was his health and physical ability; the extent, nature and severity of his injuries; also the extent to which, if at all, *the injuries he received are permanent in character;* also the extent, degree and character of suffering, mental or physical, if any; medical expenses incurred or paid, *or necessary to be incurred*, if any; the loss of time and the value thereof, if any; *the reasonable market value of services performed upon or about the automobile of plaintiff*, if any; and the *diminution in value of plaintiff's clothing, if any.*" (Italics his.)

There was no testimony in support of any of the emphasized portions of this instruction, and the same should not have been given.

Complaint is made that the court instructed the jury in part as follows on the question of damages that could be awarded: "Medical expenses incurred or paid or necessary to be incurred." There was no testimony as to any expenses necessary to be incurred. Also, "reasonable market value of services performed upon or about the automobile of plaintiff." The testimony was that the automobile was damaged to the extent of $300 less salvage $15. "Diminution in value of plaintiff's clothing." There was no testimony to warrant that. However, these instructions, even if erroneous, would not warrant a reversal, as they would be at least partly taken care of in the reduction in judgment.

[2] Under the testimony the special damage could not have exceeded $315.05, which, deducted from $1,500, the original judgment,

would leave a balance of $1,184.95 for general damage which the court has reduced by $300, leaving $884.95 as general damage.

If under the instructions the jury awarded any damage for *future pain* and suffering or doctors' bills *yet to be incurred*, or anything else delving into the future, it would be error. And from the simple injuries enumerated, keeping in mind the doctor's testimony that there were no *fractures or broken bones*, that all he felt it necessary to do was to put on an antiseptic and bandages, we feel that the judgment should be further reduced. For support we refer to Wiezorek v. Ferris, 176 Cal. 353, 358, 167 P. 234, 236, holding that: "If 'the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury' (Morgan v. Southern Pac. Co., 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 P. 603), the verdict must be held excessive." Kershaw v. Tilbury (Cal. Sup.) 8 P.(2d) 109.

It is therefore ordered that the judgment be modified by reducing the amount of damages to $900, and as so modified is affirmed; appellant to recover costs on appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 651

In re VIZELICH'S ESTATE.

MARR et al. v. MORRILL et al.

Civ. 4629, 4630.

District Court of Appeal, Third District, California.

May 24, 1932.

Rehearing Denied June 23, 1932. Hearing Denied by Supreme Court July 22, 1932.

1. **Appeal and error ⇐1033(1).**
Party cannot complain of ruling in his favor.

2. **Executors and administrators ⇐510(3).**
Appellant *held* not entitled to prosecute appeal from order settling account of executrix, where appellant did not file written exceptions to account (Code Civ. Proc. § 1635).

3. **Executors and administrators ⇐510(6).**
Appeal from order settling account of executrix taken six years after order was entered in minutes of court *held* barred, though court subsequently rendered another similar order which was not entered, since but one such order could be entered (Code Civ. Proc. §§ 1704, 1715).

Code Civ. Proc. § 1715, provides that the appeal may be taken at any time after the order in probate proceedings is rendered, but not later than 60 days after the same is entered in the minute book of the court as provided in section 1704.

4. **Executors and administrators ⇐315(4).**
Denying motion to set aside decree of distribution of decedent's estate *held* not abuse of trial court's discretion, where decree was duly entered and appeal therefrom was dismissed because filed too late (Code Civ. Proc. § 473).

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Proceeding to settle the first account of Nellie Vizelich, executrix of the estate of Nellie Harding Vizelich, deceased, and objections thereto by Jennie Vizelich Marr, legatee of Nicholas James Vizelich, deceased, and petition for distribution by the contestant and another which was opposed by Mrs. Kate Morrill and others. From an order settling the first account and from an order denying a motion to set aside a decree of distribution, contestant and petitioners appeal.

Affirmed.

C. Victor Smith, of Oakland, McNoble, Parkinson & Coblentz, of Stockton, and Harvey S. Craig, of Oakland, for appellants.

Clark, Nichols & Eltse, of Berkeley, S. Laz Lansburgh and S. Joseph Theisen, both of San Francisco, and R. C. Minor, of Stockton, for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Two appeals arising out of this estate have been combined upon this appeal. The first is from an order settling a first account in the estate, and the second is from an order denying a motion to set aside the decree of distribution made therein.

The decedent, Nellie Harding Vizelich, died testate in the year 1918, leaving six children, Amelia, Kate, Nellie, Nicholas, Henry, and Stanley, surviving her. During the course of administration, Nicholas, Amelia (Amelia Bruce), and Stanley died. The will was duly admitted to probate. Under its terms decedent directed that her real property be retained in the hands of her executors until such time as her children shall have agreed that it is to the best interests of all of them that it be sold; that thereupon it be sold, and out of the proceeds certain special legacies to children and grandchildren be paid and the remainder, with any other estate of decedent, be then equally divided among her said six children, and that meanwhile the income be divided equally among them by the executor every six months, and by paragraph "Fifthly" she provided that: "In case of the death

without issue of any of my said sons and daughters and grandchildren herein mentioned, their share and shares herein devised and bequeathed shall go to by surviving children." Appellant Jennie Vizelich Marr is the surviving widow and sole heir of Nicholas, while appellant Anita Vizelich is the surviving widow and sole heir of Stanley.

[1, 2] Nicholas died on March 18, 1920. On February 26, 1923, the executrix of said estate filed her first and annual account. It showed that she had made payments aggregating $500 to each of the then surviving five children, under the provisions of the will directing the periodical distribution of the income. No payments were shown to have been made to the heir of Nicholas, Jennie Vizelich, upon the ground that under the substitutionary provision she was not interested in the estate. In due time Jennie filed objections to this account, claiming that this provision was intended to be operative only in case the death of her husband occurred before the death of the testatrix, and, therefore, since her husband, Nicholas, was still living at the time of decedent's death, one-sixth of the estate was indefeasibly vested in him. The trial court overruled these objections, and settled the account, acting upon the theory that the provision mentioned was intended to be effective upon the death of each individual legatee without issue at any time, whenever it might occur. No objections were filed to the account by appellant Anita Vizelich or her husband Stanley. The latter was alive when the account was settled, and appeared and answered the objections filed by Jennie. Considering now the appeal from the order settling this account, we are at a loss to understand how Anita can now appeal therefrom. The ruling of the court was in favor of her husband. It is elemental that a party cannot complain of a ruling which is in fact in his own favor. Scheimer v. James, 53 Cal. App. 207, 199 P. 827. Furthermore, as neither Anita nor her husband appeared and filed written exceptions to the account and contested the same under the provisions of section 1635 of the Code of Civil Procedure (as it read in 1923), appellant Anita cannot prosecute an appeal from the order made.

But there is another insurmountable obstacle which faces *both* appellants—the appeal from this order was taken after the expiration of the time provided by law. Upon the issues mentioned, the hearing was had and upon November 24, 1923, the court made an order overruling the objections and approving the account as rendered, which order was entered in the minutes of the court at length as follows: "The objections to the first account of the executrix having been heretofore submitted to the court for consideration and decision and having duly considered the same, the court this day made an order overruling said objections and made a further order settling, allowing and approving said first account as rendered and presented."

On the same day the trial judge filed an exhaustive opinion, concluding as follows: "I am of the opinion that under the rule approved by our Supreme Court [In re Estate of Carothers, 161 Cal. 588, 119 P. 926, and In re Estate of Briggs, 186 Cal. 351, 199 P. 322] it will be necessary to construe the language used by the testator herein 'death without issue' as meaning death without issue living at the time of the death of the person or persons referred to and not death without issue as of the time of death of the testator and for that reason the objections filed by the contestant herein may be overruled and disallowed and the account be approved and allowed and settled as rendered."

On December 5, 1923, there was filed a written order dated December 4th, signed by the trial judge, wherein it was "ordered, adjudged and decreed that the said account be and the same is hereby allowed, approved and settled as presented, and that the objections to said account be and they are hereby overruled." This order does not differ materially from the previous order of November 24th

On October 10, 1929, there was filed with the clerk an "Acknowledgment of Service" reading as follows:

"Service by copy of the 'Order upon Hearing of Account of Executrix and Objections Thereto' made and entered on the 4th day of December, 1923, is hereby acknowledged this 5th day of December, A. D. 1923.

"D. P. Eicke and
"Manuelila E. Aldecoa
"Attorneys for Jennie Vizelich Marr."

The notice of appeal, filed *November 5, 1930*, recites that appellants appeal "from the whole of that judgment, order or decision rendered in the above-entitled proceeding and court on or about November 24, 1923, signed by George F. Buck, Judge, and also from the whole of that certain Order upon Hearing of Account of Executrix and Objections Thereto rendered in the above-entitled proceeding and court on or about December 4, 1923, signed by George F. Buck, Judge."

[3] Respondents contend that the order of the court made and entered upon the minutes of the court on November 24th was a proper and valid order under the provisions of section 1715 of the Code of Civil Procedure (1923), and that the sixty-day period fixed by that section had long since expired when the notice of appeal was filed. This places appellants in an embarrassing situation, for while they now contend that this order was not entered in compliance with the statute, they recite in their notice of appeal that they are appealing from the whole of the judgment, order, or decision rendered in the court

on November 24, 1923. The record shows on its face that an order overruling and disallowing the objections to the account was entered on November 24, 1923. The theory of appellants seems to be that because the trial judge rendered another order of similar import on December 4, 1923, he did not consider the first order sufficient. They say that the clerk *may* have made a mistake in entering the first order. The clerk did not so testify, nor is there any evidence to support such a theory. The trial judge on that date filed a long written opinion, and at the end thereof directed the entry of an order overruling the objections. The clerk entered the order. For some reason the trial judge filed another similar order upon Decemer 4, 1923. We are not here concerned with the circumstances which motivated the trial judge to proceed in this manner. Appellants' argument in attacking this order is predicated upon speculations as to why this procedure was adopted. So far as the record speaks, this order was both rendered and entered as required by law (section 1704, Code Civ. Proc. (1923), and an appeal taken therefrom some six years thereafter comes too late. Section 1715, Code Civ. Proc. (1923). The purported appeal from the order of December 4, 1923, is of no effect, as there obviously could be but one order rendered and entered, and the second order was an idle act, and of no force or effect.

The other appeal is taken from an order denying a motion, under the provisions of section 473 of the Code of Civil Procedure, to set aside a decree of distribution entered in said estate. On August 14, 1929, the executrix filed her petition for final distribution. It was alleged in said petition that Nicholas James Vizelich, a son, having died without issue, his estate had no interest in the estate of Nellie Vizelich. It was also alleged that Stanley Vizelich, a son, died on March 8, 1927, without issue, and that his estate had no interest in the property to be distributed. Thereafter appellant Jennie Vizelich Marr, as administrator of the estate of Nicholas James Vizelich, filed a petition for distribution, praying that a one-sixth interest in the estate of Nellie Vizelich be distributed to her. Appellant Anita Vizelich, as administrator of the estate of Stanley Vizelich, joined with Jennie in said petition, and which also prayed that a one-sixth interest in the estate of Nellie Vizelich be distributed to her. Thereafter respondents filed their written opposition and answer to the foregoing joint petition, *setting up, among other things, that appellants were bound by a prior adjudication arising out of the settlement of the first annual account, referred to in the first portion of this opinion.* The hearing of all these issues relating to distribution was duly had, all parties being represented by counsel. Thereafter the court distributed the estate in a manner adverse to the contention of appellants. The latter appealed to the Supreme Court from the decree of distribution, but said appeal was dismissed on April 7, 1931, for the reason that it was not taken within the time fixed by law.

[4] With the foregoing facts in view, we will consider the grounds which are relied upon for setting aside this decree of distribution. The affidavits presented by counsel for each appellant are practically identical in respect to the facts relied upon. They state that they accepted as a fact the recitation in the admission of service signed by the then counsel for appellants, to the effect that the order of December 4, 1923, overruling objections to the final account, had been entered. (This admission of service is set out in full, supra.) Having accepted this as a fact, they advised their respective clients that said order had become final, and could therefore be used as the basis for a plea of res judicata by respondents. They state that the trial court and all parties fell into this error. It appears that this order was never entered in the minutes of the court. The recitation was therefore not according to the true facts. As we have held that the order of December 4th was superfluous and a nullity, it would be profitless to discuss this matter further. If the true facts had been known to appellants, it could not have benefited them to have possessed such knowledge. Summing up the situation, we find that the hearing was had after due notice and issues joined; that all parties were represented by counsel, and the matter fully heard; that the decree of distribution was duly entered, and appellants appealed therefrom; that their appeal was dismissed through failure to take the same within the time required by law; and that an inspection of the records of the court would have disclosed at once that the order had never been entered and that knowledge of the truth would not have availed appellants anything. We are of the opinion that under such circumstances the trial court did not abuse its discretion in denying the motion. Kammerer v. Marino, 66 Cal. App. 720, 226 P. 980; Ingrim v. Epperson, 137 Cal. 370, 70 P. 165.

Each of the orders appealed from is hereby affirmed.

We concur: PRESTON, P. J.; THOMPSON, J.

H. D. ROOSEN CO. v. PACIFIC RADIO PUB. CO.

Civ. 7525.

District Court of Appeal, First District, Division 1, California.

May 19, 1932.

Rehearing Denied June 18, 1932. Hearing Denied by Supreme Court July 18, 1932.

1. Assignments ⇐134.

Burden of proof was on acceptor of order who claimed absolution because of prior appointment of receiver for drawer to prove the fact.

2. Evidence ⇐69.

Where acceptance of order, appointment of receiver for drawer, and injunction, occurred on same day, in absence of proof to contrary, presumption was that acceptance was prior in time (Code Civ. Proc. § 1963, subds. 1, 19, 33).

Presumption was that acceptance was prior because it will not be presumed that acceptance relied on was irregular, or that drawer disobeyed the injunction, where appointment of receiver was relied on by acceptor to defeat liability.

3. Assignments ⇐55.

Acceptance of order upon drawer's promise to print next issue of periodical and acceptor's promise to pay payee constituted nonnegotiable instrument supported by consideration.

4. Assignments ⇐55.

Acceptance of draft or order, whether negotiable or not, is not collateral, but original direct contract between acceptor and payee, consideration for which may be furnished aliunde.

5. Novation ⇐1.

Contract between acceptor and payee constitutes a "novation," and is subject to rules applicable to contracts in general.

[Ed. Note.—For other definitions of "Novation," see Words and Phrases.]

6. Assignments ⇐58.

Assignment by printer who habitually printed periodical for publisher of part of what would be due for printing next issue was, before publisher's consent, good in equity.

7. Assignments ⇐58.

Where, in consideration of drawer's promise to print next issue of periodical, drawee accepted order and fixed date for payment, he assumed direct obligation to payee cognizable at law.

8. Receivers ⇐76.

Receiver, as officer, and subject to orders, of court, takes custody of property, not as assignee, but subject to all liens and equities and claims of creditors.

9. Receivers ⇐90.

Receiver is not obliged to carry out executory contracts of debtor, but, subject to order of court, may, within reasonable time, expressly or by implication elect to adopt or reject them.

10. Receivers ⇐90.

Where receiver undertakes performance of executory contract of debtor, he assumes all obligations thereof subject to any right of offset.

11. Assignments ⇐93.

Where receiver printed issue of periodical as promised by insolvent, whose order had been accepted by publisher, acceptor was liable to payee despite payment to receiver for printing.

12. Fraudulent conveyances ⇐115(1).

Assignment by insolvent to creditor of money to become due was valid preference, supported by valuable consideration, not fraudulent, and, in absence of bankruptcy, was invulnerable.

13. Fraudulent conveyances ⇐179(1).

Acceptor of order drawn by insolvent cannot question its validity in action by payee, where acceptor was not a creditor.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the H. D. Roosen Company against the Pacific Radio Publishing Company. From judgment for defendant, plaintiff appeals.

Reversed.

Dinkelspiel & Dinkelspiel, of San Francisco, for appellant.

Gerald J. O'Gara and James A. O'Gara, both of San Francisco (John O'Gara, of San Francisco, of counsel), for respondent.

PER CURIAM.

This case involves the question of the defendant's liability under its written acceptance of an assignment made for a valuable consideration to plaintiff in the sum of $900, which had not been earned by the assignor at the time of defendant's acceptance; it being contended by defendant that, at about the time of the acceptance, such circumstances arose that nothing was thereafter earned by the assignor, and that the assignment became ineffectual and defendant's acceptance nugatory. Judgment went in favor of the defendant, and from that judgment plaintiff prosecutes this appeal.

There is no real dispute concerning the essential facts. In connection with its business the defendant published a monthly periodical, which defendant had habitually

caused to be printed by H. L. Kriedt, doing business in San Francisco under the trade-name of H. L. Kriedt Company. The periodical came out about the 25th of each month, and the printing bill was customarily paid about one month later. By August 4, 1927, however, full payment had been made for all work previously done by Kriedt. At that time Kriedt was indebted to plaintiff in the sum of $900 for printer's ink previously purchased; and, being pressed for payment, Kriedt sent plaintiff an assignment in the following form:

"August 4, 1927.

"H. D. Roosen Co., 340 E. 4th St., Los Angeles, Calif.

"Gentlemen: For value received we hereby assign, sell and transfer to your company the sum of $900.00 for purchases to be paid by Pacific Radio Publishing Company. The above amount covers your account in full. We are advising the Radio Publishing Co. to the same effect.

"Yours very truly,

"H. L. Kriedt Co.

"By H. L. Kriedt."

Notice of this assignment was given by Kriedt to the defendant; and that notice, after defendant's acceptance had been appended, was likewise delivered to plaintiff.

As set forth in the court's findings, the notice, with the acceptance, reads as follows:

"August 4, 1927.

"Pacific Radio Publishing Co., Pacific Bldg., San Francisco, California.

"Gentlemen: Please be advised that we have been obliged to pass an assignment in the amount of $900.00 to the H. D. Roosen Co. of San Francisco and Los Angeles covering supplies furnished this company. You are therefore authorized to pay the H. D. Roosen Co. from our next invoice the sum of $900.00.

"Thanking you for past favors, we are,

"Sincerely yours,

"H. L. Kriedt Co.

"By H. L. Kriedt.

"Accepted Aug. 8/1927

"By Pacific Radio Pub. Co.

"H. W. Dickow, Treasurer."

At the time of the acceptance, Mr. Dickow wrote upon the right-hand margin the words "Due and payable September 25th, 1927."

The acceptance was written at the personal solicitation of Kriedt, with whom Dickow was friendly, and who informed Dickow that he was in great need of money, and that without acceptance of the assignment he would not be able to print the next issue of the periodical. Dickow testified that, owing to Kriedt's financial difficulties, the defendant had planned to make arrangements for its work with some other printer, but concluded to let Kriedt print one more issue, as it was too late to arrange with any one else. So is was agreed verbally that Kriedt should print the August issue, the expense of which would be about $1,400, and that settlement would be made on September 25th. It was under these circumstances that Dickow, acting on behalf of the defendant, accepted the assignment on August 8th, and fixed September 25th as the date for payment.

Before the assignment had been made, an action to foreclose a chattel mortgage of Kriedt's equipment had been begun against Kriedt and his wife by the Anglo California Trust Company; and in that action, upon application of the trust company, presented on August 8, 1927, the day of the acceptance, an order was forthwith made, with the written consent of Mr. and Mrs. Kriedt, acting by their attorney of record, whereby Kriedt's superintendent, Alex. R. Held, was appointed receiver of the personal property and business, with authority to take possession of the business and assets, collect moneys receivable, and pay such amounts as should be necessary in maintaining the business pending trial of the action. Under this order, the receiver continued the operation of the business, and caused to be printed and delivered to defendant the issue of the periodical in contemplation at the time of defendant's acceptance of the assignment. Instead of reserving for plaintiff $900 of the amount of about $1,400 payable for the printing of that issue, the defendant paid the full amount to the receiver, and denied all liability to plaintiff under the assignment which defendant had accepted. The receiver, having collected the full amount charged, is not here with any claim; and the issue is wholly between the plaintiff, as payee under the accepted assignment, and the defendant, who, by virtue of its acceptance, is held accountable by plaintiff as its debtor substituted in place of Kriedt.

The trial court found in substance that the assignment had been made to plaintiff, and that on August 8, 1927, defendant had appended thereto its acceptance, and that on that day the receiver was appointed. The court then found that, at the times of the assignment and the acceptance, the defendant was not indebted to Kriedt, and that the assignment was of no effect, and was null and void, that thereafter Kriedt, acting through the receiver, did business with the defendant, which produced moneys in excess of $900, but that, by reason of the appointment of the receiver on August 8th, "H. L. Kriedt or H. L. Kriedt Company did not on that date or thereafter have any power, ability or authority to make or execute any assignment on its behalf to plaintiff herein, to assign any indebtedness due or to become due said H. L. Kriedt or H. L. Kriedt Company from defendant, to plaintiff."

[1, 2] The acceptance and the order appointing the receiver were signed on the same

day, but there is nothing in the record to show the precise time of either act. If the receiver was appointed and qualified before the acceptance, the burden to prove the fact rested on the defendant, who claimed to be absolved by reason of that appointment. In the absence of proof to the contrary, the presumption is in favor of the fairness and regularity of the transaction effected between Kriedt and the defendant. Section 1963, subd. 19, Code Civ. Proc. Furthermore, the order appointing the receiver restrained Kriedt from interfering with the business in any manner, and it is presumed that in his dealings on the day in question he was innocent of wrong, and that he obeyed the law. Section 1963, subds. 1 and 33, Code Civ. Proc.

[3] There is in the briefs considerable discussion of points which are foreign to the decisive question in the case. Except for the intervention of the receiver, there would be nothing arguable. The evidence shows without conflict that defendant agreed with Kriedt that he should print defendant's August issue. Upon that agreement the defendant accepted the assignment or order in favor of plaintiff, and promised to make payment of $900 to plaintiff on September 25th out of the fruits of the printing to be done. The assignment, thus accepted, constituted non-negotiable business paper with consideration in its support.

[4] Acceptance of a draft or order, whether negotiable or not, by one from whom moneys are to become payable, is not a collateral, but an original, direct and immediate contract between the acceptor and the payee, for which consideration may be furnished aliunde. Raborg v. Peyton, 2 Wheat. (15 U. S.) 385, 4 L. Ed. 268.

[5] Such contract constitutes a novation between the parties, and is subject to the rules applicable to contracts in general. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 567, 86 P. 820; Sprague C. M. Co. v. Western Ranching Corp., 29 Cal. App. 374, 378, 155 P. 1017.

[6] While on August 4th, the day of the assignment itself, there was no express agreement that Kriedt was to print the August issue for defendant, yet he had been doing defendant's work for a long time; and Dickow's testimony shows that defendant did not intend to make a change before that issue appeared. In furtherance of the purposes of both parties, an express contract for the printing was made verbally at the time of the acceptance on August 8th, whereby defendant undertook to pay plaintiff $900 out of the compensation to accrue. The fund was unquestionably existent potentially at the time of the acceptance; and, in view of the past relations of the parties and the testimony of Dickow as to contemplated continuance of the relationship, the assignment, when made on August 4th, had for its support not merely a supposititious expectancy, but a potentiality sufficient to validate an equitable transfer. Walker v. Rich, 79 Cal. App. 139, 144, 249 P. 56. And a partial assignment of money to become due will have the powers of equity exerted in its behalf as fully as enforcement will be accorded in favor of a total assignment in a court of law.

In Bank of Harlem v. Bayonne, 48 N. J. Eq. 246, 252, 21 A. 478, 480, the rights created in equity by an assignment are defined as follows:

"While, properly speaking, an assignment cannot be made of a subject which does not exist, such as a fund to become due on the future performance of a subsisting contract, yet equity, on the possible debt ripening into an enforceable specific money liability, treats the agreement as an assignment pro tanto of the fund, and, by force thereof, vests the equitable title to the money in the assignee. * * *

"To impound the amount in the hands of the debtor, notice of the assignment must be given to him; but no particular form of notice is required. Any writing or act which clearly indicates that the assignor intends to make over the fund belonging to him amounts, in equity, to an assignment of the fund. * * * On notice being given to the debtor, and the sums being earned under the contract, the debtor becomes trustee, or quasi trustee, for the assignee as to the amount assigned, subject to existing equities and valid prior charges thereon. * * * From this it follows that neither payment to, nor a release or discharge by, the assignor, after notice of the assignment, can affect the rights of the assignee against the debtor. * * *

"It is evident from this statement of the incidents of an equitable assignment that acceptance by the debtor of the order or assignment is not, in equity, necessary to its validity as a transfer pro tanto of a fund in his hands. It takes effect from the acts of the assignor and assignee, and the debtor, so far as the right to the fund is concerned, is but the instrument through whom the transfer is to be actually made. The debtor's acceptance or promise gives the assignee an action at law against him, not on the assignment, but on the promise; in equity, it neither creates, increases, nor diminishes his liability to the assignee. 3 Pom. Eq. Jur., § 1280, and note 1."

[7] The contract expressly made between the defendant and Kriedt on August 8th sufficed to give equitable vitality then at any rate to the assignment, whatever its previous status had been; and when, after making a definite contract with Kriedt, the defendant accepted the assignment and fixed

September 25th for payment, defendant assumed by that promise a direct and original obligation to the assignee cognizable in an action at law.

In its salient features the case closely resembles Barlow v. Lande, 26 Cal. App. 424, 147 P. 231, 232. There an attorney, who was representing the executor in matters pertaining to the estate of Julius Friedman, gave an order on the executor in a certain amount payable "out of the next fees allowed by order of court"; and this order was accepted in writing by the executor. Thereafter a sum in excess of the amount specified was allowed by the court for services rendered the executor, whereupon the executor, ignoring his acceptance, paid to the attorney the amount so allowed for services, with the result that the executor was himself held answerable to the aggrieved payee named in the order. In the trial the court excluded proffered evidence of want of consideration and of cancellation of the order after the acceptance. In relation to these matters, the appellate court said:

"It is the rule of law in this state that the drawing and delivery of a nonnegotiable order for the payment of a part of a debt operates as an equitable assignment pro tanto as between the assignee and payee, although such an assignment in and of itself does not, as between the drawee and payee, obligate the former to recognize the assignment and pay the sum called for therein. Being only for a portion of a debt, the drawee may insist upon his right to discharge the debt in toto, and by a single payment. But by accepting the assignment, even though it be for only a part of the debt, the debtor admits the original debt, and to the extent of the sum called for in the assignment becomes the debtor of the assignee, and assumes the obligation to pay only him. In such a case the original indebtedness of the drawee will be deemed a sufficient consideration for the drawee's acceptance of the assignment and consequent liability to the assignee thereof. It is no defense to an action by the assignee of a debt that there was no consideration for the assignment. Owing the debt, it is immaterial to the debtor to whom he pays it, providing he be protected against the demand of the original creditor for the payment of the same debt. This the assignment and its acceptance would fully do. Consequently the purpose and consideration of the assignment in the present case were no concern of the defendant. And an assignment of a debt which has been accepted cannot be rescinded or annulled at the mere option of the assignor."

If Kriedt had continued in charge of his business until the August issue of the periodical had been printed, defendant could not have defended an action based upon its acceptance. A receiver was, however, appointed, and the August issue was printed under the administration of the receiver. As was conceded at the close of the trial by the attorney then representing the defendant, the sole question now is whether the contract made with Kriedt was abrogated when the receiver took charge.

[8] A receiver is an officer of the court, administering his stewardship in an official capacity. As a custodian subject to the orders of the court, he becomes clothed with the title of the debtor, and takes the property cum onere, in the plight and condition existing at the time of his appointment, subject to all liens and equities, including the right of setoff, and impressed with the legal and equitable rights and claims of creditors. 22 Cal. Jur. 437; Kennison v. Kanzler (C. C. A.) 4 F.(2d) 315; Wright v. Seaboard S. & M. Corp. (C. C. A.) 272 F. 807; In re Farmers' & Merchants' Bank, 194 Mich. 200, 207, 160 N. W. 601; Irwin's Bank v. Fletcher S. & T. Co., 195 Ind. 669, 145 N. E. 869, 146 N. E. 909.

The receiver does not occupy the status of an assignee. His function is that of a minister of the court in possession of the property, to the end of conserving the rights of everybody having any interest; and no lien or contract is disturbed or altered by the court's intervention. Bories v. Union B. & L. Ass'n, 141 Cal. 74, 77, 74 P. 552; Meili v. Crane, 102 Cal. App. 144, 147, 282 P. 960; Highland Securities Co. v. Superior Court (Cal. App.) 6 P.(2d) 116.

[9, 10] The mere fact of possession does not, however, obligate the receiver to carry out executory contracts of the debtor; and, subject to the order of the court, he may have a reasonable time after his appointment to elect whether to adopt any such contract or reject it. 53 C. J. 149–152. Adoption may be signified either by express agreement or by implication (Crawford v. Gordon, 88 Wash. 553, 557, 153 P. 363, L. R. A. 1916C, 516), and if, without declaring himself, he undertakes performance, he assumes the obligations of the contract and adopts it subject to its burdens and to any right of offset. Odell v. Bedford Co. (D. C.) 224 F. 996, 997; In re Farmers' & Merchants' Bank, supra.

In this case, there is no evidence at all of any repudiation by the receiver of Kriedt's contract for the August issue; nor is there anything to indicate any new or independent contract between the receiver and the defendant. Apparently neither party sought the advice or direction of the court; and the printing of the issue proceeded just as if Kriedt were still in control of the business. The court did not find that there had been repudiation or cancellation by the receiver, and there is no evidence which would permit any inference of abrogation to be drawn from the findings made. Rossini v. St. Paul F. & M. I. Co., 182 Cal. 415, 421, 188 P. 564; Robb

v. Cardoza, 110 Cal. App. 116, 120, 293 P. 851.

[11] Election to carry out the contract was not so much a matter of law as a matter of judgment. The receiver selected by the parties with the approval of the court is presumed to have had good sense and to have used reasonable intelligence in performing his duties. When he elected to proceed with the work, he did so, just as Kriedt would have done, subject to the rights of plaintiff under Kriedt's assignment and subject to defendant's right of set-off by virtue of its acceptance of the assignment. If, notwithstanding its acceptance and without seeking the advice of the court, defendant was so imprudent as to pay the entire contract price to the receiver instead of reserving $900 for plaintiff, neither that payment nor any acquittance from the receiver can be translated into a release of the defendant from its absolute liability to the plaintiff evidenced by its acceptance. After adopting the contract, the receiver stood in the shoes of Kriedt; and defendant could no more relieve itself of its positive obligation to plaintiff by settlement of its accounts with the receiver than by a settlement with Kriedt himself in derogation of the accepted assignment. McCloskey v. City and County of San Francisco, 66 Cal. 104, 4 P. 1092; McCarthy v. Mt. Tecarte L. & W. Co., 110 Cal. 687, 691, 43 P. 391.

[12, 13] In defendant's brief considerable space is devoted to argument in support of a contention that, in making the assignment and procuring its acceptance, Kriedt perpetrated a fraud both on the defendant and on his creditors. In the answer to the complaint there is an averment that Kriedt "fraudulently attempted to assign to plaintiff herein the sum of $900.00 to become due from defendant herein to H. L. Kriedt Company," but the epithet is left bare of precise specification. Neither was any charge of fraud pressed at the trial, nor is there anything on the subject in the findings.

The assignment was for a valuable consideration, and Kriedt had a right to give a preference to the plaintiff. Even if Kriedt was insolvent, his assignment was not fraudulent, and, in the absence of bankruptcy proceedings, was not vulnerable. Joint Pole Ass'n v. Steele (Cal. Sup.) 2 P.(2d) 335. Moreover, defendant, not being a creditor, cannot assume to impute invalidity to the transfer. Frink v. Roe, 70 Cal. 296, 308, 11 P. 820; Darrah v. Lang (Cal. App.) 6 P. (2d) 989.

It is argued, however, that there was a fraud practiced on defendant in procuring its acceptance of the assignment by reason of representations of Kriedt that he was in such need of money that, in Dickow's language, "If I didn't do it that day, he was dead broke the next day; he was so badly involved that he had to have $900 that day." And Dickow said further that from the statements made he believed that the acceptance would result in enabling Kriedt to keep in business so as to print defendant's next issue. Kriedt was evidently not concealing his precarious situation; and, though the business went into the hands of a receiver, the contract made with Kriedt was not repudiated. The work in contemplation was done as agreed; but unfortunately defendant did not keep its promise to plaintiff. Of that breach this litigation is the sequel.

The judgment is reversed.

123 Cal.App. 411

TRANSMARINE CORPORATION v. R. W. KINNEY CO., Inc.

Civ. 8074.

District Court of Appeal, First District, Division 1, California.

May 11, 1932.

Rehearing Denied June 10, 1932. Hearing Denied by Supreme Court July 8, 1932.

1. Pleading ⇐129(1).

Denial of allegations of complaint upon "no knowledge or information sufficient to form a belief," being insufficient, admitted allegations (Code Civ. Proc. § 437, subd. 2).

2. Shipping ⇐145.

Under bills of lading providing that freight, although collectible at destination, was payable ship lost or not, carrier could recover freight without excusing nondelivery of cargo.

3. Shipping ⇐106(3).

Covenants in bills of lading, one requiring that shipper pay freight, and the other that carrier compensate for lost cargo, are independent.

4. Shipping ⇐153.

In action for freight under bills of lading, exempting carrier for specified losses, carrier need not allege or prove nondelivery resulted from exempted cause.

5. Shipping ⇐153.

In action for freight under bills of lading exempting carrier for specified losses, whether loss resulted from nonexempted cause *held* not in issue, defendant's answer not raising it.

6. Shipping ⇐153.

In action for freight under bills of lading exempting carrier for specified losses, shipper should present issue respecting cause

of loss by answer or counterclaim (Code Civ. Proc. § 437, subd. 2).

7. Shipping ⇐153.

In action for freight under bills of lading exempting carrier for specified losses, shipper, if presenting issue respecting cause of loss, has burden of proving it (Code Civ. Proc. § 437, subd. 2).

8. Judgment ⇐720.

In action for freight under bills of lading exempting carrier for specified losses, record in limitation of shipowner's liability proceeding exonerating carrier proved loss not resulting from cause imposing liability on carrier.

9. Judgment ⇐812(3).

Limitation of shipowner's liability decree exonerating carrier, being in rem, bound shipper sued for freight.

10. Judgment ⇐708.

In action for freight under bills of lading, record in limitation of shipowner's liability proceeding *held* admissible respecting cause of loss.

Record was admissible, since a former adjudication may be used either as conclusive evidence of some fact or issue common to different causes of action or as a complete bar to relitigation of same cause of action.

11. Judgment ⇐650.

Decree in limitation of shipowner's liability proceeding *held* "final decree" and conclusive in action for freight charges, where appeal from decree was dismissed by parties' stipulation.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

12. Appeal and error ⇐882(8).

Shipper sued for freight *held* not entitled to complain of admission of evidence relating to limitation of liability proceeding offered by it, notwithstanding protest.

13. Principal and agent ⇐123(4).

Ostensible agency between shipper and company making shipping arrangements *held* established by prior making of identical shipping arrangements through same company (Civ. Code, § 2300).

14. Principal and agent ⇐173(3).

Ratification of agency of company making shipping arrangements between shipper and carrier *held* established by shipper's using bills of lading naming it as consignee (Civ. Code, § 2307).

15. Limitation of actions ⇐46(11).

Respecting limitation of actions founded on bills of lading, parties' liabilities *held* fixed at signing and issuance, notwithstanding prior delivery of goods and shipper's not signing bills (Code Civ. Proc. § 337, subd. 1).

16. Shipping ⇐153.

Three-year limitation in interstate commerce act *held* inapplicable, where water carrier sued shipper for freight, notwithstanding total claim was partly inland and partly ocean freight (Interstate Commerce Act, §§ 1, 16 (3) (a), as amended 49 USCA §§ 1, 16 (3) (a).

17. Shipping ⇐103.

Water carrier *held* not subject to Interstate Commerce Act, since not acting with rail carrier under common control, management, or arrangement for continuous shipment (Interstate Commerce Act § 1 [49 USCA § 1]).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Transmarine Corporation against R. W. Kinney Company, Inc. From an adverse judgment, defendant appeals.

Affirmed.

McCutchen, Olney, Mannon & Greene, of San Francisco (Farnham P. Griffiths and Jay T. Cooper, both of San Francisco, of counsel), for appellant.

Treadwell, Van Fleet & Laughlin, of San Francisco, Single & Hill, of New York City, and Carroll Single, of San Francisco (T. J. Labhard, of San Francisco, of counsel), for respondent.

ROBINSON, Justice pro tem.

The appeal in this action, taken by bill of exceptions, is from a judgment entered in the superior court in favor of the plaintiff in the sum of $2,058.33 upon causes of action for freight claimed to be due under the terms of certain identical bills of lading which provided as follows: "It is hereby expressly agreed that the freight (as stated herein) whether prepaid by the Shipper or to be collected at destination, becomes wholly due and belongs absolutely to the Carrier upon the receipt of the goods into the custody of the Carrier or its agents, and if prepaid is not to be returnable, and if collect, is payable ship and/or cargo lost or not lost." Tr., p. 41, fol. 123.

The facts pertinent to a decision by this court are as follows: Republic Iron & Steel Company shipped by rail from Youngstown, Ohio, to Port Newark, N. J., five carloads of wrought iron pipe. At Port Newark the shipment was received by Atlantic Port Railway Corporation, a switching or terminal carrier, and delivered to respondent. The latter accepted the shipment for transportation to San Francisco and Oakland, Cal., by wa-

ter. Two of the carloads were received by the respondent on March 8th, two on March 9th, and one on March 11, 1926. Formal issuance of bills of lading showing appellant R. W. Kinney Co., Inc., as consignee was made on March 13, 1926, each of which bills of lading contained the following clause: "In accepting this Bill of Lading, the Shipper, Owner, Consignee and/or Holder thereof, agree to be bound by all of its terms and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee, and/or Holder."

The steamship Suduffco, operated by the respondent, sailed with the shipment on March 13, 1926, for San Francisco. On the following day, by wireless, she reported all was well and gave her position, approximately 130 miles south of Scotland Lightship. That was the last heard of or from the Suduffco.

A complaint containing two similar causes of action was filed in the superior court of the city and county of San Francisco on March 11, 1930. Each cause of action sets up the corporate existence of the parties, alleges that the plaintiff chartered, controlled, and operated the steamship Suduffco; that on or about March 13, 1926, plaintiff received the respective shipments of wrought iron pipe from the Republic Iron & Steel Company, consigned to the defendant, R. W. Kinney Co., Inc., for transportation to San Francisco under an agreement in writing (bills of lading) by which the defendant made the promise and agreement which is hereinabove quoted from the bills of lading.

Other averments allege the loading of the goods aboard the steamship, Suduffco, the subsequent loss of the ship and cargo, and the demand for, and nonpayment of, the freight.

A general and special demurrer was interposed by the defendant. The point made on general demurrer was that the complaint was fatally defective in failing to show that the cause of the loss of the shipment was one for which the carrier, under the contract of carriage, was excused from liability. The special demurrer attacked the complaint for uncertainty as to the identity of the contract. Both were properly overruled.

[1, 2] By use of inappropriate language, the defendant in its amended answer attempts to deny most of the allegations of the complaint upon "no knowledge or information sufficient to form a belief," etc. Under the provisions of section 437 (2) of the Code of Civil Procedure and the decisions thereon, such attempted denial is insufficient, and admits the allegations. Brooks v. Nelson, 95 Cal. App. 144, 272 P. 610; Aronson & Co. v. Pearson, 199 Cal. 295, 298, 249 P. 191; Nave v. Graham, 37 Cal. App. 332, 174 P. 76; 21 Cal. Jur., pp. 151-3; Davidson Investment Co. v. Dabney, 103 Cal. App. 392, 284 P. 673. However, the answer does deny that any sum as freight became due from the defendant to the plaintiff. At the trial, and upon this appeal, stipulations were entered into between the parties admitting the following facts:

(1) The corporate existence of each of the parties.

(2) That the second cause of action should be controlled by proof upon the first cause of action.

(3) That, at all times mentioned in the complaint, plaintiff chartered, controlled, and operated the steamship Suduffco, and that plaintiff placed said steamship on general berth and undertook to transport merchandise for shipment between Atlantic and Pacific ports, and was a common carrier of merchandise by sea.

(4) That on March 13, 1926, said steamship Suduffco left Port Newark for Pacific Coast ports with a cargo of merchandise.

(5) That before starting the voyage the plaintiff at Newark received from Republic Iron & Steel Company, Youngstown, Ohio, the shipment referred to in the first cause of action, the same being consigned to the defendant at San Francisco and Oakland, Cal.

(6) That the shipments consigned to it were transported from Youngstown to the ship by railroad carriers engaged in interstate commerce in so transporting said shipments; that none of these railroads was under any common control, management, or arrangement for a continuous carriage or shipment; that the terminal railway carrier at Port Newark, the Atlantic Port Railway Corporation, shared in rail rates under Interstate Commerce Commission jurisdiction.

(7) That under the established shipping custom and practice between railroads and steamship companies engaged in intercoastal or foreign service, when shipments are not prepaid, the terminal carrier collects from the ocean carrier receiving the shipments the railroad freight charges, and makes its accounting with connecting railroads. The shipments here involved were forwarded collect, and the freights were paid by plaintiff to the terminal carrier, and said carrier in turn paid said charges, less its share, to the various connecting carriers; that plaintiff made such payment more than three years prior to the commencement of this action.

(8) That the merchandise was loaded aboard the Suduffco prior to March 13, 1926.

(9) That during the voyage said steamer and said merchandise were lost at sea.

(10) That after receipt by plaintiff of the merchandise, it issued freight bills and bills of lading covering each separate shipment in the five railroad freight cars; that said bills of lading were of the regular current form

used by plaintiff, and were signed by plaintiff's auditor, dated March 13, 1926, and forwarded to the shippers.

(11) That, after the loss of said ship, plaintiff demanded and was refused payment of freight charges.

(12) That R. W. Kinney Company insured the shipments, and, in later making claim for loss, filed with the insurance carrier the bills of lading herein referred to; that the insurance company paid the insured value, less transportation charges from point of shipment to point of destination, and agreed in writing that, in the event of suit by Transmarine Corporation to collect such charges, it would protect R. W. Kinney Company, Inc.; that prior to making claim on the policy, and before the steamer was reported lost, the Kinney Company paid for the merchandise.

In a second defense, the amended answer alleges upon information and belief that the plaintiff placed the steamship Suduffco on general berth, and as a common carrier of merchandise undertook to transport merchandise between Atlantic and Pacific ports; then follows an allegation that, in the premises, the complaint states insufficient facts to constitute a cause of action.

A third defense sets up the bar of the statute of limitations—section 337, subdivision (1) of the Code of Civil Procedure of the state of California.

A fourth defense alleges upon information and belief that part of the freight claimed in the first cause of action was for advances to cover freight charges of railroad carriers; that, in the premises, the railroad carriers were engaged in interstate commerce, and that that portion of the claim is barred by the provisions of the Interstate Commerce Act of February 4, 1887, c. 104, § 16, subsec. (3), subd. (a), 24 Stat. 379, as amended, 49 USCA § 16 (3) (a).

A fifth defense alleges on information and belief that, of the freight claimed in the first cause of action, $1,241.81 was for advance charges for rail transportation from Youngstown to Port Newark, and that said portion of the amount sued for is barred by the provisions of section 339, subdivision (1), of the Code of Civil Procedure.

Upon the issues framed, the trial court found in favor of the plaintiff and gave judgment for the full amount prayed for.

The first point relied upon by the appellant is that under the clause, "ship and/or cargo lost or not lost," plaintiff cannot recover because of its failure to prove that nondelivery of the merchandise was due to a cause which would relieve it of its responsibility to earn the freight.

The written contract of the parties unambiguously fixed the carrier's right to freight in plain words that require no interpretation: "It is hereby expressly agreed that the freight (as stated herein) * * * becomes wholly due and belongs absolutely to the Carrier upon the receipt of the goods into the custody of the Carrier or its agents, and if prepaid is not to be returnable, and if collect, is payable ship and/or cargo lost or not lost."

Viewing the foregoing provision as a whole, it appears that thereunder, if the freight be prepaid (which, however, was not the case here), then, without any qualification, it is "not to be returnable, * * * ship and/or cargo lost or not lost." Let us suppose that the appellant had prepaid the freight under the foregoing agreement; that, upon payment, the freight belonged absolutely to the carrier, and that the same was not returnable, even though the ship were lost. Could the shipper successfully sue for the return of that which it had agreed in writing should so belong to the carrier and be not returnable? An action to accomplish that object would not be upon the contract, but would constitute an attempt to defeat its very terms.

The defendant below did not prepay the freight, but did by the same solemn written obligation bind itself to the foregoing provision that the freight, "whether prepaid by the Shipper or to be collected at destination, becomes wholly due and belongs absolutely to the Carrier upon receipt of the goods * * * and * * * is payable ship and/or cargo lost or not lost." It would be neither logical nor in accord with the plain intention of the contracting parties to hold that, if the freight was prepaid, unquestionably it belonged to, and was not returnable by, the carrier, but that, if not prepaid, the carrier, although by agreement the absolute owner of the freight, could not successfully sue for its recovery without proving an exculpating reason for failure to make delivery of the cargo at destination.

The position taken by the respondent is that the action is based solely upon the contracts in writing, which alone should control the respective rights and obligations of the parties, and respondent cites in support of its contention Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, 3 A. L. R. 15; Standard Varnish Works v. The Bris, 248 U. S. 392, 39 S. Ct. 150, 151, 63 L. Ed. 321; International Paper Co. v. The Gracie D. Chambers (1919) 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318, 321, which cases are cited in the footnote to section 29, page 59, of Poor on Charter Parties and Ocean Bills of Lading, the text of which reads as follows: "In line bills of lading, there are often elaborate provisions with regard to advance freight. Where the bill of lading provided 'prepaid freight to be considered earned on shipment of goods', and, further, that the freight was not to be returned 'ship lost or not lost', and the ship was lost soon after sailing, it was held that

the ship owner could collect the freight from the various shippers."

While it is true, as appellant points out, that the authorities cited by respondent relate to cases where freight had been prepaid and not where the shipper was suing for freight, the language used in the decisions is pertinent to the issues here presented.

In Allanwilde Transport Corporation v. Vacuum Oil Co., supra, the Supreme Court held that, where the shipper had paid the freight under a bill of lading similar to that entered into between the parties to the present action, and the voyage was frustrated and the goods never carried, the shipper had no obligation to return the freight money. In that case the court approached and disposed of a presentation and various assertions of unreasonableness and unfairness very similar to those of the appellant, as follows (page 384, 385 of 248 U. S., 39 S. Ct. 147, 148):

"The argument of counsel upon the elements of the questions is quite extensive, ranging through all of the ways in which contracts can be dissolved or their performance excused by the agreement of the parties or prevented by some supervening cause independent of the parties and dominating their convention. We do not think it is necessary to follow the argument through that range. It may be brought to the narrower compass of the charter party and the bills of lading. * * *

"Let us repeat: the explicit declaration is —'Freight to be prepaid net on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost.' The provision was not idle or accidental. It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the noncarriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure, and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation."

In Standard Varnish Works v. The Bris, supra, the shipper had prepaid the freight charges upon a shipment of goods which, because the government would not grant the ship a clearance, never left port. The court held the shipper could not recover the payments as "the contract determines against them," and said: "Their declaration [i. e., the declarations in the bills of lading] is that 'prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost.' The declaration is clear, and, in anxiety of purpose, uses some tautology. The words 'prepaid freight is to be considered as earned' declare a completed right and carried the power of retention without the expression of the latter. And the expression of the right and the power cannot be put aside. Counsel, however, would make them purposeless and would consider the bill of lading as if they were not contained in it, and urges that the only effect of the refusal of clearance to the ship was the 'commercial frustration of the adventure' working a dissolution of the contract, absolving from performance but requiring the restitution of the payments that were made as the consideration of performance."

The appellant makes no charge of fraud, misrepresentation, or mistake in connection with the issuance and acceptance of the bills of lading; nor is any attempt made by the appellant to set up any counterclaim or demand for affirmative relief, based on loss of the shipment, if such counterclaim or demand for affirmative relief could be set up in the action. Although a seeming hardship may result to the appellant, this court cannot grant relief therefrom by, in effect, making a new contract for the parties.

[3] The bills of lading contain a list of the causes of loss for which the carrier shall not be responsible; but such provisions do not in any way bar the carrier's right to collect freight on goods lost after the same have come into the carrier's possession. That right accrued upon the carrier's receipt of the goods. Any remedy which the shipper might have to recover for loss of the goods would of necessity accrue after they had been received by the carrier. The two covenants, one to pay freight and the other to compensate for lost cargo, are independent. Front St., etc., R. Co. v. Butler, 50 Cal. 574, 577.

"Where the covenants of the respective parties are to be performed at different times they are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof." Fresno Canal, etc., Co. v. Perrin, 170 Cal. 411, 416, 149 P. 805, 807.

[4] The complaint, which is in ordinary concise language, alleges the material or issuable facts constituting the cause of action. It was unnecessary for the plaintiff to allege or prove that the failure to deliver the goods at destination was due to one of the excepted clauses.

"The only allegations essential to a complaint are those required in stating the cause of action. A plaintiff need not anticipate or negative any defense or counterclaim on the part of the defendant. * * * Allegations inserted for the purpose of intercepting an anticipated defense are superfluous; they do not require an answer, and may render a pleading demurrable for ambiguity or uncertainty.

"Under this rule, a plaintiff is not bound to show affirmatively in his complaint that

the action is not barred, that he was not guilty of contributory negligence, that he did not do prohibited acts, or that he performed conditions subsequent. Nor need he negative a defense founded upon an exception to a general rule." 21 Cal. Jur. 61–63.

[5-9] It being unnecessary for the plaintiff under the Code system of pleading to anticipate any defense that might be raised, that the loss of the goods resulted from an act or omission for which the carrier would be responsible, no burden or duty rested upon the plaintiff to make proof of that which it did not have to allege; and no issue in that connection having been raised by the defendant's pleadings, the question of the carrier's responsibility, if any, for failure to deliver at destination, was not in issue. The provisions of the bill of lading control, and this fact is recognized in cases cited by appellant, among which is the case of The Hellig Olav (C. C. A.) 282 F. 534, 537, in which the court says: "It is agreed that the party issuing the bills of lading was a common carrier. There can be no doubt that as such the ship was liable as an insurer for failure to make the delivery at Copenhagen, unless she was excused by the terms of the bills of lading."

Although, upon its demurrer to the complaint, the defendant made and argued the point that failure of plaintiff to allege that the cause of loss was one for which the carrier was excused from liability, no pleading filed subsequently by the defendant raised the point, which could well have been alleged in the answer as new matter constituting a defense or counterclaim. Code Civ. Proc. § 437 (2). But that would have placed upon the defendant the burden of proof on that issue. If it be assumed that there rested upon the plaintiff the burden of proving that the loss did not result from a cause which would fasten liability upon the carrier, such proof was sufficiently made by the introduction in evidence of the record in the limitation of liability proceedings that were had in the United States District Court for the Southern District of New York (33 F.(2d) 775), wherein the final decree adjudges that the loss of the cargoes of the Suduffco were not done, occasioned, injured, or caused with, and were without, the privity or knowledge of the petitioners, and that the petitioners, and each of them, and the said steamship are not liable to any extent, and are forever exempted, exonerated, and discharged from all loss, etc. The decree established that the vessel was seaworthy upon sailing, and that the vessel was not lost through any negligence on the part of the plaintiff. The decree in that case was in rem and is binding upon the defendant and appellant. The City of Boston (D. C.) 159 F. 261; 15 Cal. Jur., pp. 138–139.

[10] The record in the United States District Court above referred to was properly admitted in evidence and the following cases support this view:

In Estate of Clark, 190 Cal. 354, 360, 212 P. 622, 625, it is held that a "judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far as it settles and determines questions of fact. * * * It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court" —citing cases.

In Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 510, 258 P. 387, 390, quoting from Freeman on Judgments, Fifth Edition, § 671, pages 1416, 1417, and section 672, page 1418:

"'* * * A former adjudication may be used for two different purposes, namely, either as a complete bar to the relitigation of the same cause of action, or as conclusive evidence of some fact or issue common to different causes of action.' * * *

"'If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject-matter of the two actions be different'"—citing many California cases.

The Price Case is further authority to the effect that, though the causes of action may be different, if the second action involve a right, title, or issue as to which the judgment in the first action is an adjudication, estoppel. so far as that right, title, or issue is concerned, must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made. See, also, Henderson v. Miglietta, 206 Cal. 125, 273 P. 581.

[11] An appeal by claimants was taken to the United States Circuit Court of Appeals from the decree last above referred to, and by stipulation of the parties the appeal was dismissed. Tr., p. 75, fol. 224. This, then, left the decree as if no appeal had been taken, and hence final.

[12] The record of the United States District Court was offered in evidence, not by the respondent, but by the appellant, whose trial attorney at first offered a certified copy of the petition of the Transmarine Corporation for limitation of liability; thereupon opposing counsel tendered a certified copy of the final decree of dismissal, stating at the time that he objected to the original petition being introduced in evidence unless other documents in that cause were also admitted. The court

ruled as follows: "If it goes in, it cannot go in part, it must go in in its entirety. * * * I take it that it won't be complete unless all of it goes in for whatever it may be worth."

Appellant's trial counsel then said: "Then I will introduce also a certified copy of the Commission's report, and under the court's ruling and under protest we will offer the court's decree. * * *"

He then offered in evidence the petition, the commissioner's report, the final decree, and stipulation of parties as to entry of final judgment ending the liability proceedings. Appellant's trial counsel stated that he would not offer the stipulation dismissing the appeal, upon which the court remarked: "If any part of it goes in all of it goes in. Whether or not it may or may not become material I don't know, because I don't know what the position of counsel is." Whereupon appellant's trial counsel said: "I don't think it does any great harm, and on Your Honor's ruling I will offer that in evidence."

The record discloses no motion to strike out any portion of the documentary evidence relating to the limitation of liability proceeding.

It needs no citation of authority to support the proposition that one is bound by the evidence which he offers even though he declare the offer to be made by him "under protest." Those words, which sometimes work magic when accompanying the payment of taxes, have no more effect upon one's offer of evidence than having one's fingers crossed at the time. Hence the appellant cannot now be heard to complain that the evidence introduced by him was inadmissible.

[13] We find no merit in appellant's second contention that the plaintiff failed to prove that defendant was a party to the contract of carriage. Identical shipping arrangements in the past had been executed between the parties to this action through the Republic Iron & Steel Company as agent for the appellant shipper, and the evidence upon this point is sufficient to establish an ostensible agency. Civ. Code, § 2300; Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 119 P. 388; Ford v. Lou Kum Shu, 26 Cal. App. 203, 146 P. 199; Niles v. Gonzales, 1 Cal. App. 324, 82 P. 212; Buckley v. Silverberg, 113 Cal. 673, 45 P. 804.

[14] After the issuance of the bills of lading, wherein the appellant was named as consignee, the appellant voluntarily received them without objection and made use of them to its own advantage, whereby it ratified the agency of the Republic Iron & Steel Company, and is bound thereby. Civ. Code, § 2307; 1 Cal. Jur. 770–777.

Having voluntarily accepted, acted upon and used the contracts for its own benefit, the appellant cannot now inconsistently deny privity. Emeric v. Alvarado, 64 Cal. 529, 587, 2 P. 418; Del Campo v. Camarillo, 154 Cal. 647, 657, 98 P. 1049; Bogart v. Crosby & Van Haren, 80 Cal. 195, 198, 22 P. 84.

[15] The appellant's third point that the claim sued upon was barred by the four-year statute of limitations is not well taken. The rights and obligations of the parties were fixed by the bills of lading when the same were signed and issued. It is undisputed that this took place on March 13, 1926. The fact that the goods were delivered to the ship before that date is immaterial where the action is founded upon the written instruments; and the action having been commenced on March 11, 1930, section 337, subdivision (1) of the Code of Civil Procedure cannot successfully be raised in bar. Collins v. Driscoll, 69 Cal. 550, 11 P. 244; Jefferson v. Wendt, 51 Cal. 573; Sherwood & Sherwood v. Gill & Lutz, 36 Cal. App. 707, 173 P. 171; New v. Denison Clay Co. (C. C. A.) 260 F. 70, 72.

That the bills of lading were not signed by the shipper is immaterial. Elder, Dempster & Co. v. St. Louis, etc., Ry. Co., 105 Tex. 628, 154 S. W. 975.

[16] The fourth point raised by appellant is that, part of the haul having been made interstate by rail, the plaintiff, who advanced the money necessary to pay rail carriers, stands in their shoes; that its action as respects rail freight is barred by the three-year limitation contained in Interstate Commerce Act § 16, subsec. 3, subd. (a), which provides that "all actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." We agree readily with the proposition that the foregoing limitation would be a bar to a rail carrier, subject to the provisions of the chapter referred to, from bringing an action more than three years after the accrual of its cause of action for charges earned.

The appellant agreed in writing to pay the respondent the freight as stated in the bills of lading, to wit, a total of $1.968.75, which is the amount sued for in the first cause of action. As to the second cause of action for $89.58, it was stipulated that "it should not be necessary or required that either party introduce any evidence * * * but * * * should in all respects be controlled and abide by the determination of the first cause of action" (Tr., p. 31, fol. 92) for $1,968.75 (making the total claim $2,058.33 as found by the court), plus interest.

Without denying that such was its agreement made for considerations, the appellant seeks to theorize a way out of its promise to pay by splitting the total amount of freight into inland and ocean freight. But the appellant has failed to bring the respondent within the provisions of the limitation quoted

by not showing that the respondent is a carrier subject to the jurisdiction of the Interstate Commerce Commission, and hence the limitation is inapplicable and the point untenable. Interstate Commerce Act, § 1 (U. S. Code Ann., title 49, Transportation, p. 10); United States v. Munson, S. S. Line (D. C.) 33 F.(2d) 211, affirmed (C. C. A., 4th Cir.) 37 F.(2d) 681, affirmed Supreme Court (March, 1931) 283 U. S. 43, 51 S. Ct. 360, 75 L. Ed. 830.

[17] It is admitted in this case that the water carrier was not acting with the rail carrier under a common control, management, or arrangement for a continuous carriage or shipment, and it was therefore not subject to the Interstate Commerce Act. Wilmington Transportation Co. v. R. R. Comm. of California, 236 U. S. 151, 153, 35 S. Ct. 276, 59 L. Ed. 508 (see, also, decision in same case, 166 Cal. 741, 137 P. 1153, affirmed by the Supreme Court of the United States in case cited); Ex parte Koehler (C. C.) 30 F. 867; In the Matter of the Jurisdiction Over Water Carriers. 15 I. C. C. 205, 207; Corona Coal Co. v. Secretary of War, 69 I. C. C. 389.

The rulings of the trial court upon the admission of certain evidence not hereinabove covered have been reviewed by this court, and no prejudicial error is found therein.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 499

PEOPLE v. MILLER.

Cr. 2175.

District Court of Appeal, Second District, Division 1, California.

May 17, 1932.

Rehearing Denied May 31, 1932. Hearing Denied by Supreme Court June 16, 1932.

1. Criminal law ⇐274.

Motion to withdraw plea of guilty for purpose of moving to quash information was addressed to discretion of trial court (Pen. Code, §§ 858, 859, 995).

2. Indictment and information ⇐140(2).

Evidence *held* sufficient to support quashing of information because of committing magistrate's failure to inform accused of right to counsel and provide means of communication (Pen. Code, §§ 858, 859, 995).

3. Indictment and information ⇐137(5).

Where accused was not informed by committing magistrate of his right to counsel, accused was not "legally committed" within statute requiring setting aside of information (Pen. Code, §§ 858, 859, 995).

4. Criminal law ⇐245.

Accused did not waive right to object to illegality of preliminary hearing where he objected and moved to withdraw plea of guilty before trial and at first opportunity after obtaining counsel (Pen. Code, §§ 858, 859, 995, 996).

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Proceeding by the People against Walter Miller. From order granting defendant's motions to set aside information and permitting defendant to withdraw plea of guilty, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., all of Los Angeles, for appellant.

Joseph L. Fainer and R. E. Parsons, both of Los Angeles, for the People.

TAPPAAN, Justice pro tem.

This is an appeal taken by the people from orders made by the Superior Court granting defendant's motions to set aside the information herein and permitting defendant to withdraw his plea of "not guilty" entered to the charge set forth in the information.

The defendant was charged by the information with the crime of murder. Defendant was placed on trial before the Superior Court on the charge contained in the information. When the case was called, defendant, through his attorneys, answered in reply to a question by the court that he was ready for trial. The court then ordered that a jury be impaneled. During the impanelment of the jury and before the jury had been sworn to try the cause, defendant's attorneys made the following motion: "We move that the entire preliminary proceedings be set aside on the ground that the defendant was not informed of his constitutional rights, was not informed that he was entitled to the aid of an attorney at all stages of the proceedings, at any time, and neither did he have an attorney. * * *." Later the motion was restated as one to quash the information and the preliminary transcript, and in that connection defendant also made a motion for permission to withdraw his plea of "not guilty" for the purpose of making the motion in reference to the quashing of the information. The court at the time the motion was first made took the matter under advisement, and continued with the impaneling of the jury. Later, and in the absence of the jury and jury panel, the court heard evidence introduced by both the

people and the defendant relative to the matters involved in the motion. This evidence may be summarized as follows: The defendant testified that, while he was confined in jail, he requested a police officer, who was the complaining witness, to secure an attorney for him. This officer advised him that at the preliminary hearing he did not need an attorney. After some further conversation, this officer stated to defendant that he would tell the jailor to call the attorney mentioned by defendant. This was not done. That, at the time of the preliminary hearing, defendant stated he was not informed of his right to have an attorney, and in fact had no attorney at this hearing. The committing magistrate testified that he had no recollection of informing the defendant of his constitutional rights as to an attorney or process to secure the attendance of witnesses at the hearing. The police officers and the court clerk testified that defendant, at the time of the hearing, was informed of these constitutional rights. The reporter, who took the testimony at the preliminary hearing, testifying from his notes made at the time, stated that he did not hear defendant informed of his constitutional rights in this regard. There was some testimony offered to the effect that the matter of the preliminary hearing was continued for the purpose of defendant securing an attorney. After hearing the evidence thus produced, the court granted both motions made by defendant.

[1-3] The question thus presented to the court was one purely of fact, addressed to the sound judicial discretion of the trial court. The evidence showed a sharp conflict in the versions of the different witnesses. Under the circumstances here, it cannot be said that the act of the trial court in granting defendant's motion to quash the information was an abuse of discretion, nor that there was insufficient evidence to support it.

Section 858 of the Penal Code provides: "When the defendant is brought before the magistrate upon an arrest * * * the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." This Code in section 859 places upon the court the duty to provide the defendant with means of communicating with counsel. The Penal Code in section 995 enumerates the grounds upon which the court must set aside an information. Among the grounds so specified is the following: "That before the filing thereof the defendant had not been legally committed by a magistrate." The law expressly requires of the committing magistrate that he inform the defendant of his right to aid of counsel in every stage of the proceeding instituted against him. The court found this was not done in the present case. That the right to be so represented and have the aid of counsel is a substantial right is unquestionable. This right was not afforded defendant, and defendant's commitment was illegal under the circumstances presented here. People v. Salas, 80 Cal. App. 318, 250 P. 526; People v. Napthaly, 105 Cal. 641, 39 P. 29.

Counsel for the people cites a number of cases in which it appears that the defendant was informed of his constitutional right to have the aid of counsel, but that he had failed to secure counsel, and the question involved was as to his right to further continuance of the preliminary hearing to enable him to secure counsel. These cases are to be distinguished from the instant case, in that here the trial court has found that defendant was never informed of such right.

The question of the power of the magistrate to further continue the preliminary hearing to a date later than the one upon which it was held is immaterial, in view of the finding of the trial court that defendant had not been legally informed of his constitutional right to aid of counsel. In this regard it may also be said that the question as to whether defendant was afforded the right to communicate with counsel vouchsafed to defendant by section 859 of the Penal Code was one of fact, and the evidence relative thereto was of a conflicting nature.

The remaining contention made by the people upon this appeal, that defendant had waived his right to object to the illegality of his preliminary hearing by his failure to interpose his objection at the time of his arraignment upon the information, is not supported by the record nor by the evidence presented upon this appeal.

[4] The fact that defendant was not represented in court by counsel at any stage of the proceedings had against him, prior to the time that he was actually placed upon trial, is not questioned. His counsel then, at that time and before the jury was sworn to try the issue presented by his plea of not guilty, made the objection and moved for leave to withdraw his plea of not guilty entered by him when he was present in court without counsel. This motion to withdraw the plea of not guilty was one addressed to the discretion of the trial court. "Even after his plea was entered, he had the right, at any time before trial, to apply to the court for leave to withdraw his plea, for the purpose of demurring or moving to set aside the information." People v. Villarino, 66 Cal. 228, 230, 5 P. 154, 155. The doctrine of waiver, as stated in section 996 of the Penal Code, has no application here. The defendant made his application at the first time afforded him after he had the aid of counsel. This rule of waiver has been applied by our courts in many cases where the motion was not made until the trial had been had or judgment en-

tered. Such cases have no application in the instant case. There was no abuse by the court in the granting of this motion. The circumstances present here are sufficient to support the trial court in the granting of the motion.

The orders appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

123 Cal.App. 649

WARREN et al. v. WATKINS et al.

Civ. 7132.

District Court of Appeal, Second District, Division 2, California.

May 24, 1932.

1. Fraud ⇐41.

Complaint by original and subsequent purchasers and assignees of partial interests in one another's claims for original sellers' misrepresentations concerning realty stated cause of action in favor of original purchasers and assignees (Civ. Code, §§ 953, 954).

2. Assignments ⇐24(3).

Cause of action for fraud in sale of realty was assignable (Civ. Code, §§ 953, 954).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by J. F. Warren and Adelaide K. Warren, husband and wife, and William T. Morgan and Velma Morgan, husband and wife, against J. F. Watkins and Ethel A. Watkins. From judgment dismissing plaintiffs' complaint, plaintiffs appeal.

Reversed, with directions.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellants.

FRICKE, Justice pro tem.

Plaintiffs brought an action to recover damages for fraud and misrepresentation in the purchase of real estate. The complaint alleges that plaintiffs J. F. Warren and Adelaide K. Warren, husband and wife, in December, 1927, entered into a written agreement for the purchase of certain land from the defendants; that they were induced to enter into said agreement through certain fraudulent representations of the defendants; that in February, 1928, the Warrens entered into an agreement with their coplaintiffs, William T. Morgan and Velma Morgan, husband and wife, whereby the latter agreed to purchase said land; that shortly prior to the contract of February, 1928, the Warrens referred the Morgans to defendants, who repeated to them the alleged misrepresentations previously made to the Warrens; and that the Morgans, believing and relying thereon, entered into said contract with the Warrens. The complaint then alleges that prior to the commencement of this action the Warrens and the Morgans entered into an agreement whereby each of said parties assigned to the other a one-half interest in and to any right of action that either of said parties had against the defendants. The trial court sustained a demurrer because of the misjoinder of parties plaintiff, and, upon the latter's refusal to amend, the judgment of dismissal from which this appeal is taken was entered.

[1, 2] The cause of action pleaded was one in favor of the Warrens, based upon their purchase of the land. The basic question here is whether, subsequent to the sale of the lands to the Morgans, the cause of action of the Warrens was assignable. Unless it was assignable, the Morgans are not proper parties plaintiff, and the demurrer was properly sustained. However, under the liberalization of the common-law rule by sections 953 and 954 of the Civil Code, a cause of action for damages arising out of the obtaining of property by fraud and deceit is assignable. Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959, and cases cited.

The judgment is reversed, and the trial court is directed to overrule the demurrer and permit the defendants to answer.

We concur: WORKS, P. J.; CRAIG, J.

123 Cal.App. 670

In re TOMPKINS' ESTATE.

TOMPKINS v. TOMPKINS et al.

Civ. 8336.

District Court of Appeal, First District, Division 1, California.

May 25, 1932.

1. Appeal and error ⇐1010(1).

Findings supported by substantial evidence cannot be reviewed.

2. Husband and wife ⇐262(1).

Unless contrary appears, law presumes money used in family's maintenance and payment of personal loans to be drawn from community funds before encroachment on separate property.

3. Husband and wife ⇐264.

Trustees asserting property left by deceased husband was his separate estate, inherited from parents, need not identify each item as inherited property.

4. Husband and wife ⇐264.

To dissipate presumption favoring community property, there need only be such evidence as would ordinarily convince unprejudiced mind.

5. Husband and wife ⇐264.

Evidence justified finding that property left by husband and claimed by widow as community property was husband's separate estate.

Facts disclosed that husband had received various gifts from his mother prior to her death, including one-fifth interest in a piece of land, and in certain stocks and bonds, which were of substantial character and value, and that husband shared in mother's estate on her death, and also shared in his father's estate, and that additional investments made by husband were from proceeds of securities previously held and not from his salary.

6. Witnesses ⇐409.

Facts and circumstances tending to contradict and impeach credibility of testimony not expressly contradicted justifies finding contrary thereto.

7. Appeal and error ⇐994(3).

Weight to be given testimony rests within trial court's discretion, and appellate court will not give credence to testimony rejected, unless record establishes certitude beyond peradventure.

8. Husband and wife ⇐263.

Where widow claimed deceased husband's property was community property, evidence of family's mode of living, and loans from husband's mother *held* admissible to show estate was husband's separate property.

9. Husband and wife ⇐263.

Where widow claimed deceased husband's property was community property, distribution decree of mother's estate showing husband's inheritance *held* admissible without showing what portion of inheritance remained his separate property.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Petition by Beatrice M. Tompkins for final distribution of the estate of Mangle Minthorne Tompkins, deceased, opposed by Philip W. Tompkins and another, trustees under the last will and testament of deceased. From a decree adjudging certain property to be separate property of deceased and distributing it to trustees, petitioner appeals.

Affirmed.

Walter E. Dorn, of San Francisco, for appellant.

Keyes & Erskine, of San Francisco, for respondents.

JOHNSON, Justice pro tem.

This is an appeal by Beatrice M. Tompkins, widow of Mangle Minthorne Tompkins, from the decree of final distribution of the estate of the decedent, wherein certain property, which is claimed by the widow to have been community property of the marriage, was adjudged to be separate property, and as such was distributed to the respondents as trustees, pursuant to certain provisions in the will of the deceased creating a trust, under which the widow is one of the beneficiaries.

The appellant makes some minor specifications of error which will be noticed later, but the chief question concerns the true character of the property in controversy.

The widow was duly appointed as executrix of the will, which was admitted to probate on August 25, 1928; and on December 27, 1929, she filed her account, together with a petition for final distribution. In the petition she averred that certain of the personal property of the estate, comprising enumerated stocks and bonds in addition to a sum of money, constituted community property of the marriage; and she prayed that one-half thereof be distributed to her individually. Objections both to the account and the petition were filed by the trustees named in the will, and in due time the account was settled. The hearing of the petition was postponed, however, from time to time, and, after the settlement of a second account, the court on October 27, 1930, made its findings, in which it found that the property in dispute and all other property of the estate was the separate property of the deceased; and, in accordance with such findings, final distribution was thereupon made to the trustees as provided in the will. Under the terms of the trust the widow and the son of the deceased are the chief beneficiaries.

The widow bases her asserted community right upon two grounds: One, the legal presumption attaching to property acquired during marriage; the other, an alleged verbal agreement effecting a conversion of separate property of the spouses into community property. It is contended that upon both grounds the evidence entitled the widow to findings and decree in her favor.

[1] The issue was largely one of fact for the determination of the trial court; and, in so far as there was substantial and credible evidence sufficiently clear and convincing to the mind of the trial judge to lead to the conclusion that the property was in fact separate property of the deceased, the court's decision upon the facts cannot be made the subject of review, even though there was also evidence to the contrary.

It can hardly be gainsaid that the evidence as a whole is sufficient to support a finding that the property in dispute represents property acquired by the decedent by gifts or inheritance from his parents.

Mr. and Mrs. Tompkins were married on July 15, 1911. At that time neither of them appears to have had any substantial possessions. Mr. Tompkins was then employed by the Montebello Oil Company in Ventura county. Before he married, he had been earning between $75 and $90 a month besides his board; and, after the marriage, his pay was from $100 to $140, less a charge of $15 for rent of a cottage. He remained with the oil company until about August, 1912, when he and his wife took up their residence in San Francisco. After a period of unemployment, during which he received an allowance of $75 a month from his mother, Mr. Tompkins became associated in 1914 with the Golden Gate Music Company, both as an employee and a stockholder. His original investment in stock of the company was in the amount of $3,000 furnished by his mother, and his salary began at $100 a month. His connection with the company continued from 1914 until his death on July 16, 1928. By March, 1917, his salary had increased by stages to $150 a month, and later this amount was increased to $300 a month, which was paid from January 1, 1919, to December 31, 1921, and thereafter he received $350 a month to the time of his death. As a stockholder in the company, his holdings increased from 503 shares on December 1, 1915, to 1,495 shares on November 4, 1916; and these shares he continued to hold until January, 1920, at which time he gave 1,468 shares to his wife, leaving himself the owner of only 27 shares during the rest of his life. The total dividends received by Mr. Tompkins from 1915 to the time of his death amounted to $11,465.70, or an average of approximately $900 a year.

Prior to the death of his mother in 1918, Mr. Tompkins appears to have had no other sources of income than those mentioned, together with certain property received as gifts from his mother; and the widow testified that throughout the period of his connection with the Golden Gate Music Company the family's living expenses were about $300 a month, except toward the end of Mr. Tompkins' life, when the expenses ran as high as $450 a month.

The mother's estate, in which Mr. Tompkins shared, was distributed on April 19, 1919; and, the father having died later, Mr. Tompkins shared also in the distribution of the father's estate under a decree made on May 27, 1921. Besides property acquired under the will of his mother, Mr. Tompkins had received as gifts from her in her lifetime a fifth interest in a piece of real property in San Francisco and a fifth interest in certain stocks and bonds. The property derived by Mr. Tompkins from his parents was substantial in character and value, as appears from the schedules before the court, and was productive of income.

The evidence indicates that Mr. Tompkins did not speculate, and that, while from time to time there were changes in the securities owned by him, such changes were brought about for the most part by purchase of new securities with the proceeds of sale of securities previously held. He had kept a record of his business transactions in a book admittedly in the possession of the widow after his death, which, however, she declared herself unable to produce at the trial. If that book had been available, the detailed dealings might have been readily followed.

[2] After the death of his parents, Mr. Tompkins acquired property in San Rafael on which he built a home. The land with the improvements and furnishings cost about $30,000; and the financing was done in large part with borrowed money. The widow testified that these loans were paid, so far as she knew, out of Mr. Tompkins' earnings, but that, when he died, there was $6,000 still due the Humboldt Bank on the house. This property was deeded to Mrs. Tompkins March 24, 1924, and was not part of the estate. It is a fair inference that the living expenses and payments made on loans must at least have equalled the earnings of Mr. Tompkins from 1914 to the time of his death. And, unless the contrary is made to appear, the law presumes that money used in the maintenance of the family is drawn from community funds before there is encroachment on separate property. Estate of Cudworth, 133 Cal. 462, 468, 65 P. 1041; Estate of Granniss, 142 Cal. 1, 6, 75 P. 324; Thompson v. Davis, 172 Cal. 491, 495, 157 P. 595; Title Ins. & T. Co. v. Ingersoll, 158 Cal. 474, 492, 111 P. 360; Van Camp v. Van Camp, 53 Cal. App. 17, 25, 199 P. 885. The same presumption attaches to payment of loans obtained on personal credit. It seems probable, however, that some of the income from the inherited property was devoted to repaying money borrowed from time to time.

In the briefs filed on behalf of the widow, much insistence is laid on the presumption that property acquired during marriage is community property, and that the burden of overcoming that presumption rests upon those contending otherwise. In this connection it is urged that the evidence is insufficient in probative force to overbear the presumption. The law demands for the purpose clear and convincing evidence; but it must be remembered that the weight and credibility of the testimony are to be gauged by the trial court. If, upon an analysis of evidence of substantial character, in the light of the established rules, the mind of the trial judge, exercising reasonable discrimination, is satisfied that

the naked presumption in favor of community property has been outweighed, then the findings of the trial court must prevail. Estate of Nickson, 187 Cal. 603, 606, 203 P. 106.

[3, 4] It is contended, however, by the widow that it devolved upon the trustees, asserting all the property left by the deceased to be his separate estate, to identify positively each item either as property inherited in specie from one of the parents or acquired with the avails thereof. But there is no absolute requirement of such precise identification. Proof should consist of the best evidence reasonably obtainable, but the law does not exact the impossible; and it must be remembered that the widow had been in possession of her husband's records after his death, but testified that they had been lost in some way. Circumstantial as well as direct evidence is receivable, and legal proof is that made by a preponderance of the evidence under all the facts and circumstances as presented in each individual case. Upon the submission of the controversy, it is then for the court to draw its reasonable inferences from all the evidence adduced, bearing in mind the rule that, to dissipate the naked legal presumption in behalf of the community right, there need be exhibited only "such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind" (Freese v. Hibernia S. & L. Soc., 139 Cal. 392, 395, 73 P. 172, 173; Ballinger on Community Property, § 167); or, as otherwise expressed, "such proof as would so convince the mind of the ordinary practical every-day man that he would be willing to act upon it in the business affairs of life" (McKay on Community Property, § 221; Estate of Nickson, supra; Estate of Pepper, 158 Cal. 619, 622, 112 P. 62, 31 L. R. A. (N. S.) 1092; Freese v. Hibernia S. & L. Soc., supra; Stewart v. Stewart, 113 Cal. App. 334, 298 P. 83).

[5] While we have not recited the substance of all the testimony given, and have omitted reference to some which the widow regards as favorable to herself, we have no hesitancy in saying that in our opinion there was sufficient evidence to justify a conclusion that the property left by Mr. Tompkins represented property acquired by gift or inheritance from his parents.

Irrespective, however, of the source of the property, the widow bases her claim also on a verbal agreement, which she said was made between herself and Mr. Tompkins before their marriage. On this subject she testified: "Mr. Tompkins said at the time we were married he did not have very much money at that time, but he expected during his lifetime to get money from his mother and father, and that would be community property. It would be as much mine as his."

There is evidence that at various times bank accounts in the name of Mr. Tompkins were changed to joint accounts of himself and wife, and that he gave her the stock of the music company and the San Rafael home. On the other hand, his will operates as a declaration on his part that his property was his to dispose of in his discretion, and, in the assertion of testamentary power over "all the property real and personal" owned at the time of his death, he created a trust for the benefit of his wife and his son. The testimony of Mrs. Tompkins, which was not without inconsistencies, was therefore to be weighed against the will itself, and against all the other facts and circumstances in evidence.

[6] The general rule that the uncontradicted testimony of a witness to a particular fact is not to be disregarded has its exceptions. There are modes of impeachment other than by direct contradiction, such as the manner and motives of the witness, faultiness of memory, indefiniteness and evasiveness of answers on cross-examination, inconsistent conduct of the parties, and adverse independent facts and circumstances. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; Blanc v. Connor, 167 Cal. 719, 722–723, 141 P. 217; Caldwell v. Weiner, 203 Cal. 543, 546, 264 P. 1100; Michener v. Hutton, 203 Cal. 604, 612, 265 P. 238, 59 A. L. R. 480; Staples v. Hawthorne, 208 Cal. 578, 583–584, 283 P. 67; First Nat. Bank v. Shipley, 109 Cal. App. 194, 200, 292 P. 996; Cowan v. Hill, 109 Cal. App. 656, 659, 293 P. 871; Younger v. Younger, 112 Cal. App. 445, 447, 296 P. 1104.

[7] The weight and credit to be given to the testimony on this point as upon others was within the province of the trial judge; and this court would not be justified in giving credence to testimony which he rejected, unless the record were such as to establish certitude beyond peradventure.

To our minds, the evidence as a whole supports the findings of the trial court, declaring all the property of the estate to have been separate property of the deceased.

[8] Regarding the evidence, it is contended that the court erred in admitting testimony of the mode of life of Mr. and Mrs. Tompkins during his employment in Ventura county, likewise of loans made to Mr. Tompkins by his mother after he moved to San Francisco, and also testimony concerning the cost of the San Rafael home and the gift of that property to Mrs. Tompkins. Since the character of the property acquired by Mr. Tompkins was brought into issue, and he was not able to speak for himself, it was proper to address inquiry to the situation of the parties at the time of their marriage, and to ascertain by what means the family expenses were met as the years passed. It was proper to show, also, that it was not until after the death of the parents of Mr. Tompkins that an expensive home was acquired; and, just as Mrs.

Tompkins herself introduced evidence of transfers of bank deposits from individual accounts of the husband to joint accounts of the spouses, so the trustees were entitled to show a gift of the home to the wife, in support of an inference opposed to Mrs. Tompkins' testimony concerning a prenuptial agreement of common ownership.

[9] Error is assigned further because of the admission of the decree of distribution of the estate of Mr. Tompkins' mother without pointing out what portion of his share remained as property of Mr. Tompkins himself when he died. The evidence shows that among other things upward of $30,000 in money came to Mr. Tompkins from the sale of certain real property which had belonged to the mother; and what has been said on the subject of tracing mutations is a sufficient answer to the criticism expressed. We find nothing in the record justifying any complaint.

The decree of final distribution is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 508

ERRO et al. v. CITY OF SANTA BARBARA et al.

Civ. 8000.

District Court of Appeal, First District, Division 2, California.

May 18, 1932.

1. Municipal corporations ⇐323(3).

Complaint in action to restrain proceedings to open private alley to public *held* to allege gross abuse of discretion amounting to legal fraud, though not using word "fraud," nor expressly alleging collusion between city council and owners of lots benefited.

The complaint alleged that plaintiffs had perpetual easement or right of way to private alley, that owners of other lands in assessment district had no right to use it, that owners of some of such lands procured institution of proceedings to form district and open portion of alley to public use, and that proposed district was of no possible public benefit to plaintiffs, but for sole private benefit of such other owners.

2. Pleading ⇐204(4).

Complaint stating cause of action in equity for any one of several plaintiffs is sufficient against general demurrer.

3. Eminent domain ⇐85.

Lot owners' perpetual right under partition decree to use private alley is property right, which cannot be taken or damaged without compensation (Const. art. 1, § 14).

4. Municipal corporations ⇐458.

Public improvement assessment so arbitrary and unjust as to work confiscation of private property is legal fraud on owners.

5. Appeal and error ⇐758(3).

Appellate court need not search record to determine point presented by reprint of all evidence taken, complete copy of trial court's findings, and general statement that evidence did not support them.

6. Constitutional law ⇐280.

Proceedings in which property owners, given perpetual right to use private alley by partition decree, were assessed for benefits from opening thereof to public without compensation, *held* void as to them (Const. art. 1, § 14).

Appeal from Superior Court, Santa Barbara County; T. A. Norton, Judge.

Action by Miguel Erro and others against the City of Santa Barbara and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

J. F. Goux, City Atty., and Coleman E. Stewart, Deputy City Atty., both of Santa Barbara, for appellants.

Robertson & Crawford, of Santa Barbara (Ernest D. Wagner, of Santa Barbara, of counsel), for respondents.

NOURSE, P. J.

The plaintiffs seek by this action to have the proceedings of the city council of the city of Santa Barbara for the opening of an alleyway declared void and to restrain the defendants from taking further proceedings to that end. Plaintiffs had judgment, and the defendants appeal upon typewritten transcripts.

The proceedings taken under the Street Opening Act (St. 1889, p. 70, as amended) were designed to declare public an existing private alley 20 feet in width and about 315 feet in length, commencing on the northeasterly line of Chapala street in block 142 and running at right angles northeasterly to the end of lot 21. The complaint alleged, and the trial court found, that all the lands belonging to the plaintiffs and lying northerly and northeasterly of the proposed alley have a perpetual easement or right of way to the existing private alley, and that all the other lands included in said assessment district and lying to the south of said alley did not have any right to the use of the existing alley. By a decree of partition in the estate of Orella, the superior court in Santa Barbara county on October 10, 1914, adjudged the plaintiffs

in this action to have an easement and the right to use a certain alley designated as "Caesar alley" appurtenant to the lots therein distributed to the plaintiffs and their predecessor, which alley is found in the proceedings here under review to be a way of the uniform width of 20 feet commencing at Chapala street and running northeasterly to the end of lot 21 and then northerly at the same uniform width to the southerly line of Figueroa street. After the entry of this decree the owners of lot 12, which is south of said alley, and which is one of the lots included in said assessment district, commenced the construction of a building on said lot, and commenced the use of said private alley as a means of ingress to and egress from the rear of the building erected on that lot. The plaintiffs in this proceeding thereupon commenced an action in equity against the owners of lot 12, and by decree of the superior court it was adjudged that these plaintiffs had the sole and exclusive right to the use of said alley, and the defendants therein were perpetually restrained from using the same or setting up any claim thereto. It is alleged in the action now before us, and the trial court so found, that immediately following the entry of the latter decree the owners of lot 12, in conjunction with the owners of lots 5, 7, and 11, procured the institution of the proceedings before the city council for the formation of said assessment district and the opening of a portion of this alleyway to public use. (It should here be noted that the street opening proceedings contemplate the opening of that portion of the alleyway which adjoins the properties of the defendants and which are designated as lots 5, 7, and 11 and 12. It does not include that portion of the alley running from Figueroa street southerly to the rear of lot 21.) When the proceedings were instituted before the city council, all the plaintiffs herein, who are the owners of lots fronting on Figueroa street and running back to the proposed public alley, and the plaintiffs, who are the owners of lots fronting on State street and running back to that portion of the private alley which runs from Figueroa street and to the rear of lot 21, joined in protest to the city council, stating as grounds of their protest that they were the owners and had the sole right to use the entire alley running from Chapala street through to Figueroa street; that the proposed assessment district was confined to the properties of these plaintiffs and to the four lots south of the proposed alley heretofore mentioned; that the proposed assessment district was of no possible public benefit to the protestants, but that the proposed district was for the sole private benefit of the owners of lots 5, 7, 11, and 12. This protest was denied and the proceedings progressed to the filing of a commissioner's report wherein and whereby the owners of those lots facing on Figueroa street and running back to the proposed alley were listed as having an ownership in the land to be taken and were assessed for benefits for the proposed improvement; the owners of all the lots facing on State street and running back to that portion of the private alleyway which was not taken for public use were listed as having no interest or property in the land taken, but were assessed for benefits for the proposed public improvement, and the same action was taken as to the owners of lots 5, 7, 11, and 12.

In the action now under review the trial court found that the proceedings leading to the opening of the public alley were void because they were not instituted for a public purpose, but were instituted solely for the use and benefit of the owners of lots 5, 7, 11, and 12; that none of the property of the plaintiffs in said assessment district could be benefited by the opening of said alley; that the alley could not be used as a thoroughfare except in conjunction with the private alley created by the decree of partition in the Orella estate and assigned to these plaintiffs in private ownership; that all the plaintiffs herein have by the terms of said decree a private alley and a right to use the same over all the premises defined in the proceedings before the city council; and that these proceedings are void as to these plaintiffs because they contemplate the taking of private property for a public purpose without due process of law and without compensation made to the owners of the property to be taken.

[1-4] On this appeal the appellant raises but two points: First, that the complaint does not state a cause of action; and, second, that the evidence is insufficient to support the findings of fact. On the first point they argue that the complaint is insufficient because it fails to allege that the proceedings before the city council were the result of fraud, collusion, or a gross abuse of discretion. It is true that the complaint does not use the word "fraud" in any of its allegations, and collusion between the city council and the owners of the lots to be benefited by the proceedings is not alleged in express terms, but it cannot be said that the facts pleaded to do not present a case of gross abuse of discretion amounting to legal fraud. If the complaint states a cause of action in equity for any one of the plaintiffs, it is sufficient against a general demurrer. We have endeavored to point out in the foregoing statement of facts that the complaint alleged and the trial court found it to be a fact that the owners of all those lots facing on State street and running back to the portion of the private alleyway which is not proposed to be taken were assessed for benefits for the opening to the public of that portion of the alley which does not adjoin their properties. (Lot 21 excepted.) Thus lot 1, facing on State street

with a width of 21.6 feet on State street and a depth of 125 feet on Figueroa street, is assessed for benefits in the opening of the alley which runs from Chapala street down to the end of lot 21, the nearest portion of the proposed alleyway being more than 100 feet distant from any portion of this lot 1. Lots 16 to 20, inclusive, all facing on State street, do not adjoin the proposed alleyway, and the owners of those lots could have no possible use of the alleyway except through the approach over the portion of the private alley which is not taken in these proceedings. However, it is alleged in this complaint, and found by the trial court, that the owners of all these lots have a perpetual right to the use of the existing alley by reason of the partition decree, and this, of course, is a right of property which cannot be taken or damaged without compensation first paid therefor under the express terms of section 14 of article 1 of the Constitution. The case comes squarely within the rule of those cases which hold that, when the assessment for a pubic improvement is so arbitrary and unjust as to work a confiscation of private property, it is not a legal assessment, but is in effect a legal fraud upon the owners of private property which is not conclusive upon the court. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 32, 148 P. 217, L. R. A. 1918E, 197; People v. City of Los Angeles, 62 Cal. App. 781, 793, 218 P. 63; Swall v. County of Los Angeles, 42 Cal. App. 758, 764, 184 P. 406; Federal Construction Co. v. Ensign, 59 Cal. App. 200, 209, 210 P. 536; Cutting v. Vaughn, 182 Cal. 151, 156, 187 P. 19; Irish v. Hahn, 208 Cal. 339, 347, 281 P. 385, 66 A. L. R. 1382.

It is suggested that the plaintiffs might derive some benefit from the opening of this portion of the alley to the public, in that it would enable the police and fire departments of the city to have more ready access to their properties. But, though this would be a public use of the existing alley, it is nevertheless a use for which the public must pay, and there can be no doubt that the private right which all the plaintiffs have to the use of the existing alley is a property right which cannot be taken for the benefit of the public without compensation. In the concurring opinion of Justice Sloss in Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 699, 137 P. 1119, 1142, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, it is said: "I think it cannot be doubted that an order, compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. For property consists, not of the tangible things, whether realty or chattels, over which dominion is claimed, but of the right to possess or use those things. An order requiring the owner of a house to permit others to occupy and use it, is a taking of that house, although the legal title remains in the owner." Thus, aside from the technical objections to the complaint which might apply to those plaintiffs whose lots face on Figueroa street, it cannot be doubted that, in so far as the action covers those plaintiffs whose properties face on State street and do not adjoin the proposed public alley, the complaint clearly states a cause of action when it shows that the proposed public improvement assesses those properties without any possible benefit to them and without any plan to compensate the owners of those properties for the property taken for the public use.

[5, 6] The second point raised by the appellants is presented by a reprint of all the evidence taken at the trial, followed by a complete copy of the findings made by the trial court. This is followed by the very general statement that the evidence does not support these findings. It is not incumbent upon this court to search a record of this character to determine a point raised in this manner. However, it must be conceded that, irrespective of the rights of the group of plaintiffs first mentioned above, there is sufficient evidence showing that those plaintiffs whose properties face on State street own a perpetual right to the use of the existing alley, and that in the assessment proceedings no compensation is allowed or contemplated to be paid them for taking this property right. Since these owners are assessed for benefits for the use of their private property without compensation to them for the public use of the same property, the proceedings are void as to them, and this alone is sufficient to support the judgment.

Judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

123 Cal.App. 547

GOLISH v. FEINSTEIN.

Civ. 6937, 7091.

District Court of Appeal, Second District, Division 1, California.

May 19, 1932.

1. Judges ⇐51(4).

Party contending judge hearing motions regarding vacating of judgment was prejudiced had burden of showing such bias.

2. Judges ⇐51(4).

Finding that no prejudice "has been shown to exist" *held* sufficient to sustain order that no prejudice existed on part of judge hearing motions regarding vacating of judgment.

3. Appeal and error ⇐1199.

Proceeding to transfer motions for vacation of judgment on ground judge was disqualified may be heard by court after appeal from order denying disqualification.

4. Appeal and error ⇐957(1).
Judgment ⇐139.

Vacation of default judgment rests within trial court's discretion, and, unless abused, order vacating judgment will not be disturbed (Code Civ. Proc. § 473).

Appeals from Superior Court, Los Angeles County; Marshall F. McComb and Harry W. Falk, Judges.

Action by R. H. Golish against Bob Feinstein, doing business under the fictitious name and style of Bob Feinstein & Co. From orders denying objection to hearing and determination of motions by named judge and granting motions to set aside default and to strike out portion of second amended complaint, plaintiff appeals.

Affirmed.

Frazier McIntosh, of Los Angeles, for appellant.

Paul J. Ziegler, of Los Angeles, for respondent.

YORK, J.

Two appeals have been prosecuted by the plaintiff in the above-entitled action, which appeals come to this court upon bills of exceptions.

The default of the defendant for failure to answer the second amended complaint was entered on the 11th day of July, 1929; a judgment by default by clerk was entered in plaintiff's favor on the same day; and execution was placed in the hands of the sheriff. Thereafter, on the 15th day of July, 1929, defendant served and filed his notice of intention to move to vacate the said default judgment, and at the same time served his notice of intention to move for judgment on the pleadings, and to strike the second amended complaint. These motions came on to be heard in the law and motion department on the 17th day of July, 1929, at which time said motions were transferred by the judge therein presiding to the department of Judge Marshall F. McComb for hearing and determination. Before said motions were called for hearing, plaintiff presented to the court and filed with the clerk her verified objections to the hearing by Judge McComb of any further issue of law or fact, upon the ground of bias and prejudice of said judge. By stipulation, these objections were heard by Judge Falk and were by him denied; whereupon plaintiff immediately perfected her appeal from said order, which is appeal herein numbered 6937.

Judge McComb, notwithstanding the pendency of said appeal, proceeded to hear and determine all of defendant's motions, and granted the motion to set aside default, vacated the judgment, recalled the execution, struck out one cause of action from the second amended complaint, denied a motion for judgment on the pleadings, and granted respondent ten days within which to answer. The second appeal numbered 7091 is prosecuted from said order.

[1, 2] Appellant contends that, while Judge Falk found that no bias or prejudice "has been shown to exist," this finding is insufficient, and does not amount to a finding upon the direct issue as to whether or not bias or prejudice did exist, and that, in any event, there being no finding that bias or prejudice did not exist, the order denying appellant's objections is erroneous.

The burden was upon appellant to show that bias or prejudice existed on the part of the judge complained of, and, in the absence of proof of that fact, the presumption is that no bias or prejudice actually existed, and a finding such as made herein is sufficient to uphold the order appealed from.

Appellant's ground for her appeal (No. 7091) from the order made and entered in the case by Judge McComb are (a) lack of jurisdiction of the court; (b) that no mistake, inadvertence, or excusable neglect were shown; (c) that the application was not made in good faith; and (d) that the court should have granted the motion for judgment on the pleadings.

[3] In support of the first ground, appellant maintains that, an appeal having been taken from the order denying appellant's objections to further proceedings before Judge McComb, the Superior Court had no jurisdiction to proceed further with the hearing of the motion to vacate the default judgment until the question of Judge McComb's quali-

fication should be determined by this court. We are of the opinion that the proceeding by which appellant filed her objections to the hearing of defendant's motion by Judge McComb, and in which she requested that the matter be transferred to the department of another judge of said court, is analogous to a motion for change of venue, and that therefore the court had jurisdiction to proceed to hear the defendant's motion to vacate default judgment after the appeal had been taken from the order denying the disqualification of Judge McComb. The statement made by the court in the case of Hibbard v. Chipman, 1 Cal. Unrep. Cas. 16, to wit, "It was not error for the court to proceed with the trial after notice of an appeal from its decision refusing a change of venue. Such a course would be a most vicious practice. Every case in which one party sought delay would have to be continued upon an application for change of venue, however frivolous or imperfect it may be presented"—is applicable to the instant case.

[4] Whether or not a default judgment should be vacated under section 473, Code of Civil Procedure, is a question that is clearly within the discretion of the trial court, and, in the absence of a showing of abuse of such discretion, an order vacating such judgment will not be disturbed upon appeal.

No answer having been filed at the time the motion for judgment on the pleadings was made, there was no error made by the trial court when it denied such motion.

The orders appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

123 Cal.App. 618

PEOPLE v. PORTER.

Cr. 1194.

District Court of Appeal, Third District, California.

May 21, 1932.

1. Witnesses ⇐277(2).

In prosecution for theft, general question on accused employee's direct examination whether he had accounted for all employer's goods and proceeds permitted complete cross-examination respecting misappropriations (Pen. Code, § 1323; Const. art. 1, § 13).

2. Witnesses ⇐277(3).

Notwithstanding accused need not testify for himself, upon doing so he can be cross-examined respecting past conduct inconsistent with present testimony (Pen. Code, § 1323; Const. art. 1, § 13).

3. Witnesses ⇐277(4).

In prosecution for theft, accused employee's direct testimony of fully accounting for employer's goods justified detailed cross-examination respecting normal, and other sources of, income.

4. Criminal law ⇐1036(1).

In prosecution for theft, admitting evidence without objection that accused employee issued fictitious checks on employer's bank account *held* not reversible error.

Admitting the evidence was not reversible error, since, although some of the transactions amounted to forgery, and the evidence indicated a general course of moral turpitude on accused's part and was prejudicial to him without tending to prove his guilt of the crime charged, it was adduced without objection.

5. Criminal law ⇐1036(1).

On appeal, accused cannot complain for first time of proof of crime other than that charged.

6. Criminal law ⇐1129(3).

Appellate court need not search voluminous transcript to discover evidence to support general assertion of error respecting admission of evidence.

7. Criminal law ⇐491(1).

In prosecution for theft, accused employee's signature on inventories furnished employer and on checks on employer's bank account *held* provable by expert's testimony.

8. Criminal law ⇐698(1).

Notwithstanding evidence of crimes neither directly nor indirectly connected with offense is incompetent, failure to object thereto waives error.

9. Criminal law ⇐369(2).

Evidence of crimes other than that charged is competent if logically tending to prove fact material to crime charged.

10. Criminal law ⇐683(2).

Permitting certain witnesses to testify in rebuttal *held* not erroneous; order of trial being largely within trial court's discretion.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Charles B. Porter was convicted of grand and petit larceny, and he appeals.

Affirmed.

Nathan F. Coombs, of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of grand and

petit theft on three counts of an indictment which was returned against him by the grand jury in Napa county. The indictment charged him with ten separate offenses which were set out in as many different counts. The first count charged him with arson. The remaining counts charged him with grand theft of farm produce and materials. He was convicted on the third, fourth, and sixth counts, and acquitted on the remaining charges. This appeal is taken from the judgment which was entered against the defendant on his conviction of the charges contained in the third, fourth, and sixth counts of the indictment, and from the order overruling a motion for new trial.

The defendant was employed from November, 1929, for the period of about a year and a half, as superintendent of a 600-acre farm in Napa county, owned by the Spreckels family and operated in the name of the Monarch Investment Company. During that period of time the ranch produced a considerable quantity of grain, hay, and fruit. From time to time, much hay and straw were stored in a large barn which was situated on the premises. The defendant purchased the seed grain, materials, and provisions which were used on the premises. He employed and maintained the help with which the farm was operated. He was authorized to and sold much of the produce from the farm in behalf of the company. He kept an account of the money belonging to the Monarch Investment Company in the Bank of America at Napa. He also maintained separate accounts in the First National Bank of Napa in the names of himself and his wife, Clara. He paid the farm obligations, such as the wages of employees, provisions, and materials which were used on the premises, by means of checks which he drew against the farm account. The prosecution claimed that from time to time the defendant appropriated large quantities of wheat, hay, straw, and fruit belonging to the company, which he sold, and deposited the proceeds thereof in his own account, converting it to his own use; that he also appropriated to his own use a quantity of iron pipe belonging to his employer; that he drew forged checks in the names of fictitious persons, to account for the absence of proceeds from the sales of produce which was missing from the farm; that the total value of products which the defendant failed to account for exceeds the sum of $3,700. In May, 1931, the defendant furnished the company with an inventory of property which was presumed to be in his possession. June 24th of that same year, the barn was destroyed by fire. The defendant claimed large quantities of hay and grain belonging to the Monarch Investment Company were burned in this fire. An auditor was then procured and sent to the farm to obtain an accounting. It was discovered that much of the produce belonging to the company was missing. The defendant was indicted for the burning of the barn and the theft of hay, grain, fruit, and iron pipe, as above related. At the trial, he was convicted of three counts and acquitted of the remaining charges. From the judgment of conviction this appeal was perfected.

[1] It is not contended the evidence is insufficient to support the verdict of guilty of the three counts of the indictment of which the defendant was convicted. The appellant claims, however, that he was compelled to become a witness against himself, contrary to the provisions of section 1323 of the Penal Code and article 1, § 13, of the Constitution of California, by cross-examining him, over objection, far beyond the scope of the examination in chief, which resulted in prejudice to him and a miscarriage of justice. The appellant also claims the district attorney was guilty of prejudicial misconduct, and that the court erred in admitting evidence of defendant's guilt of the crime of forgery which charge was contained in none of the counts of the indictment.

The cross-examination was not extended beyond legal bounds. Proof of the several counts of grand theft with which the defendant was charged, necessarily involved an accounting of the receipts and disbursements incident to the operation of the farm while he was acting as superintendent thereof. Besides the charge of arson, the defendant was accused in the other nine counts of the indictment of appropriating large quantities of wheat, hay, straw, and fruit. The defendant took the witness stand in his own behalf. It is true that the only evidence which he gave on direct examination regarding the grand theft charges is the following:

"Q. In connection with the hay, grain, straw *and other produce* that was either on the ranch, when you took charge, or was raised, while you were there, was there any money received by you from the sale of hay, grain, straw or produce for which you did not account to either Mr. Armstrong or to the Monarch Investment Company? A. There was not."

This question, and general answer to the effect that he had accounted for all the produce of the ranch and the proceeds of the sales thereof while he had charge of the farm, opens the doors for a complete investigation on cross-examination to ascertain whether he did not appropriate products of the farm to his own use by selling some of them and pocketing the proceeds thereof. Section 1323 of the Penal Code provides that: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a

witness, he may be cross-examined by the counsel for the people *as to all matters about which he was examined in chief.*"

[2] The well-established rule with respect to the latitude which may be permitted in the cross-examination of a defendant when he has taken the witness stand in his own behalf is that there is no power in the law to compel the defendant to take the witness stand in his own behalf, but when he does it he may be asked any question which will show his past conduct to be inconsistent with his present testimony. People v. Gallagher, 100 Cal. 466, 475, 35 P. 80.

[3] For the purpose of determining whether the defendant had accounted for all of the produce from the farm which he had sold, it was competent to show what his normal and legitimate income would be, whether there were contributions to his personal bank account from sources other than his salary and legitimate income which might reasonably indicate the appropriation of proceeds from illegal sales of farm produce, and the sources from which these excess sums were derived. There appears to have been no abuse of discretion in permitting an extensive and detailed cross-examination of the defendant under the circumstances of this case.

[4-6] The appellant contends that the court erred in permitting the prosecution to adduce evidence to prove that the defendant was guilty of "separate and distinct offenses * * * not embraced within the indictment." The appellant also complains of the admission of evidence by an expert witness on handwriting regarding the genuineness of the signature of the defendant on certain bank checks by means of which he appropriated funds belonging to the Monarch Investment Company. The record contains evidence indicating that the defendant issued several fictitious bank checks upon the fund of the company in payment of pretended services of farm hands, indorsing the names of the payees of these checks and appropriating the money. Some of these transactions amounted to forgery. This evidence indicates a general course of flagrant moral turpitude on the part of the defendant in the handling of the affairs of the farm enterprise. We have no doubt this evidence was prejudicial to the defendant. Much of this testimony was incompetent. It shows a general course of moral turpitude in the conduct of his employment, but it throws no light upon the defendant's guilt of the charges of arson and grand theft of farm produce with which he was charged in the indictment. This evidence, however, does not constitute reversible error for the reason that it was adduced without objection. A defendant may not complain of proof of an offense distinct from the crime with which he is charged, for the first time, on appeal. In the appellant's brief we are directed to no citation in the record indicating that the defendant objected to the introduction of any of this testimony. The appellant's assignments of error with respect to the challenged evidence regarding other offenses merely assert that the court erred in admitting evidence of the defendant's indorsement on certain bank checks which were identified by numbers, and that the court erred in admitting the testimony of certain witnesses, naming them, and referring to the volume and page of the transcript where such evidence appears. We have examined each reference to the transcript, and have made an independent search of the record in vain for any objection to this evidence on the part of the defendant. The record contains over 1,900 pages. This evidence appears to have been admitted without objection. An appellate court may not be expected to search through 1,900 pages of transcript to discover evidence in support of a general assertion of error alleged to be therein contained. From a somewhat careful investigation of the record, it does appear that evidence of other offenses committed by the defendant was adduced without objection. These offenses consist of embezzlement of funds by means of forged and fictitious checks. In the absence of an objection to this testimony there was no error in permitting its introduction.

[7] With respect to the evidence of the handwriting expert, it appears the defendant furnished the company with numerous inventories and statements of property belonging to his employer. These documents contained the handwriting of some individual. On cross-examination the defendant denied that these instruments were in his handwriting. It became material to prove his handwriting in these inventories, because they contained admissions on his part that he had been possessed of farm products and money therein listed which he had failed to account for. It was therefore competent to call an expert witness to identify the handwriting as that of the defendant. It was also competent to prove by an expert witness the genuineness of the defendant's indorsement of these fictitious checks, or upon any other instrument containing his genuine signature, for the purpose of comparison so as to charge him with the produce and money acknowledged by these inventories to have been in his possession.

[8] It is true that evidence of the commission of a crime by the accused introduced over his objection, which is neither directly nor indirectly connected with the offense with which he is charged, may constitute reversible error. The rule is aptly stated in 16 C. J. 586, § 1132, as follows: "The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows

or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible." 8 Cal. Jur. 58, § 167; People v. Lane, 100 Cal. 379, 34 P. 856; People v. Coan, 85 Cal. App. 580, 259 P. 998.

This rule contemplates an objection on the part of the accused person, to such incompetent and prejudicial evidence. A failure to object to such incompetent evidence is a waiver of the error.

[9] It is equally true that the introduction of evidence of offenses other than the one with which the accused person is charged is competent and admissible when such evidence logically tends to prove any fact material to the establishment of the crime for which he is being tried. 8 Cal. Jur. 60, § 168.

There appears to have been no reversible error in admitting proof of the forged and fictitious checks by either expert or non-expert witnesses, for the reasons heretofore assigned.

[10] There was no error in admitting the testimony of certain witnesses in rebuttal. The order of trial is a matter largely in the discretion of the trial court. The record shows no abuse of discretion in that regard.

The evidence of the guilt of the defendant of the grand thefts of which he was convicted, seems quite convincing. There appears to have been no miscarriage of justice in the judgment of conviction in the present case.

The judgment and the orders are affirmed.

I concur: PLUMMER, J.

123 Cal.App. 646

DEMATTEI v. LAGOMARSINO et al.

Civ. 7962.

District Court of Appeal, First District, Division 2, California.

May 24, 1932.

1. Appeal and error ⇐1071(1).

Failure to make findings of fact was harmless, where undisputed evidence showed that plaintiff had mistaken his remedy.

2. Partnership ⇐108.

Partner could not maintain action at law against copartners for amount claimed to be due by reason of partnership transactions, but must sue for accounting.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Giovanni Demattei against Guiseppe Lagomarsino and another. From judgment for defendants, plaintiff appeals.

Affirmed.

Raymond D. Williamson, of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, for respondents.

SPENCE, J.

Plaintiff's complaint contained two counts. The first was for the alleged agreed rental of certain lands, and the second was for the alleged reasonable rental value of said lands. Upon a trial by the court sitting without a jury, defendants had judgment, from which judgment plaintiff appeals.

The record discloses that plaintiff had previously brought an action against the defendants seeking an accounting and settlement of their partnership affairs. In that action it was alleged by plaintiff and admitted by defendants that the parties had formed a partnership and engaged in the vegetable and truck gardening business. Although a minute order was made in that action ordering judgment in favor of defendants, the record before us does not disclose whether judgment was ever entered or whether any further proceedings were had therein. Thereafter plaintiff brought the present action seeking to recover from defendants upon common counts. A bill of particulars was demanded and furnished. It appears from said bill of particulars that plaintiff was seeking to recover from defendants two-thirds of certain rentals and other charges which he claimed to have paid in connection with the partnership affairs. Upon the trial the uncontradicted testimony of plaintiff and his witnesses showed that plaintiff and defendants had been partners, and that their partnership affairs had never been settled. The trial court made no findings of fact, but entered the judgment for defendants.

[1, 2] In the light of the record before us, which contains no findings of fact, we are at a loss to understand appellant's contention that "there is no evidence to sustain the findings." The evidence is briefly reviewed in appellant's brief, and the further contention is made that the evidence established a prima facie case, and that the trial court erred in rendering judgment for defendants. We find no merit in this contention, and we do not believe that a reversal is required by reason of the trial court's failure to make findings of fact. As the evidence showed without conflict that in this action at law appellant was attempting to recover from his copartners an amount claimed to be due to him by reason of partnership transactions before any settlement of the partnership af-

fairs had been made, he cannot prevail. It is well settled that such matters must be adjusted in an action for an accounting, and that an action at law cannot be maintained for that purpose. De Rigne v. Hart, 94 Cal. App. 209, 270 P. 1013; Dukes v. Kellogg, 127 Cal. 563, 60 P. 44; 20 Cal. Jur. 759.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

123 Cal.App. 648

COOPER v. MARGULIS–STULMAN CO. et al.

Civ. 7121.

District Court of Appeal, Second District, Division 2, California.

May 24, 1932.

Principal and agent ⇐78(6).

Evidence *held* sufficient to support finding that defendants received stated sum from plaintiff, paid out smaller sum for her, and retained difference.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Katie Feidner Cooper against the Margulis-Stulman Company, a corporation, M. Murdock, and L. L. Redfern. From a judgment against defendants Murdock and Redfern, they appeal.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Roland W. Schoettler and E. Foster Brigham, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a judgment in favor of the plaintiff and against the appellants only, for the sum of $712.71. The sole ground of appeal is that the evidence is insufficient to support the following findings: "That at various times between the 5th day of February, 1926, and the 26th day of July, 1928, the plaintiff paid to the defendants, M. Murdock and L. L. Redfern, the sum of $2,354.26 in cash, and thereafter the said defendants paid out on behalf of the plaintiff various sums of money amounting in all to the sum of $1,641.55, and that the said defendants retained and still retain the sum of $712.71 out of the moneys paid by plaintiff to the said defendants."

The testimony of the appellant Murdock shows the receipt by appellants of $2,354.26, and that they paid out for respondent $1,641.55, and nothing more. One direct question and its answer is sufficient to dispose of the appeal. Counsel: "Q. So that you still have on hand of Mrs. Cooper's money $721.77—is that correct? A. Yes sir." In more detail we come to the same conclusion from the remainder of the testimony. There is no merit in the appeal.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

123 Cal.App. 701

PALLETT et al. v. PALLETT et ux.

Civ. 4551.

District Court of Appeal, Third District, California.

May 26, 1932.

Rehearing Denied June 25, 1932.

1. Trusts ⇐44(1).

Findings that no community family funds belonging to heirs of deceased were invested in ranch, and that no resulting trust existed against grantee heirs in favor of claimant heirs, *held* supported.

2. Trusts ⇐44(3).

Evidence to establish resulting trust must be clear and convincing.

3. Property ⇐9.

Presumption existed that undisputed holder of title to land for many years was owner.

4. Trusts ⇐361.

Parties claiming that community family funds belonging to deceased's heirs were invested in ranch by deceased's son could not procure equitable aid to reclaim property from deceased's grandson without first reimbursing him for money expended in saving property from foreclosure and cost of improvements.

5. Trusts ⇐44(1).

Finding that deceased's grandson purchased property from his father without knowledge that community family funds belonging to heirs of grandfather were allegedly invested in ranch *held* supported.

6. Mortgages ⇐32(2).

In action to construe absolute deed to be mortgage, intention of parties is controlling.

7. Mortgages ⇐32(6).

In determining whether deed was intended as mortgage, circumstances, conduct, and declarations of parties may be considered, in absence of contrary written document.

8. Appeal and error ⇐1011(1).

Finding based on conflicting evidence could not be disturbed on appeal.

9. Mortgages ⇐38(2).

Grantor seeking to construe deed into mere mortgage must establish such intention of parties by very clear and convincing testimony.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Suit by T. A. Pallett and others against Robert B. Pallett, also known as R. B. Pallett, and wife. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Rush & McCormick and Rush & Beirne, all of Los Angeles, for appellants.

Haas & Dunnigan, Walter F. Haas, and W. E. McClintock, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment favorable to the defendants, which was rendered in an equitable suit instituted by the heirs of the deceased father of the grantor of real property, to establish a resulting trust therein, and to declare the deed of conveyance therefor, to be a mere mortgage. The appellants assert that the evidence is insufficient to support the findings and decree, and that the decision is contrary to law.

The plaintiffs are heirs of George W. A. Pallett, deceased. T. A. Pallett and W. A. Pallett are the surviving sons of said deceased. The remaining plaintiffs are his grandchildren. The defendant Robert B. Pallet is the son of the plaintiff T. A. Pallett. The Pallett family migrated from Tennessee to California about the year 1857. After roaming about Northern California for a period of several years, they settled on a 900-acre ranch in Los Angeles county in 1867, where they engaged in farming. Two of the daughters of George W. A. Pallett taught school. His sons and grandsons worked upon the ranch, or were employed by neighbors as farm hands. There is evidence of same trading in live stock. One of the sons acted as a deputy sheriff for a period of time. The nature of the avocations of the various members of the family indicates that their incomes did not greatly exceed their necessary expenditures. The record fails to disclose the amount of money which was brought to California. There is no evidence of opulence in their manner of living or in the property which they possessed. It does not appear what amount of money they paid for the 900-acre ranch, or where they obtained the money with which it was purchased. This ranch was held in the names of George W. A. Pallett and his wife. Several years spent in roaming about Northern California does not indicate they had the opportunity of acquiring any great amount of wealth. The evidence of the existence of a community family fund is very unsatisfactory. T. A. Pallett testified that the family worked as above related with common interest and contributed their excess earnings to a community family fund in charge of George W. A. Pallett for a period of some twenty-five years. It is asserted that several of the members of this pioneer family, headed by the patriarchal ancestor, George W. A. Pallett, who was then about eighty-five years of age, emigrated to Argentina in South America in 1900, with their accumulated wealth, amounting to approximately $59,000. There is evidence that they engaged in farm speculations and the handling of live stock, in that republic for a period of time. There is no satisfactory evidence that this enterprise prospered. George W. A. Pallett died in Argentina in 1901. His estate was never probated. There is some evidence of a partial distribution of the assets of his estate. In 1909 the Argentine boom collapsed, and the family returned to California. Some of the plaintiffs testified that about $48,000 was brought back from Argentina. In 1910 the McFadden ranch, consisting of 155 acres of land situated in Orange county, Cal., was purchased by T. A. Pallett. Part of this ranch was subsequently exchanged for the Shoemaker ranch, consisting of 291 acres of land situated in Los Angeles county. The additional sum of $4,000 was paid for the purchase of this place. One thousand dollars of this sum was paid with the check of T. A. Pallett. In 1912 this last-mentioned ranch was mortgaged by the purchaser to secure a loan of $5,000 from the Rivera State Bank. This money was applied upon the purchase price of the property.

Almost immediately after the purchase of the Shoemaker ranch, T. A. Pallett placed his son Robert Pallett in charge of the farm. Robert operated the place for several years. As consideration for his services, he received the entire proceeds from the ranch. He employed the farm help, paid the taxes, planted an orchard, and made certain other valuable improvements. None of the heirs of George W. A. Pallett ever claimed an interest in this property. Robert Pallett testified in that regard: "Q. Did any of the Pallett family, other than your father and mother, ever tell you that they claimed any interest in the property or that it was held other than under the ownership of your father and mother? A. No sir."

The indebtedness on this ranch which was incurred by T. A. Pallett was not paid. The mortgage was foreclosed by the bank. The ranch was about to be sold to satisfy the judgment. T. A. Pallett informed his son

that he was unable to pay the indebtedness. Evidently there was then no community family fund to resort to in this emergency; at this critical time no conference of alleged interested parties was called, and no heir, except Robert, offered to save the ranch from foreclosure sale. It was agreed between T. A. Pallett and his son that the ranch should be deeded to Robert, who would satisfy the debt, take the title to the property, and permit the grantor to repurchase the land at any time within the period of one year by paying the indebtedness, costs, and expenses, together with a specified rate of interest thereon. Regarding this foreclosure and the agreement to reconvey the property to his father, the defendant testified: "I asked father what he had planned, and * * * he said he couldn't do anything, that he didn't have the money to do it with. So I told him if he would deed me the property so that I could use it as collateral to raise money, that Mr. Kaufmann would carry me at the bank and renew the papers or the mortgages, if I would pay up the indebtedness * * * I was to give him for this deed, as near as we could, the same privileges that he would have if it went to sheriff's sale. * * * And he said 'all right.'"

Pursuant to this agreement, the property was conveyed on April 6, 1916, by T. A. Pallett and his wife to Robert Pallett, by an absolute bargain and sale deed without restrictions. This deed was duly recorded by the grantee. The amount of the existing indebtedness on the ranch at the time of the conveyance to Robert, for which the mortgage was foreclosed, was the sum of $6,739.14. This sum was paid by Robert Pallett by advancing $1,739.14 in cash, and by executing a new mortgage on the property in favor of the bank to secure a loan of $5,000. In connection with this transaction, Robert Pallett executed an unilateral agreement, on May 12, 1916, to reconvey the property to his father and mother upon payment to him of the sum of $1,739.14 and the additional amount of the mortgage incumbrance of $5,000, together with costs, expenses, and taxes, with interest on these sums at the rate of 8 per cent. per annum. This instrument provides in part: "The sole consideration for this agreement is the blood relationship existing between said party of the first part and said parties of the second part. * * * Unless the payments hereinbefore specified, be paid, and the conditions hereinbefore set forth shall be fully performed, on or before the tenth day of April, 1917, there shall exist no covenant or obligation on the part of the first party to convey said property to said parties of the second part." The court found this document was signed by both parties to the challenged deed. This is not true. It was signed by Robert Pallett alone, and deposited with the bank. T. A. Pallett testified that he never saw it and would not have signed it if he had been asked to do so. The finding that this unilateral agreement was signed by both parties is immaterial, and may be disregarded. The recitations of this instrument merely corroborate the oral testimony of Robert Pallett. It is in accord with his statement to the effect that he promised to reconvey the property to his father at any time within the period of one year, upon repayment of the money expended on account of the purchase price thereof. These recitations amounted to substantially the same thing which he stated to his father when he said he should have "the same privileges that he would have if it went to sheriff's sale." Undoubtedly this statement referred to the privilege of the equity of one year which the law allows for redemption of the property from a foreclosure sale as provided by section 703 of the Code of Civil Procedure.

After obtaining title to the Shoemaker ranch, Robert Pallett continued to live on the premises and operate the farm as he had done for several years previously. He made further improvements, paid all taxes, costs, and interest on the indebtedness. He conducted and paid for litigation by means of which he acquired valuable water rights appurtenant to the property. He retained all proceeds and profits derived from the operation of the farm. Neither his father nor any of the other heirs of his grandfather ever claimed an interest in the proceeds of the ranch, or that the farm was to be held by Robert in trust. After securing title to the property, for a period of over seven years, no demand was made upon Robert Pallett to reconvey the property. Not until November 15, 1923, did T. A. Pallett suggest a reconveyance of the property. On that date he did say to his son Robert he would pay him $1,800 to abandon the place. Assuming that this offer meant he would pay the sum of $1,800 in addition to assuming the original $5,000 mortgage indebtedness, it is apparent this sum was insufficient to cover the purchase price, costs, taxes, expenses, interest, and value of improvements which were paid for by Robert Pallett during the seven years in which he held title to the property. There is no evidence T. A. Pallett then had $1,800, or that he was financially able to repurchase the ranch. The record indicates that he then was, and for many years had been, impecunious. No money was tendered. The time for exercising the option to repurchase the ranch had long since expired. The offer of $1,800 was unreasonable and unjust. The defendant refused to accept the proffer. This suit was commenced by the heirs of George W. A. Pallett to declare a resulting trust in the property and to construe the deed, which was executed to Robert Pallett, to be a mere mortgage. The court adopted findings adverse to the plaintiffs on all the essential issues.

[1-4] We are of the opinion the evidence amply supports the findings that no community family funds belonging to the heirs of George W. A. Pallett were invested in the Shoemaker ranch by T. A. Pallett, and that no resulting trust exists therein. The evidence of the existence of a resulting trust in the present case falls far short of the clear and convincing proof thereof which is required by law. Having been the undisputed holder of the title to this property for many years, the presumption of law is that T. A. Pallett was the owner thereof, at the time he conveyed it to his son. This presumption was not overcome by the very unsatisfactory evidence of a community family fund. Moreover, the heirs of George W. A. Pallett could not hope to procure the aid of a court of equity to reclaim this property without first reimbursing the defendants for the money expended in payment of the indebtedness incurred in saving the property from foreclosure sale and the cost of improvements acquired which greatly enhance the value of the property. No adequate tender of such reimbursements was pleaded or proved.

[5] We are also of the opinion the evidence supports the findings to the effect that the defendants purchased the property in good faith without knowledge of the existence of an alleged trust on the part of the heirs, and that it was acquired for an adequate consideration, with an agreement to resell the property to T. A. Pallett within the period of one year, upon repayment of the purchase price therefor, together with costs, taxes, and interest, that this option to repurchase the property was not exercised pursuant to agreement, and that all rights thereunder were forfeited.

[6, 7] In an action to construe a deed which is absolute in its terms to be a mere mortgage, the intention of the parties with respect to its effect is controlling. This intention, in the absence of an accompanying written document to the contrary, is manifested by the circumstances of the case, the conduct of the parties, and any declarations of the parties which may throw light on this inquiry. In the present case, the assuming of the grantor's indebtedness by the grantee and the stipulation that the value of the land at that time was $25,000 supports the plaintiffs' claim that the instrument was intended to be a mere mortgage. On the contrary, the fact that the grantees remained in exclusive possession and control of the farm, operating it at their own expense, making valuable improvements thereon, and appropriating the entire proceeds without opposition or claim of interest on the part of the grantee for a period of over seven years, strongly supports the defendants' claim that the property was purchased with the privilege of repurchasing it by the grantor within the period of one year from the execution of the deed.

While a careless stipulation of counsel was made in the course of the trial, that the property was worth $25,000 at the time of the conveyance, this fact appears to have been refuted by the grantor's admission that he did not have the means with which to save the property from foreclosure sale. It is improbable that the grantor would have been unable to negotiate a new loan of $6,739.14 on property which was then reasonably worth $25,000. However, this stipulation appears to have been made, and it must stand for its face value.

[8] The fact still remains that there is a substantial conflict of evidence regarding the intention of the parties respecting the nature and effect of the instrument of conveyance. Under such circumstances, this court, on appeal, may not interfere with the discretion of the trial court in adopting findings upholding the theory of an absolute conveyance of title. As the court appropriately said in the case of Farmer v. Grose, 42 Cal. 169, at page 173: "It is not our province to weigh these conflicting statements; and the Court below, which heard the witnesses, having decided in favor of the plaintiff, we would not be justified in setting aside its judgment on the ground that it was against the weight of the evidence, even though we might be inclined to the opinion that the preponderance of proof was on the other side."

[9] Courts of equity are loath to hold that a deed of conveyance which is absolute in its terms is a mere mortgage, unless satisfactory and convincing evidence to that effect is adduced. The policy of the law is wisely and firmly settled that "a deed affords a very high order of proof tending to show that the intention (of a grantor) is to convey a full title." 17 Cal. Jur. 755, § 56. The burden is on the grantor who seeks to construe an absolute deed of conveyance into a mere mortgage to prove that this was the intention of the parties by very clear, satisfactory, and convincing testimony. 17 Cal. Jur. 756, § 58. This rule is supported by a host of authorities.

In the present case we are unable to say the grantor has sustained the burden of proof required by law, or that the trial court abused its discretion in determining that the deed of conveyance was intended to be exactly what it purports to have been; namely, an absolute grant, bargain, and sale deed.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

123 Cal.App. 625

Ex parte CUNHA.

Cr. 1648.

District Court of Appeal, First District, Division 2, California.

May 23, 1932.

Rehearing Denied June 3, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. Contempt ⇐52.

Counsel's affidavit of judge's disqualification not containing counsel's name, which was filed by accused, *held* not contempt committed in "immediate presence and view of court" subject to summary punishment (Code Civ. Proc. § 1211).

[Ed. Note.—For other definitions of "Immediate View and Presence," see Words and Phrases.]

2. Judges ⇐39.

Even if counsel's preparation of affidavit to show judge was disqualified were act committed in immediate view of court, counsel could not be summarily punished by that judge (Code Civ. Proc. §§ 170, 1211).

Provision of Civ. Code Proc. § 170, providing for a fair and impartial trial by another judge of the issue of a trial judge's disqualification, negatives the thought that such issue may still be prejudged in a summary proceeding by the order of the judge charged with prejudice.

3. Contempt ⇐7.

Filing affidavit of judge's disqualification *held* not prima facie "act tending to interrupt due course of trial" constituting contempt (Code Civ. Proc. § 1209).

4. Contempt ⇐51.

Proceedings for contempt for filing affidavit of trial judge's disqualification must be as for indirect contempt (Code Civ. Proc. § 1211).

5. Contempt ⇐60(2).

In contempt proceedings against counsel for preparing affidavit of judge's disqualification, such judge's and district attorney's affidavits introduced on trial of issue of disqualification *held* inadmissible.

Such affidavits having been filed in a separate proceeding were not admissible in evidence in contempt proceeding.

6. Witnesses ⇐227.

In contempt proceeding against counsel for preparing affidavit of trial judge's disqualification, unsworn testimony of such judge *held* inadmissible.

7. Contempt ⇐60(2).

In contempt proceeding against counsel for preparing affidavit alleging disqualification of judge whom counsel alleged original trial judge, who had declared himself disqualified because of prejudice, selected to carry out original trial judge's prejudices, excluding original judge's testimony *held* reversible error.

8. Habeas corpus ⇐85(3).

Evidence is presumed to have been favorable to one adjudged in contempt, in absence thereof in habeas corpus proceeding.

9. Contempt ⇐60(1).

In contempt proceeding against counsel for preparing affidavit that trial judge was disqualified, judge had burden to prove contempt (Code Civ. Proc. § 170).

Such proceeding was not a case in which the trial judge could rest on the record without proof and require the accused to make answer; and, if the affidavit contained untrue charges against the court, which counsel knew were untrue and which were included to give offense, these were all matters which had to be proved by competent evidence.

Application by Edward A. Cunha, for writ of habeas corpus, against the Sheriff of Alameda County, to secure the release of petitioner from a commitment on an order adjudging him guilty of contempt of court.

Order annulled; petitioner released.

Dean Cunha and Harry I. Stafford, both of San Francisco, for petitioner.

Earl Warren, Dist. Atty., J. Frank Coakley, Asst. Dist. Atty., and George C. Perkins, Deputy Dist. Atty., all of Oakland, for respondent.

NOURSE, P. J.

Petitioner seeks his release from a commitment issued upon an order adjudging him in contempt and sentencing him to the maximum penalty of five days in jail and a $500 fine.

The proceedings rest upon the following state of facts: The petitioner was chief counsel for the defendant in an action entitled People v. Kelly pending in the Superior Court of Alameda county wherein the defendant was charged with manslaughter growing out of an automobile accident in which two persons were killed. The cause went to trial before Judge Fred V. Wood and a jury on October 26, 1931. The cause was given to the jury on November 5, 1931, and on the following day the trial judge called the jury into the court and ordered their discharge, stating that he had been informed of misconduct on the part of certain members of the jury. The cause was then continued to a later date for a new trial, but in the meantime Judge Wood declared himself disqualified because of prejudice against the defendant, and suggested the appointment of another judge by the judicial council. In due time the judi-

cial council assigned the respondent, Judge Stanley Murray, to act and preside in the trial of that case. On December 7, 1931, the day on which the case of People v. Kelly was set for trial, the defendant Kelly personally presented in open court a document entitled "Statement of Defendant Objecting to Hearing," etc., which was, in short, an affidavit executed by defendant Kelly alleging that Judge Murray was disqualified from proceeding further with the trial of his case by reason of bias and prejudice upon grounds specified in the affidavit. Counter affidavits were filed by Judge Murray and by the district attorney's office, and the question of disqualification was duly assigned to Judge Murphey, one of the judges of the Superior Court of Alameda county, who, after a hearing held on December 11, 1931, ruled that Judge Murray was not disqualified. On January 15, 1932, the case of People v. Kelly came on duly for hearing, and resulted in a verdict finding the defendant guilty of manslaughter. On January 29, 1932, while the defendant Kelly was before Judge Murray for sentence, he was asked who prepared the affidavit alleging the disqualification of Judge Murray, and was informed by the defendant Kelly that such affidavit had been prepared by the petitioner herein. After sentence had been imposed upon Kelly, Judge Murray then issued a citation for contempt against this petitioner, ordering the petitioner to appear before him on February 4, 1932, to show cause why he should not be adjudged guilty of contempt in the preparation of such affidavit. On the day set a hearing was had before Judge Murray, at the close of which the petitioner was adjudged guilty of contempt and sentenced in the manner above stated.

The affidavit which is the basis of the contempt charge covers twenty-six typewritten pages. It contains a full recital of the proceedings before Judge Wood in the discharge of the jury in the first trial of the case of People v. Kelly, and this is followed by a lengthy statement of facts upon which the affiant based his conclusion that Judge Wood was biased and prejudiced against the defendant Kelly and the petitioner herein. In this connection it is alleged that Judge Wood, having declared himself disqualified to act further in the cause of People v. Kelly, became actively engaged with the district attorney's office in the selection of Judge Murray to try said cause; that, having declared himself disqualified, he urged the judicial council to assign Judge Murray for that purpose without permitting the parties to agree upon another judge; that he and the district attorney's office were in consultation with Judge Murray for the purpose of procuring him to sit in the trial of said cause; that Judge Wood engaged in a tirade against the defendant Kelly "for the purpose of intimidating and influencing jurors" who might be called later to try the Kelly case; and that in many other ways Judge Wood was active in carrying his bias and prejudice against the defendant over into the further prosecution in the proceedings of the case of People v. Kelly. The conclusion is then drawn in the affidavit that, by reason of the provisions of section 170, Code of Civil Procedure, which authorize the assignment by the judicial council of another judge when the parties have failed to agree upon another judge, the assignment of Judge Murray was illegal and irregular, and that the activities of Judge Wood and of the district attorney's office in procuring said assignment were the result of the admitted bias and prejudice of Judge Wood against the affiant. It is then alleged on information and belief that, before the assignment of Judge Murray to sit in said cause, Judge Wood and the district attorney's office had been in consultation with Judge Murray, and had obtained his consent to succeed Judge Wood as the judge in said cause. The affiant then resorts to his conclusion that the assignment by the judicial council was illegal for the reasons above stated, and that Judge Murray must be presumed to have known the provisions of section 170, Code of Civil Procedure, and that, in insisting upon sitting in the trial of his cause notwithstanding the illegality of his appointment, Judge Murray displayed bias and prejudice against the affiant. (Here it should be noted that at the hearing on the contempt proceedings all those portions of the affidavit relating to Judge Wood were eliminated and the petitioner herein was expressly informed by the trial judge that those portions of the affidavit were not assigned as contemptuous by him and that he was not concerned with them in any way.) The portions assigned as contemptuous begin with the averments that the affiant was informed and believed that Judge Murray was biased and prejudiced against him, and that for that reason the affiant believed that he could not have a fair and impartial trial before Judge Murray. The portions of the affidavit relating to the alleged consultation of Judge Murray and Judge Wood prior to the assignment of the former and the conclusion that Judge Murray must have known that his selection was illegal are assigned as contemptuous, and in this connection all those portions of the affidavit relating to the proceedings following November 27, when Judge Wood declared himself disqualified, and including the assignment of Judge Murray by the judicial council and the statement of fact that the affiant had not agreed upon Judge Murray and had not signified his inability to agree upon another judge, are assigned as contemptuous. It is then alleged that "it is generally understood that said Stanley Murray is by temperament a convictor with an ac-

tive leaning and prejudice and bias against the defendant and in favor of the prosecution," and that for this reason his selection was suggested by Judge Wood and the district attorney. It is then alleged on information and belief that Judge Murray has shown prejudice and bias against the affiant by agreeing in advance of his motion for a continuance that he would force the affiant to trial without the attendance of the petitioner herein, who was engaged in the trial of another action in another county. This allegation is based upon the further averment that the information regarding Judge Murray's attitude in reference to a continuance of the trial came to affiant through a statement of the district attorney's office made to his counsel, the petitioner herein.

[1, 2] At the outset the petitioner argues that the alleged contempt was not a direct contempt committed in the immediate view and presence of the court. We are in accord with this view. Section 1211, Code of Civil Procedure, declares that a direct contempt is one committed in the immediate view and presence of the court, or a judge at chambers, and may be punished summarily, but, when the contempt is not committed in the immediate view or presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt. The admitted facts here are that the affidavit for the disqualification of Judge Murray was dictated and prepared by petitioner, but that it was filed personally by defendant Kelly at a time when the petitioner herein was not within the county; and that the petitioner's name did not appear upon the document as attorney for Kelly or in any other manner. It was only by subsequent examination of the defendant Kelly at a later date that the trial court was able to learn that the petitioner herein had dictated the affidavit and had furnished the major portion of the information contained therein. It is a plain perversion of the express language of the Code section to say that these acts were committed within the "immediate view and presence of the court." In support of the judgment, respondent relies upon Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619; In re Arnold, 204 Cal. 175, 267 P. 316; Hughes v. People, 5 Colo. 436; Ex parte Ewell, 71 Cal. App. 744, 236 P. 205; Paddon v. Superior Court, 65 Cal. App. 34, 223 P. 91; Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A. L. R. 482, and In re Lapique, 26 Cal. App. 258, 146 P. 690. We do not find that any one of the cases cited is in point. In the Lamberson Case a contemptuous affidavit was filed in open court personally by the attorney who was thereupon cited for contempt. In the Arnold Case the contempt consisted in the writing of personal letters to the members of the Supreme Court designed to influence the court in the consideration of a case before it, and the question whether this was a direct or an indirect contempt was not raised in that proceeding, and, of course, was not determined. In the Hughes Case the Colorado court had a situation similar to what appeared in the Arnold Case; the affidavit therein alleged to have been contemptuous having been personally signed and sworn to by the accused. Ex parte Ewell also involved the sending of a contemptuous letter to the judge before whom a cause was pending, and Blodgett v. Superior Court involved the filing personally by the accused of a brief containing contemptuous matter. Paddon v. Superior Court involved the filing of an affidavit by the accused in which he admitted the service of a subpœna upon him and his refusal to obey. The question whether this was a direct contempt was decided on the citation of the Lamberson Case, and we may assume from all that is said in the opinion that this act was the personal act of the accused. In the Matter of Lapique the facts are not fully stated, but in this case, like the Ewell and Blodgett Cases, the accused was appearing in propria persona, and it is fair to assume from all that appears in the opinion that the accused personally filed the affidavit as was done in the Lamberson Case. There is no authority to which we have been cited holding that, where an attorney gives information to his client and aids him in the preparation of an affidavit seeking the disqualification of a trial judge, but who does not appear in open court or otherwise as sponsoring said affidavit, and who does not personally present the affidavit for filing, is guilty of contempt committed in the immediate view and presence of the court. All the reason and purpose of the Code section compels us to hold to the contrary.

Among the acts declared contemptuous by section 1209, Code of Civil Procedure, are "disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding." Could it be said that one who has given a party information from which the party might conclude that the trial judge was biased and prejudiced against him had performed an act in the immediate view and presence of the court when at some time thereafter the party upon the information so obtained filed an affidavit claiming the judge to be disqualified? However, if there be any language in any of these cases which would indicate a holding that the acts charged to the petitioner herein were acts committed in the immediate view and presence of the court, that rule must fall under the amendments to section 170, Code of Civil Procedure, which provide a complete scheme for the establishment of the disqualification of a trial judge

and the trial of that issue as an issue of fact before another judge. This on the well-known doctrine that, when the reason for the rule ceases, the rule itself ceases. Thus, if the preparation of an affidavit of disqualification is a direct contempt committed in the immediate view and presence of the court, the judge sought to be disqualified could immediately adjudge and punish the party and his counsel for contempt, although upon a hearing of the issue of disqualification before another judge it is determined that all the facts alleged in the affidavit are true and that the judge is in fact disqualified. The issue of disqualification is one which is vital to the interests of the party in whose behalf the affidavit of disqualification is filed, whereas a contempt proceeding such as we have here is one which concerns the attorney for the party alone. The care and industry with which the Legislature has frequently amended this section to insure a fair and impartial trial of this issue negatives the thought that it intended that such issue may still be prejudged by the order of the judge charged with bias, and this in a summary proceeding which must necessarily determine the truth of the facts which the Legislature has delegated to an impartial judge to try and determine. To insure the rights of the party, as distinguished from the rights of his counsel, it is essential that the trial of the issue of the truth of the allegations of bias be conducted free from any prejudgment of that question in a proceeding in which the party has had no opportunity to be heard. By these amendments to section 170 the question of the bias and prejudice of a judge is made a matter of trial wherein the accused judge appears as a party without any greater privileges or immunities than any other party in any other proceeding, and it would be trite to add that by a trial we mean a fair and impartial one. It cannot be said that such a trial is assured if the accused judge is to be permitted to place the party and his counsel in jail at the time when this issue is to be heard and determined.

[3, 4] For these reasons we conclude that the filing of an affidavit of disqualification is the institution of a trial of that issue which is expressly authorized by the Code section, that such filing cannot, therefore, be deemed prima facie an act "tending to interrupt the due course of a trial or other judicial proceeding" (section 1209, Code Civ. Proc.); that, because the truth of the allegations of the affidavit and the good faith of the act of filing are issues to be tried before another judge, the judge accused is on the face of the record disqualified from adjudging the parties in contempt [Briggs v. Superior Court (Cal. Sup.) 10 P.(2d) 53] or of taking any other proceedings until the question of disqualification is finally determined [Cadenasso v. Bank of Italy (Cal. Sup.) 6 P.(2d) 944]; that, being thus prohibited from punishing the contempt "summarily," as provided in section 1211, Code of Civil Procedure, in relation to direct contempts, he must proceed in the manner prescribed in the last paragraph of that section and treat the contempt as an indirect one.

[5, 6] But for an entirely unrelated reason the judgment here under review must be annulled, and that is that the petitioner was not given a fair or any trial upon the charge upon which he was convicted. At the outset of the hearing of the contempt proceedings, the petitioner objected to the jurisdiction of the court, and this objection was overruled. Then the trial judge, without being sworn and without offering himself for cross-examination, or otherwise, proceeded to state his views of the conduct of the petitioner and stated his own frame of mind and his own impressions as to the charges of disqualification, and then, over the objection of the accused, admitted in evidence affidavits filed by the district attorney and himself in the proceeding before Judge Murphey which questioned his qualification to sit in the case of People v. Kelly. These affidavits, having been filed in a separate proceeding, were not admissible in evidence in this proceeding under any theory of our legal procedure. The unsworn statements of the trial judge were not evidence of any fact.

[7] The petitioner called to the stand Judge Fred V. Wood. Judge Murray refused to let him testify. In the disqualification affidavit the affiant had alleged at great length the proceedings taken by Judge Wood in the discharge of the jury in the first trial of People v. Kelly, the later voluntary disqualification of Judge Wood upon the ground of his bias and prejudice, the activity of the judge in conjunction with the district attorney in the selection of Judge Murray to succeed him, the asserted illegality of the assignment of Judge Murray, and, from these facts, the affiant drew the conclusion that Judge Wood and the district attorney had purposely brought about the assignment of Judge Murray and had given such wide publicity to the admitted prejudice of the former that Judge Murray would come to the trial of the cause with a fixed prejudice against the defendant and an inclination to carry out the prejudices of Judge Wood. The petitioner offered to prove by the witness that, before he disqualified himself in the Kelly Case, Judge Wood brought about the selection of Judge Murray, and that afterwards he sought to direct the proceedings in the Kelly Case. He offered to prove by the witness "everything set forth in the verified statement where Judge Wood is referred to." This offer was rejected on the ground that it was incompetent, irrelevant, and immaterial. This ruling was not mere error. It was a complete denial of a right of trial.

The tendered evidence was, of course, material to the issues involved. If all the statements relating to Judge Wood were true, then the entire good faith of the affidavit of disqualification was established and the petitioner should have been adjudged not guilty of contempt. If these facts were true, it was the privilege, as well as the duty, of the petitioner to his client, to present those matters in an assignment of disqualification. We should not, however, be understood as passing upon the truth of any of these allegations or as approving the intemperate language in which the allegations are made. But what we wish to emphasize is that all the matter was eliminated from the contempt proceedings by Judge Murray, and the petitioner was commanded to answer the charge of contempt as limited to the other portions of the affidavit. Those matters were, however, an integral part of the facts from which Kelly concluded that Judge Murray bore him prejudice, they were part of the "information" upon which other allegations made on information and belief were based, and they were substantial evidence of the good faith of the affidavit.

[8] Elaborate findings were made following the hearing in which it was found that all the allegations of the disqualification affidavit were untrue; but there is not a word in the evidence upon which this finding can be based. In filing the affidavit of disqualification, the affiant drew the conclusion that he believed Judge Murray was biased and prejudiced against him, and stated the information upon which that belief was founded. There is nothing in this proceeding which goes to show that that information was not honestly given and that those beliefs were not honestly entertained. There is nothing to show that the petitioner herein did not act in good faith when he gave this information to his client in the preparation of the affidavit. The finding of want of good faith is without any evidentiary support. On the other hand, it must be presumed that the petitioner acted in good faith, and no presumptions can be indulged in to support the judgment. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127; In re Lake, 65 Cal. App. 420, 427, 224 P. 126. Though it was found that all the allegations in the affidavit of disqualification were false, the finding is manifestly error, because a large portion of the allegations of that affidavit are based upon matters of record which are not disputed.

[9] Thus, even though we were to treat this as a direct contempt, there is nothing in the portions of the affidavit to which the proceedings were limited by the respondent which is contemptuous per se or which upon its face appears to be purposely and gratuitously offensive. The paper was filed in accordance with the express privilege given by section 170, Code of Civil Procedure, and, if it was filed in bad faith, or if matter purposely or gratuitously offensive was included (Hotaling v. Superior Court, supra), or if it contained untrue charges against the court which the petitioner knew were untrue and which were included for the purpose of giving offense—these were all matters which had to be proved by competent evidence. It is not a case, therefore, in which the trial judge may rest upon the record without proof and require the accused to make answer. If Judge Murray was selected by the judicial council without the parties having been given an opportunity to agree upon another judge, as required by section 170 (and here we must say that the record is all with the petitioner, notwithstanding the belated "amendment" of the clerk's minutes after the point had been raised in this proceeding), then the defendant Kelly and his counsel had reason to believe that Judge Murray was unlawfully selected for that position, and they had the right to assume that Judge Murray was familiar with the law in that respect, and that, in insisting upon sitting illegally, he was doing so for the purpose of carrying out the alleged prejudices of Judge Wood. If it were true, as alleged in the affidavit, that Judge Murray was by common reputation a "convictor," the fact that Judge Wood was solicitous in having him selected to try the Kelly Case was a fact which was sufficient to cause the defendant and his counsel to believe that Judge Murray would be unfriendly to them in the trial of the case. In this connection the reputation of Judge Murray is not denied. In his counter affidavit filed in the disqualification proceedings he denied that he was in fact a "convictor," but this was not an issue. The charge that Judge Murray had agreed in advance of a request that he would deny defendant's motion for a continuance was based upon information from the assistant district attorney. This may have been mere idle boasting, but it formed the basis for the defendant's conclusion, and it is not denied by any evidence in the proceeding.

It was necessary to prove by competent evidence that the actions of the petitioner in preparing the affidavit of disqualification were contemptuous as a matter of fact, and, no evidence having been offered to that end, the judgment of conviction cannot stand. It is not necessary to discuss the other grounds raised in the petition.

The order is annulled, and the petitioner released from custody.

We concur: STURTEVANT, J.; SPENCE, J.

Edward A. CUNHA, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, and Stanley Murray, Acting Judge thereof, Respondents.*

Civ. 8423.

District Court of Appeal, First District, Division 2, California.

May 23, 1932.

Rehearing Denied June 22, 1932. Hearing Granted by Supreme Court July 21, 1932.

Application for certiorari to review an order of the Superior Court of Alameda County, Stanley Murray, Judge, adjudging petitioner guilty of contempt. Order annulled.

Dean Cunha and Harry I. Stafford, both of San Francisco, for petitioner.

Earl Warren, Dist. Atty., J. Frank Coakley, Asst. Dist. Atty., and George C. Perkins, Deputy Dist. Atty., all of Oakland, for respondents.

PER CURIAM.

Petitioner seeks to review by certiorari the order of the Superior Court adjudging him guilty of contempt. Upon the authority of Ex parte Cunha (Cal. App.) 11 P.(2d) 902, this day decided, the order is annulled.

123 Cal.App. 575

ERICKSON v. GERANSON et al. (two cases).

In re JOHNSON'S ESTATE.

Civ. 955, 956.

District Court of Appeal, Fourth District, California.

May 19, 1932.

Rehearing Denied June 15, 1932. Hearing Denied by Supreme Court July 18, 1932.

1. Specific performance ⇐121(7).

Evidence *held* to support findings that testator and wife never agreed to adopt plaintiff with right of inheritance, nor held him out as adopted son.

2. Appeal and error ⇐1170(7).

Admission of hearsay evidence in trial before court was harmless, where plaintiff failed to prove that testator agreed to adopt him, and all findings against plaintiff were amply supported by other evidence and inferences therefrom (Const. art. 6, § 4½).

3. Appeal and error ⇐1056(1).

Judgment will not be reversed for exclusion of hearsay testimony of questionable character by interested parties in plaintiff's behalf in action involving alleged agreement to adopt with right of inheritance.

4. Specific performance ⇐28(1), 51.

To warrant specific performance of contract to adopt with right of inheritance, contract must be definite and fair.

5. Specific performance ⇐42, 121(7).

Alleged contract to adopt, with right of inheritance, should be carefully scrutinized, proofs should be clear, and acts of claimant referable to contract alone.

6. Specific performance ⇐121(7, 11).

Evidence *held* insufficient to show alleged contract to adopt with right of inheritance, or such performance by claimant as law requires.

Appeals from Superior Court, San Diego County; S. L. Strother, Judge.

Separate action and proceeding by Charles Erickson, also known as Charles Johnson, against G. A. Geranson, as executor of the will of Edward Johnson, deceased, and others, which were tried together. From judgment for defendants, and from order of distribution, plaintiff-petitioner prosecutes separate appeals, which were consolidated.

Judgment and order affirmed.

Hamilton, Lindley & Higgins and Frank M. Downer, Jr., all of San Diego, for appellant.

W. J. Mossholder and Harrison G. Sloane, both of San Diego, for respondents.

E. W. Peterson, of San Diego, for executor G. A. Geranson.

BARNARD, P. J.

Edward Johnson died in September, 1927, leaving an estate valued at approximately $80,000, leaving a will by which he disposed of approximately one-half thereof, and dying intestate as to the remainder. The appellant concedes that he intended to dispose of all his property by will, but failed to do so because certain real property he owned was worth much more than he thought. In his will Johnson stated that he had no living children, but in two bequests, with much misspelling, he left certain sums to his wife's heirs, and other sums to "my heirs," including $2,000 to Charles Erickson, which was paid during the course of administration.

Before distribution was made in this estate, and in May, 1929, Charles Erickson brought an action against the executor and the known heirs for the specific performance of a contract to adopt "in its property aspects." In his complaint he alleges that he was born in Chicago on May 26, 1873; that his father died in 1876 and his mother died on August 20, 1877; that for a time after the death of his mother he was cared for by an aunt, Mary Erickson; that on August 28, 1877, after public announcement to the congregation of the Swedish Mission Church of Chica-

go, the plaintiff and his sisters and a brother were by their said aunt Mary and the members of said church, and in said church, offered for adoption; that the plaintiff was then and there, with the consent of his said aunt and the approval of the membership of said church, given into the custody and control of Edward Johnson and his wife, Ida Johnson; that they thereupon publicly agreed with the said aunt and with the membership of said church that in consideration of the surrender of the plaintiff to their custody and control and the waiver by the said aunt of all of her claims upon him, they would receive the plaintiff into their home and adopt him, would bring him up, educate and maintain him as their own child, and would give him the same right and privileges in all things as a natural child would have, including the right of inheritance; that pursuant to said agreement, plaintiff lived with the Johnsons as their son, and for many years was known and is still known to many people as Charles Johnson; that until he grew to young manhood he lived continuously with the Johnsons, and rendered to them all the duties and devotion due to parents from their children, and was in all respects treated as their natural son; that he was led to believe and did believe that he was their legally adopted son; that because of this belief, after he reached the age of maturity he continued to render to them the duties and obligations of a son; and that he has fully performed the contract made on his behalf by his said aunt, but that no legal steps have been taken to adopt him according to law. After then alleging that Ida Johnson predeceased her husband, and other facts in reference to the administration of the estate and the property left by the deceased, the plaintiff prays that the agreement between Edward Johnson and his aunt, Mary Erickson, be specifically enforced; that he be adjudged to be the owner of all of the property left by Edward Johnson and not disposed of by will; and that the defendants be adjudged to hold the property in trust for him.

Subsequently Charles Erickson filed in the estate of Edward Johnson a petition for distribution and an objection to the petition for distribution filed by the executor of the estate, in which he alleges essentially the same facts as are alleged in the complaint referred to, and prays that the agreement between Edward Johnson and Mary Erickson, his aunt, be specifically enforced, and that he be adjudged to be, in equity, the adopted son of Edward Johnson, deceased, and entitled to inherit and have distributed to him the residue of said estate undisposed of by will. After answers filed, the issues thus raised in both proceedings were tried together. The court found against the contentions of the plaintiff and petitioner, Charles Erickson, and from a judgment entered in the action for specific performance, and from the order and decree entered in the estate upon his petition for distribution to him, separate appeals have been taken. These appeals have been consolidated for hearing upon one transcript and one set of briefs.

[1] It is first contended that the evidence does not sustain the findings of the trial court in favor of the respondents in the two proceedings, and the judgment and order which followed. Briefly summarized, these findings were to the effect that in the first week of November, 1878, Edward Johnson went from his home in Princeton, Ill., to Chicago, to attend a meeting of the Swedish Mission Church, and that his wife did not accompany him; that at said meeting of said church the congregation was asked to find a home for the appellant; that Edward Johnson was importuned by the congregation of said church to take said child and care for him; that the evidence does not show that any aunt of appellant was present at said meeting; that Edward Johnson took said child home with him, but with no intention or agreement with any one to adopt the child; that the appellant remained in the home of Johnson from that time until some time in September or October, 1885; that thereafter, the appellant never made his home or lived with the Johnsons, but left their home, worked for himself, and made his own way; that neither the said Edward Johnson nor his wife on or about August 28, 1877, in Chicago or at any other time or place, entered into any agreement or understanding with an aunt of the appellant or with the members of the Swedish Mission Church, by which they agreed to adopt the appellant or maintain him as their own child with the same rights and privileges as a natural child, including the right of inheritance; that no such agreement as that alleged in the complaint was ever made or entered into or agreed to be entered into by either of the Johnsons; and that neither of them held out the appellant to other people as their adopted son.

On behalf of the appellant the record shows the following evidence: He himself testified that his parents died when he was very young, his mother in 1877; that his first recollection of Edward Johnson and his wife, Ida Johnson, was that they were both together in a church with a lot of other people; that "we were all gathered there to be adopted by somebody"; that some one there stated the reason for their being assembled, "and then they got together and talked things over between themselves, the people that were there, but I was so young I was not interested, you might say;" that, when they were ready to leave, Mr. Johnson said, "Come now, Charlie, we will go," and that Mrs. Johnson took him by the hand and they walked out (at another time, he testified that when they got ready to leave he went with Mr. Johnson); that he went to live with the Johnsons at Princeton,

Ill.; that he called Mr. Johnson "father" and Mrs. Johnson "mother" and they never objected; that Mrs. Johnson told him "we will be your father and mother now"; that, after a son was born to the Johnsons, they played together as brothers and were treated alike by Mr. and Mrs. Johnson; that he was known as "Charlie"; that when he was about nine years old they moved to Aurora, Neb., and lived on a farm; that he was known there as Charlie Johnson and helped do chores on the farm; that the Johnsons represented him as "their son, their boy"; that Mr. Johnson referred to his own son and to appellant as "my boys"; that after about four years the Johnsons went back to Princeton, but that he did not go with them but stayed with a Mr. Moberg for a year or a year and a half; that he wanted to stay in Nebraska because he "had formed a liking for Mr. Moberg"; that later he went back to Princeton when Mr. Johnson wrote him a letter asking him if he did not think he had better come home and go to school; that they did not know what train he was coming on; that he went to Sunday school in Princeton under the name of Charlie Johnson; that in 1887 he wrote his name "Charlie Johnson" in a book; that he went to public school in Princeton; that he helped with the chores and worked two summers "at Arlington"; that he was working at Arlington when Isaac died (this was on November 22, 1889); that about two weeks later he went home; that not very long after that he went to Chicago; that when he left Mr. Johnson gave him his birth certificate and told him to preserve it; that in Chicago he went by the name of Charlie Johnson; that he has lived in Chicago ever since, being married there on December 17, 1898; that shortly after his marriage he and his wife visited the Johnsons at Lafayette, Ind., where they had moved; that he introduced the Johnsons to his wife as his father and mother; that a year later the Johnsons visited him in Chicago, and some years later Mr. Johnson attended the funeral of one of his children; that when he first went to Chicago he went by the name of Charlie Johnson, but later he and his brother decided to take their own father's name; and that he saw the Johnsons three times after he was married.

His brother, Albert Erickson, two years older, testified that soon after their father and mother died "we were brought to the church and there was an announcement made there was four children for adoption. Anyone who had no children and wanted to take them, why, they were there for adoption. That is all I remember"; that at one time he visited his brother at the Johnson home and found that his brother addressed Mr. and Mrs. Johnson as father and mother, and that he was known as Charlie Johnson. Adolph V. Julin testified that from 1876 on, he was an officer of the Swedish Mission Church in Chicago; that from his connection with that church he was familiar with its custom about the years 1877 and 1878 regarding orphaned children, and that "we used to place them in families that had no children, in families we knew would take care of them. An oral personal agreement was required of the people who took orphan children. That they should adopt them and bring them up as their own children"; that he was not present on the occasion when Edward Johnson took Charlie Erickson, but in a general way he was sure it went through the board of the church, and that it was general knowledge among the people of the church, at the time and shortly after, that "Edward Johnson had taken Charlie Erickson." Blanche E. Erickson, appellant's wife, testified that they visited the Johnsons shortly after she was married, and that her husband introduced the Johnsons to her as his father and mother; that Mrs. Johnson told her that when Charlie first came to them he wanted to go home, and she told him "This is your home and we are your father and mother." She also testified that after her marriage she found in her husband's possession, a book, on the inside cover of which was written "Charlie Johnson Princeton, Illinois, December 2, 1887." A sister of appellant testified that she once visited the Johnson home and that the appellant called Mr. and Mrs. Johnson "father and mother." A number of other witnesses who had known the Johnsons at Princeton and at Aurora testified to the following effect: That they first knew the appellant as Charlie Johnson and in later years heard him called Charlie Erickson; that he was generally known in the community as Charlie Johnson; that it was the common reputation in the community that he had been adopted.

On behalf of the respondents, the record shows the following evidence: Frank Johnson (not related to the deceased) testified that he owned a two-story brick house in Princeton; that in October, 1878, Edward Johnson and his wife moved into the second story of this house; that shortly thereafter Edward Johnson went to Chicago for three or four days and returned with the appellant; that Johnson's wife did not accompany him on this trip; that he and his wife and Mrs. Johnson went to the depot to meet Johnson when he returned; that Mrs. Johnson was angry and protested at his bringing the boy with him; that about three weeks later Mrs. Johnson gave birth to a son, who was named Isaac; that the Johnsons continued to live in his house for about two years and a half, when they moved to Aurora, Neb., where they remained for four years; that the Johnsons returned to Princeton, bought this brick house from the witness, and lived in it three or four years before they moved to Indiana; that during these three or four years the witness lived within about 100 feet of the brick

house and was on friendly terms with the Johnsons; that, when the Johnsons returned to Princeton from Nebraska, the appellant did not come with them; that he visited them a few times thereafter, but never made his home there; that, when the appellant returned from Nebraska, he went out to work at a farm up near Arlington; that he did not know how many years the appellant worked around there because "I lost track of Charlie altogether after that because I never seen him around"; that he never saw the appellant going to school after the Johnsons returned from Nebraska, and knows that he would have seen this had it occurred; that he never heard the Johnsons talk about having adopted the appellant, and never heard others say they had adopted him, but he had heard some people say they thought he was adopted; and that he had never heard the Johnsons call him their adopted son. When asked by what name the appellant was known, he replied: "We called him Charlie Erickson." Emma Carlson, a neighbor of the Johnsons at Princeton, testified that Mrs. Johnson was not pleased with her husband's bringing the appellant home, because she was not well; that she knew the appellant before the family went to Nebraska, but did not know him after they returned; and that "I think he went to Nebraska and there spent his young days." Magnus Carlson testified that he lived about a block from the Johnsons at Princeton; that Mrs. Johnson did not go to Chicago on the occasion when Mr. Johnson brought the appellant home; that he never heard either Mr. or Mrs. Johnson talk about adopting the child; that he never heard them call the appellant their son; that after the Johnsons returned from Nebraska, he did not see the appellant about their house; and that the appellant was not about, except that he went to work near Arlington.

Alfred Nelson testified that he lived next door to the Johnsons and within 60 feet, after they returned from Nebraska; that he was in the shoe business with Mr. Johnson; that they were good friends and visited and talked every day; and that after they returned from Nebraska no one lived at the Johnson home except Mr. Johnson, his wife, and their son, Isaac. E. S. Johnson and his wife (not related to deceased), both testified that they knew Edward Johnson and his wife at Princeton from 1887 to 1889, and that the only child then in the family was Isaac. Ida Swanson testified that she heard people in the neighborhood call the appellant "Charlie" and also, "There were so many Charlies that they would say, Edward Johnson's boy," and that she always knew that the appellant's last name was Erickson. A. J. Swanson testified that the appellant remained at Moberg's in Nebraska two or more years, probably two and one-half years, after the Johnsons returned to Princeton; that his name was Charlie Erickson; that he never heard Mr. Johnson say he had adopted this boy; and that he never heard from any one that Mr. Johnson had adopted him or agreed to adopt him. Fred Anderson testified that he himself lived with the Johnsons fifteen months at one time and two years at a later time; that he heard the Johnsons talk of the appellant as the boy they raised; and that he never heard them call him anything except "Charlie Erickson." Several other witnesses testified that the appellant was known as Charlie Erickson.

We think that a mere summary of the evidence is sufficient to show that the findings complained of are amply supported. There is an entire absence of direct evidence that the contract alleged and relied upon was ever made. If it can be said that the evidence as to the subsequent conduct of the parties is such as to have justified a finding in favor of the appellant, it certainly cannot be said that it is such as to compel a trial court to so find upon the issue of fact presented.

[2] Appellant's second point is that reversible error was committed by the trial court in admitting certain evidence to the effect that on two occasions Mrs. Johnson replied "No" to an inquiry as to whether they had adopted the appellant; that on another occasion Mr. Johnson made the same answer to a similar question; and that on several occasions both Mr. and Mrs. Johnson spoke of the appellant as "the boy they had raised." The questions that elicited this testimony were objected to as calling for hearsay and self-serving declarations. The court ruled, "It will be received subject to the objection. It will be stricken out if I become satisfied." It does not appear that this evidence was subsequently stricken from the record, nor was any motion made for that purpose. It may be assumed that the court, by its ruling, assumed the duty of later passing upon the matter and that at least a part of the evidence objected to was inadmissible. Rulofson v. Billings, 140 Cal. 452, 74 P. 35. Appellant argues, that the findings to the effect that Edward Johnson was importuned by the Swedish church to take and care for him, that he so informed his wife upon his return to Princeton, that she was angry on that account, that this was a short time before she gave birth to a son, and that Edward Johnson took the appellant home without any intention or agreement to adopt him, were all based upon these self-serving declarations; that they have no other justification in the evidence; that they are all preliminary to the essential finding that no agreement to adopt was entered into; and that the error was therefore sufficiently prejudicial to compel a reversal. Under section 4½ of article 6 of the Constitution, it is our duty to examine the evidence for the purpose of discovering whether, in our opinion, a miscarriage of justice has resulted, before ordering a reversal

for the reasons stated. The value of this provision of the Constitution is especially apparent in this case, in which, as appellant states in his brief, "all of plaintiff's testimony and most of defendants' are in the form of depositions so this court is in as good a position as the trial court to consider its value and effect." We are unable to agree with appellant that the essential findings have no justification in the evidence, aside from these declarations. All of the special findings referred to are fully supported by other evidence, except the one as to Johnson's having been "importuned" to take the child, and even that follows as a reasonable inference from the other facts shown. In our opinion, the presence or absence of these declarations makes little difference and no miscarriage of justice appears. After all, the burden was upon the appellant to establish his case by satisfactory evidence, and this, we think, he failed to do. The variance between the proof and the allegations of the complaint is at once apparent. There is no direct evidence whatever of any contract or agreement with the appellant's aunt as alleged in the complaint and petition, and it does not even appear from the evidence that the aunt was present when the child was taken. There is no direct evidence of any agreement at the church meeting with the church members, or with any one else. Nor do we think the evidence of the subsequent conduct of the parties is sufficiently convincing to establish such an agreement with the certainty and definiteness required. Nowhere in the voluminous transcript is there a word of evidence from any one that during those fifty years either Johnson or his wife ever told the appellant, or any one else, that they had adopted or had agreed to adopt or intended to adopt him. The evidence is undisputed that somewhere between the age of twelve and sixteen years the appellant left the home of the Johnsons for good, and that prior thereto he left them for another period of about two years; that he preferred to leave the Johnson home and go to live with the Mobergs because he had formed a liking for Mr. Moberg, and that he was allowed to do this by the Johnsons; that at least by the time he was sixteen, he left their home permanently, at his own desire, to go to Chicago; that at that time Mr. Johnson gave him his own birth certificate and told him to preserve it; that at some time after he went to Chicago, in common with his brother, he chose his own family name; that he married and raised a family under the name of Erickson; and that after he went to Chicago, he never visited the Johnsons but once, shortly after his marriage in 1889, although for years they lived in that region, and although in a number of letters introduced, Mr. Johnson said he had looked for him to visit them, but "in vain." Mr. and Mrs. Johnson visited the appellant once in Chicago, and on another occasion Mr. Johnson attended the funeral of appellant's daughter. It appears from the letters that on three occasions the appellant did not know that the Johnsons had moved to another state until long afterward, and that on several occasions when Mr. Johnson went to Chicago he did not visit the appellant because he did not know where he lived. By a great preponderance of the evidence, it appears that Mrs. Johnson was not present at the church in Chicago when the alleged agreement is supposed to have been made, and that the appellant did not live in the Johnson home after 1885, when he was twelve years old. While the appellant claims that he lived in the Johnson home about four years after 1885, and that he only worked at Arlington during two summers, he himself testified that he was working at Arlington the latter part of November, 1889, when Isaac died, that his intentions were to stay there over the winter, but that he went to Chicago not very long after that. It would appear from the evidence that he used the name "Erickson" fully as much as he used the name "Johnson," and that soon after he went to Chicago he abandoned the name of Johnson entirely. The only material difference between the evidence for the two sides is that according to that for the appellant he stayed in the Johnson home a little longer, he used the name of Johnson a little longer, and some of the neighbors thought he was an adopted child. One of the most persuasive bits of evidence is the letters from the Johnsons, which were introduced. They were all addressed to Charlie Erickson or to his wife Blanche Erickson. They show a friendly interest and no more. It is impossible to read them and to believe that the writers thought they had adopted the appellant. In view of appellant's insistence upon the honesty and integrity of the Johnsons, this circumstance strongly indicates the absence from their minds of any idea that they had made or entered into any such agreement as is alleged and relied upon by the appellant. We think the evidence introduced was not sufficient to establish the contract relied upon; that the evidence, the admission of which is complained of, could not have been controlling; and that such error as appears is not sufficient to justify a reversal.

[3] The only other point raised by appellant is that the court erred in refusing to admit certain evidence offered by him. The testimony of Blanche Erickson, wife of the appellant, was offered, to the effect that after she married the appellant, her mother, since deceased, told her that she remembered the death of appellant's father and mother; that soon thereafter she heard an announcement in church that there would be a meeting on the following Thursday and that the four Erickson children would be adopted; that she attended the meeting at the church the

following Thursday; that various people took the four children respectively; that Mr. and Mrs. Edward Johnson took Charlie; and that the children were taken by the respective parties "as their own." There was also offered the testimony of appellant's sister, who was herself about two years old at the time the appellant was taken by the Johnsons, her testimony being to the effect that her foster mother, who had been dead for more than thirty years, had told her that she was their adopted daughter; that after her father and mother died it was announced in the church "that there were four orphans that were to be adopted"; that the adoption was in the church; and that Charlie was adopted by Edward Johnson and his wife. It is admitted that this offered evidence is hearsay and ordinarily inadmissible, but it is contended that a new rule should be adopted in California permitting the introduction of hearsay testimony as to ancient events, under certain circumstances. If it be assumed that there might be circumstances justifying such a modification of the rule, we think that such circumstances do not here appear, especially in view of the apparent interest of the parties whose testimony was offered. To reverse a judgment for the refusal of a trial court to admit such evidence, under the circumstances shown by this record, would tend to open the door to innumerable frauds, and, in our opinion, would unduly endanger the security of property rights.

[4, 5] Assuming that the complaint and the petition state a cause of action, the requisite proof in support thereof is lacking. Appellant argues that the only established rule in cases of this kind is that "a claimant must prove his case by clear and convincing evidence." Certainly there is nothing in the evidence here that warrants the conclusion that an agreement on the part of the Johnsons to make the appellant their heir by legally adopting him as their own child, has been established with any definiteness and certainty, or by clear and convincing evidence. There is nothing to show that the appellant has ever changed his position in reliance upon such an agreement, or that it would be any fraud upon him not to enforce the same. As was said in Baumann v. Kusian, 164 Cal. 582, 129 P. 986, 988, 44 L. R. A. (N. S.) 756: "As we have said, it is settled that, to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. It is also settled that it must be just and fair. It was said in Owens v. McNally [113 Cal. 444, 33 L. R. A. 369, 45 P. 710], supra: 'But the question whether relief should be granted or denied in a particular case addresses itself to the conscience of the chancellor; and, before a plaintiff entitles himself to it, many considerations enter and are to be weighed. * * * Where a contract such as this, resting in parol and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract.'"

[6] Not only is there in this case a failure of satisfactory proof as to the making of such an agreement, but the evidence fails to show such a performance upon the part of the appellant as should be required in a case of this kind. It clearly appears that he preferred to and did leave the home of his benefactors at a very early age, and just at the time when, in the ordinary course of events, he could have been of some aid and assistance to them, and that thereafter he assumed his own name and went his own way, with very little interest in the Johnsons for about forty years. Respondents raise the questions of laches and the statute of limitations based upon the fact that this claim arose thirty-two years after the appellant became of age, and more than fifty years after the agreement was supposed to have been made. We prefer, however, to treat the case upon its merits without passing upon those contentions. We have read the many cases cited, but have found none holding that heirship could be established, and the property of a deceased taken upon such evidence as appears in this record.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

123 Cal.App. 688

BAKER et ux. v. MARKET ST. RY. CO.

Civ. 8030.

District Court of Appeal, First District, Division 1, California.

May 26, 1932.

Rehearing Denied June 25, 1932. Hearing Denied by Supreme Court July 25, 1932.

1. Carriers ⇨318(10).

Evidence *held* sufficient to support verdicts for plaintiffs in spouses' action for injuries to wife falling from street car suddenly started while she was alighting.

2. Appeal and error ⇨1002.

Substantial conflict of evidence on fact question cannot be resolved by appellate court.

3. Carriers ⇨320(26).

Negligence in suddenly starting street car while passengers were alighting *held* for jury.

4. Damages ⇐132(1).

Verdict awarding 49 year old married woman $6,000 damages for cuts and bruises on shoulder and hip, resulting pain in side and hip and severe headaches, medical services worth $358, and fallen kidney necessitating operation, *held* not excessive.

5. Appeal and error ⇐1004(1).

Appellate court cannot exercise power of revision over jury's verdict on question of damages, unless award is so grossly disproportionate to compensation reasonably warranted by facts as to shock sense of justice and raise presumption of passion, prejudice, or corruption.

6. Trial ⇐133(2).

Statement of plaintiff's counsel that conductor would have lost position had he admitted starting street car while plaintiff was alighting *held* not ground for reversal of judgment for plaintiff, especially in view of instruction that argument was simply counsel's deduction or speculation without evidentiary support.

7. Appeal and error ⇐1060(1).

Misstatement or improper statement to jury during argument must relate to material facts, as distinguished from matters of mere opinion, and materially prejudice party to warrant reversal of judgment.

8. Trial ⇐121(4).

Attorney may make comments regarding witnesses' credibility in argument to jury.

9. Trial ⇐133(6).

It is only in extreme cases that court, acting promptly and speaking clearly and directly, cannot correct impropriety and remove effect of counsel's conduct or remarks by instructing jury to disregard them.

10. Carriers ⇐321(23).

Instruction on carrier's liability for failure to exercise generally highest degree of care towards passenger *held* proper, though complaint alleged specific negligence in suddenly starting street car while plaintiff was alighting.

11. Carriers ⇐321(15).

General instruction defining negligence *held* proper and necessary in action for injuries to passenger falling from street car suddenly started while she was alighting therefrom.

12. Carriers ⇐321(23).

Instruction that burden was on plaintiff, in action for injuries to passenger falling from street car suddenly started, to prove that injuries were direct, proximate result of "occurrence in question," *held* not erroneous as allowing finding for plaintiff on negligence not charged in complaint.

13. Damages ⇐216(1).

Instructions that jury should consider certain elements of damage and that they should not consider such elements unless proximately caused by accident *held* not erroneous as confusing.

14. Appeal and error ⇐1064(1).

Instruction that it was defendant's duty, when it stopped street car, not to start it while passengers were alighting, *held* not prejudicial error as instruction that car was stopped when plaintiff started to alight.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Charles H. Baker and wife against the Market Street Railway Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellant.

Harold H. Price, of San Francisco, for respondents.

ROBINSON, Justice pro tem.

This appeal is taken by the defendant railway corporation from judgment in favor of plaintiffs, Charles H. Baker and Ethel Baker, his wife. The action is for damages for personal injuries sustained by the wife and special damages suffered by the husband in a street car accident; the complaint alleging negligence on the part of the railway corporation in suddenly starting the street car while Ethel Baker, a debarking passenger, was about to alight at her destination.

The charge of negligence is special; the complaint alleging that on April 24, 1929, while plaintiff Ethel Baker was in the act of alighting from a Haight street car which had stopped on Haight street at Buchanan street, San Francisco, the "defendants and each of them, without warning to plaintiff, suddenly and so negligently started said street car as to cause plaintiff, Ethel Baker, to be and she was precipitated from the platform of said street car into the intersection of said streets," and injured in the "right side of the body in the region immediately above the right hip bone," and elsewhere. The action was commenced on March 14, 1930.

The railway company's answer admits its corporate existence and also that it operated electric street cars on Haight street, San Francisco. Separate special defenses charging contributory negligence generally are set up against the plaintiffs severally, and the case was tried upon the theory of negligence being charged by the plaintiffs and contributory negligence charged by the defendant. The jury returned a verdict in favor of the plaintiff Ethel Baker in the sum of $6,000,

and a separate verdict in favor of her husband, Charles H. Baker, in the sum of $1,500.

The points relied upon by the appellant upon this appeal are: First, that the evidence does not support the verdict; second, that the verdicts are grossly excessive; third, that plaintiffs' counsel was guilty of prejudicial conduct in his argument to the jury; and, fourth, that the court erred in refusing two certain instructions offered by the defendant railway company and also in giving two certain instructions at the request of the plaintiffs.

The points relied upon will be disposed of in the foregoing sequence.

[1-3] A careful review of the evidence reveals ample support of both verdicts. The plaintiff Ethel Baker testified that she boarded the Haight street car at Eighth and Market streets, San Francisco, paid her fare, walked to about the middle of the car, and took a standing position, the car being fairly crowded. When the street car came within about a quarter of a block of arriving at her destination, the corner of Haight and Buchanan streets, she pressed a button to signal for a stop and went to the rear exit. The car stopped with the rear end at about the middle of the intersection. She testified that she took hold of the stanchion at the rear exit with her right hand and held a package in her left arm; that according to her best recollection, some one preceded her in alighting; that as she started to lift her left foot to step down from the platform to the step "the car started up with a jerk"; and that she was "shot through the" exit, and "out on the street," falling on her left hip, shoulders, and head. Her testimony was corroborated by plaintiffs' witness Frank I. Meyers. His testimony was that the car came to a full stop and that after alighting therefrom he walked directly to the northwesterly corner and waited for the car to start so as to permit him to cross Haight street; that he was facing Mrs. Baker, and when he first saw her, "she was leaning over, attempting to get down to the next step, and the car give a sudden jerk and bumped her off in the street, and started forward"; that when he first saw her the car was at a dead stop; that it started as she was attempting to alight.

Testimony was adduced by the defendant company in contradiction of the foregoing evidence; but, at most, the defendant's evidence produces only a substantial conflict upon a question of fact, which cannot be resolved by this court.

"Whether this method of starting a car after it had been stopped for the purpose of enabling passengers to alight, and while passengers were in the act of alighting, was or was not negligence on the part of the defendant was clearly a question for the jury." Murray v. United Railroads of San Francisco, 49 Cal. App. 462, 193 P. 596, 597.

[4, 5] The appellant's contention that the verdicts were grossly excessive is not supported by the evidence. Before this court can exercise its power of revision over a jury's verdict upon the question of reasonable compensation for unliquidated items of damage, there must appear from the evidence a disproportion that shocks the sense of justice.

The evidence discloses that before the accident Mrs. Baker, forty-nine years of age, was in good health, doing her own housework, and able to walk long distances without fatigue; that in falling heavily upon the pavement at the time of the accident, her left shoulder and left hip were cut and bruised; that she sustained other objective injuries; that she suffered pain in her side and severe headaches then and for long thereafter; that from her injuries she had become, at the time of trial, subject to pain in the left hip while walking. Her physician, Dr. Francis Redewill, rendered to Mrs. Baker medical services for the care of her injuries, which appellant's trial counsel stipulated were of the reasonable value of $358. This physician, an expert urologist, testified that he found Mrs. Baker to be suffering from a fallen kidney, resulting in a 75 per cent. loss of its function; that in his own twenty-five years of professional experience, he had known that where kidneys were removed, or damaged to such an extent that they are the same as removed, one can expect the patient to live for only ten years. He testified that Mrs. Baker needed an operation for kidney suspension, and that her falling from a street car to the pavement upon her left side and shoulder would be a probable producing cause of the injuries regarding which she testified. He explained at length how her falling upon the left side would injure the right kidney, and testified that the cases of falling kidney which he had treated numbered two or three thousand. It will serve no useful purpose to set forth here the lengthy testimony of the attending physician, Dr. Redewill; suffice it to say that a review of the evidence bearing upon this point leaves this court's sense of justice unshocked by the jury's valuation of Mrs. Baker's injuries.

"Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision." Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76, 81.

[6-8] The next point made upon appeal is the alleged misconduct of plaintiffs' counsel in stating to the jury that if the conductor

had admitted that he started the car, he would have lost his position and his wife and children would lose his support, and there would be "another member in the ranks of the unemployed; another member probably in the bread-line." When plaintiffs' counsel made his statement, the substance of which appears above, trial counsel for the defendant objected to it, and asked the court to instruct the jury to disregard it, stating that there was no evidence in the record to justify this statement to the jury. The court forthwith informed the jury that there was no evidence in the case that if the conductor admitted that he had started the car, he would lose his position, and concluded by saying: "You will understand counsel's argument to be simply his deduction or his speculation on what that might be. I think that is sufficient comment to make." Appellant in its opening brief admits "the endeavor of the court to cure the misconduct complained of," but argues that it left an indelible stain upon the minds of the jurors that could not be removed by the cautionary remarks of the court. The statement complained of related not to matters of fact material, but was merely an obvious statement of counsel's opinion.

"* * * Misstatements or improper statements made to the jury during argument as affording ground for reversal must relate to matters of fact material, as distinguished from matters of mere opinion, and, in any event, 'must be such as in a material matter to have prejudiced the defendant.'" Clements v. Watson, 7 Cal. App. 74, 93 P. 385, 386; 24 Cal. Jur. 740.

The obvious intention of counsel in making to the jury the statement, "* * * do you think for a single minute that he could admit to the officials of the Market Street Railway Company that through his negligence in starting a car that a woman was injured?" was to discredit the testimony of an employee who had testified favorably to his employer. In arguing a case to the jury, an attorney has a right to make his comments regarding the credibility of the witnesses. The statement did not intend to assert a material fact; and if the remark did prejudice the defendant before the jury, the court's instruction removed the effect of the remarks.

[9] "It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." Tingley v. Times-Mirror, 151 Cal. 1, 23, 89 P. 1097, 1106.

The remaining points raised by the appellant on this appeal relate to certain instructions given and other instructions refused.

Although the issues in the case are not at all complicated, the defendant offered fifty-five instructions, eleven of which were given —some of them being modified. Error is claimed only as to the court's refusal to give three of the forty-four rejected. Twenty-one instructions were offered by the plaintiffs, eleven of which were given. Other instructions were also given by the court. From all of the instructions given, it appears that the jury was fully informed upon the law applicable to the issues.

[10-12] The position taken by appellant is that the complaint being based upon a specific charge of negligence in suddenly starting the street car while plaintiff was in the act of alighting, the court erred in instructing the jury with regard to the carrier's liability for failure to exercise generally the highest degree of care toward its passenger. Undoubtedly, the charge of negligence was special; but it must be borne in mind that the particular act of negligence complained of was in the nature of a specific instance of the carrier's failure to exercise its full duty of care toward the passenger. Hence, it was proper for the court to instruct the jury upon the carrier's responsibility for the safe carriage of its passengers. It was also proper and even necessary for the court to give a general instruction defining negligence. The first instruction given by the court told the jury that the plaintiff Ethel Baker was demanding damages "alleged to have been sustained by her by reason of *the claimed negligence.* The negligence which is alleged in the complaint is denied specifically by the railway company in its answer." (Italics ours.) The court further instructed the jury that the plaintiffs had the burden of proof upon the allegations of their complaint; also, that "the burden is upon the plaintiffs in this action to prove that Mrs. Baker sustained any injuries complained of as a direct and proximate result of the occurrence in question, and if you find that plaintiffs have not proved that any of the injuries complained of by Mrs. Baker were a direct or proximate result of such occurrence, then" plaintiffs cannot recover. The "occurrence" referred to in counsel's opening statement was the sudden starting of the street car as Mrs. Baker was in the act of alighting. In the opening statement on behalf of the defendant we find this language: "We will prove that an occurrence took place on the 24th day of April, 1929, at Buchanan and Haight streets, in this city, where, upon alighting from a car that was in motion, Mrs. Baker fell to the ground. * * * she deliberately stepped off of that car while it was still in motion. * * * We will prove to you that * * * she was violating an ordinance of the city and county of San Francisco which prohibits people from boarding or alighting from street cars while they are in motion, * * *" etc. There could have been no doubt in the minds

of the jury that the court, in using the expression "the occurrence in question" contained in the foregoing instruction, was understood to refer to the negligence charged in the complaint and referred to by counsel in their opening statements.

In support of its contention that the instructions given allowed the jury to find in favor of plaintiffs upon negligence not charged in the complaint, appellant cites Starkey v. Market Street Railway Co., 90 Cal. App. 249, 265 P. 839, 842; but this citation does not support the contention made. In the Starkey Case, supra, the complaint alleged specially that the plaintiff, a passenger in the act of boarding a standing street car, was thrown off and injured by reason of the car being suddenly *started*. An instruction given in that case reading in part "the fact that plaintiff had boarded the car while the same was in motion will not bar his recovery" was obviously error, in that it allowed a recovery upon a theory different from that upon which the complaint was predicated.

[13] There is no merit whatever in the objection raised to the instruction given at plaintiffs' request upon the measure of damages. We deem it captious to argue that confusion must have arisen in the minds of the jury because the court instructed them "that they should" consider certain elements of damages, and also instructed them that they should not consider those elements unless they were proximately caused by the accident.

[14] Neither is there any merit in the appellant's remaining point, to wit, that the court committed prejudicial error in charging the jury: "You are instructed as a matter of law applicable to this case that it was the duty of the defendant as a common carrier of persons, *when it stopped its car*, whether on a signal from some passenger or not, not to start the same again while its passengers are in the act of getting on or off the car," etc. The italicized words are complained of, as an instruction by the court that the street car was actually stopped—a disputed and material issue. The instruction was upon the general duty of care owed by the carrier to the passenger. It nowhere mentions or refers to the parties to or the facts of the case at bar.

In the case of Dawson v. Pacific Electric Railway Co., 177 Cal. 268, 170 P. 602, 606, the court instructed the jury: "If you believe from the evidence that defendant was guilty of both or either of said *negligent acts*, and that the same or either contributed directly or proximately to cause the accident, then the plaintiff may recover in this case." Appellant criticized the instruction, claiming that the italicized words assumed that the acts in question were negligent and that the province of the jury was invaded. Upon that contention the Supreme Court says: "We think, however, that the court was merely referring to its preceding description of acts *alleged by the plaintiff* to have been negligent. Furthermore, in view of other instructions which specifically directed the jury that the burden of proof was upon the plaintiff to establish a want of ordinary care, there is no room for the belief that the jury could have been misled." The language of the Supreme Court in the Dawson Case is adopted as applicable to the case here considered.

The judgment and the order appealed from are affirmed.

We concur:

KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App.(Supp.) 783

AMERICAN NAT. BANK OF SANTA MONICA v. JOHNSON et al.

Civ. A. 1329.

Appellate Department, Superior Court, Los Angeles County, California.

May 18, 1932.

1. Justices of the peace ⇐36(7).

Santa Monica township having population of over 30,000, justice of peace thereof *held* to have jurisdiction of summary possession action in nature of unlawful detainer where other jurisdictional elements were present (Code Civ. Proc. §§ 112, 1161a).

2. Statutes ⇐183.

Intention of Legislature is not always found in strict interpretation of language of statute.

3. Pleading ⇐8(11).

Allegation in unlawful detainer action that on certain date plaintiff became owner in fee of premises and entitled to possession through sale under trust deed *held* demurrable as stating conclusion of law.

4. Appeal and error ⇐236(2).

Where demurrer was improperly sustained on jurisdictional grounds, failure to request leave to amend did not require affirmance of judgment based on demurrer, such request being futile.

Appeal from Justice's Court, Los Angeles County; W. R. Garrett, Justice of the Peace.

Action by American National Bank of Santa Monica, a national banking association, against Frank O. Johnson and others. From a judgment for defendants, plaintiff appeals.

Reversed.

Richard K. Gandy, of Santa Monica, for appellant.

Tanner, Odell & Taft, of Santa Monica, for respondents.

BISHOP, J.

[1] A demurrer, on the ground that the trial court had no jurisdiction of the subject-matter of the action, having been sustained without leave to amend, the judgment appealed from was entered. Plaintiff was seeking to recover possession of some real estate located within Santa Monica township, which he had purchased at a trust deed foreclosure, and for the purpose attempted to pursue the summary proceedings now authorized by section 1161a, Code of Civil Procedure. The value of the property involved is not stated, but we assume that it exceeds $1,000. Its monthly rental value is alleged to be less than $100, more nearly $75. The question thus presented is whether or not the justice's court of Santa Monica township, a township of over 30,000 population, has jurisdiction of an action for summary possession authorized by section 1161a, Code Civ. Proc.; to this question we give an affirmative answer.

The provisions of sections 112 and 1161a, Code Civ. Proc., should be before us. In part, section 112 reads: "The justices' courts shall have jurisdiction as follows: 1. In * * * judicial townships, having a population of thirty thousand or more, said courts shall have original jurisdiction in all cases at law in which * * * the value of the property in controversy, amounts to one thousand dollars or less; of all actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less."

Section 1161a is as follows: "In either of the following cases, a person who holds over and continues in possession of real property, after a three day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter. 1. Where the property has been duly sold by virtue of an execution against him, or a person under whom he claims, and the title under the sale has been duly perfected. 2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in this code, of a mortgage, or under an express power of sale contained therein, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected. 3. Where the property has been duly sold in accordance with section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected."

[2] The section just quoted, it will be observed, does not define the actions for possession therein authorized, as actions for forcible entry or detainer or unlawful detainer, and they do not fall within the definitions of those actions as contained in the preceding sections 1159, 1160, and 1161. Therefore, if the Legislature always selected its words with care, so that the intent could be measured by the exactness of the terms employed, the answer to our problem would be plainly indicated. But, unfortunately, in many instances the intent is not to be found in a strict interpretation of the language of a statute [see illustrations, 23 Cal. Jur. 738, and Gallagher v. Campodonico (1931) (Cal. Super.) 5 P.(2d) 486], and we do not so find it here.

Turning our attention again to sections 1159, 1160, and 1161, we find that they define three terms: Forcible entry, forcible detainer, and unlawful detainer. Unlawful entry is a term not recognized. Nevertheless in 1929, at the same session when section 1161a was written into our law, section 112 was amended to include for the first time references to these summary remedies, and it purports to give to the justices' courts, jurisdiction over actions of forcible or unlawful entry. Sections 1159, 1160, and 1161 have defined the three causes of action since 1872, yet until 1929 the justices' courts would have had no jurisdiction over any action of unlawful detainer, had a strict interpretation been given to the Code sections, for jurisdiction was expressly given over actions of forcible entry and detainer only. Sections 113 and 1163, Code Civ. Proc., prior to their repeal, and section 11, art. 6, state Constitution, prior to 1924. In spite of the silence of these sections and the Constitution as to actions of unlawful detainer, it was held that justices' courts were given jurisdiction over them. Ivory v. Brown, (1902) 137 Cal. 603, 70 P. 657; Richmond v. Superior Court (1908) 9 Cal. App. 62, 98 P. 57; and see the early cases cited in Ivory v. Brown. A fair indication of the common viewpoint of the whole matter is found in a statement appearing in Francis v. West Virginia Oil Co. (1917) 174 Cal. 168, 162 P. 394: "The mortgagor is not a tenant within the meaning of the unlawful detainer act." There is, of course, no unlawful detainer act other than that chapter of the Code of Civil Procedure entitled: "Summary Proceedings for Obtaining Possession of Real Property in Certain Cases." In this "unlawful detainer act" we now find section 1161a, under which the action before us was brought.

Within section 1161a, furthermore, we find a clue to the legislative intent. Bearing in mind that prior to the enactment of this sec-

tion in 1929 (St. 1929, p. 719) the action of unlawful detainer required the conventional relation of landlord and tenant, Francis v. West Virginia Oil Co., supra; and being conscious of the obvious fact that you cannot have a subtenant without having a tenant to whom he is subordinate, we can only interpret the words "subtenant," twice appearing in section 1161a, as indicative of the legislative understanding that, for the purposes of the summary remedy, one holding over after he had been given a three days' notice to quit, in any one of the three instances set forth, was a tenant of the owner of the fee. Had the Legislature intended to have a different jurisdictional rule apply to actions to oust the tenants and subtenants thus recognized by section 1161a, from that applying to actions to oust those who are, strictly speaking, tenants and subtenants, it would, we believe, in amending section 112, Code Civ. Proc., at the same session when it adopted section 1161a (St. 1929, pp. 834, 719), have made use of terms other than the historically generic ones employed. We conclude that the jurisdiction given to justices' courts by section 112, Code Civ. Proc., includes those actions authorized by section 1161a.

This conclusion is in accord with Cheatham v. Municipal Court (1931) 112 Cal. App. 114, 296 P. 305, where the matter is not discussed, but where, seemingly, it is assumed that an action brought under section 1161a, Code Civ. Proc., is one for unlawful detainer.

[3, 4] We have predicated our statement that the case is one in which relief is sought under section 1161a, Code Civ. Proc., largely on the following allegation of the amended complaint: "That on February 1, 1932, plaintiff became the owner in fee of said premises and entitled to the possession thereof by virtue of a sale of said property to the plaintiff in accordance with section 2924 of the Civil Code, under power of sale contained in a Deed of Trust executed by the defendants Frank O. Johnson and Florence W. Johnson." No other attempt is made to state the facts relating to the trust deed and sale on which plaintiff relies. The portion of the complaint just quoted defendants attack by a special demurrer for uncertainty, pointing out that conclusions of law and not facts are stated. We find that this demurrer was well taken, for the averments are not of ultimate facts but of conclusions of law; a defect which an amendment might cure. As the trial court indicated that he sustained the demurrer upon the jurisdictional ground, a request for leave to amend would have been futile, so its absence does not require us to affirm the judgment which follows the order sustaining the demurrer without leave to amend. In re Estate of Palmieri (Cal. App. 1932) 8 P.(2d) 152. Incidentally, we note that there are no allegations in the complaint to support the prayer for damages at the rate of $10 per day.

The judgment is reversed, with costs of appeal to appellant. Plaintiff may, if it be so advised, file a second amended complaint within ten days, after service upon it of written notice that the remittitur from this court has been filed.

We concur: McLUCAS, P. J.; SHAW, J.

right of taxpayers to bring actions to contest the validity of the bonds and proceedings after 90 days, and does not purport to authorize the bringing of such actions for a period of 90 days.

2. Waters and water courses ⇐183½.

Metropolitan water district ordinance authorizing election to submit proposition of incurring bonded indebtedness for construction of water system need not state precise location of system (St. 1927, p. 694).

3. Waters and water courses ⇐182.

That Metropolitan Water District Act permits district board of directors to levy taxes *held* not unconstitutional (Const. art. 11, §§ 12, 13; St. 1927, p. 694; p. 703, § 7 (i), as amended by St. 1931, p. 820, § 5).

4. Waters and water courses ⇐183½.

Reference to taxes in Metropolitan water district ordinance authorizing election to submit proposition of incurring bonded indebtedness for construction of water system and for levy of taxes *held* not improper (St. 1927, p. 694).

5. Waters and water courses ⇐183½.

In proceeding to determine validity of issue of $220,000,000 bonds of Metropolitan water district for construction of water system, evidence that district owned no water rights and that cost would exceed $220,000,000 *held* immaterial, where no charge of fraud was made (St. 1927, p. 694; p. 703, § 7 (i), as amended by St. 1931, p. 820, § 5).

Such evidence was immaterial because, the good faith of the board of directors of the water district not being attacked, there was nothing in the plan or estimate of costs which the board was required to make and which was approved by the voters which was subject to judicial review.

215 Cal. 582

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. BURNEY.

L. A. 13503.

Supreme Court of California.

June 2, 1932.

1. Waters and water courses ⇐183½.

That only 70 days elapsed between election authorizing Metropolitan water district to issue bonds and judgment of Superior Court in action by district to determine their validity *held* not to deprive court of jurisdiction (St. 1927, p. 694; p. 703, § 7 (i), as amended by St. 1931, p. 820, § 5).

St. 1927, p. 703, § 7 (i), as amended by St. 1931, p. 820, § 5, permits the water district to bring an action to determine the validity of the bonds within 90 days from the date of the election authorizing their issuance, and the provision in the statute that after the expiration of 90 days from the date of the election no action may be brought to contest their validity and proceedings in relation thereto simply constitutes a limitation on the

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Petition by the Metropolitan Water District of Southern California, a public corporation, against J. E. Burney, to determine the validity of certain bonds authorized to be issued by the petitioner. From the judgment, defendant appeals.

Affirmed.

Reuel L. Olson, Lloyd S. Verry, Edward H. Gaylord, and Everett R. James, all of Los Angeles, for appellant.

James H. Howard, of Pasadena, and Charles C. Cooper, Jr., and Ray W. Bruce, both of Los Angeles, for respondent.

LANGDON, J.

This is a proceeding to determine the validity of certain bonds authorized to be issued

by the Metropolitan water district, petitioner herein.

Petitioner was regularly organized under the Metropolitan Water District Act (Stats. of 1927, c. 429, p. 694), and since December 6, 1928, has been operating thereunder. It embraces territory included within the corporate boundaries of the cities of Beverly Hills, Burbank, Compton, Glendale, Long Beach, Los Angeles, Pasadena, San Marino, Santa Monica, and Torrance, in the county of Los Angeles, and Anaheim, Fullerton, and Santa Ana, in the county of Orange. On September 11, 1931, the board of directors of said district adopted an ordinance which determined that the interests of the district demand the acquisition and construction of a certain public improvement, namely, a water system for supplying its inhabitants with water from the Colorado river, and that the cost thereof was too great to be paid out of the ordinary annual income of the district. The ordinance authorized the holding of a special election on September 29, 1931, to submit to the voters the proposition of incurring a bonded indebtedness of $220,000,000 for the purpose of acquiring and constructing said water system, and for the levy and collection of taxes to pay interest and for a sinking fund. The election was duly held, and the bond issue was authorized by a vote of 224,477 to 46,388.

Section 7, subdivision (i) of the act as amended in 1931 (Stats. of 1931, chap. 323, pp. 820, 823, § 5), provides in part as follows: "The board of directors shall, within ninety (90) days from the date of the election authorizing the issuance of bonds, cause to be brought in the name of the district an action in the superior court of the county in which said district, or the greater portion of the property subject to taxation by said district, according to the most recent assessment, is located, to determine the validity of any such bonds and the sufficiency of the provision for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due and to constitute a sinking fund for the payment of the principal thereof on or before maturity. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of summons. * * *" Pursuant to this section, a petition was filed on October 17, 1931, in the Superior Court of Los Angeles county, to determine the validity of the bonds authorized at the election, and the sufficiency of the taxing provisions of the ordinance. An alias summons was issued and duly published, directed to "all persons interested" in the matter. On November 13, 1931, defendant, Burney, owner of taxable property within the district, appeared and filed a demurrer and answer to the petition. On December 3, 1931, the court granted a motion of petitioner to enter the default of all persons other than said defendant. Thereafter the demurrer was overruled, the trial was had, and the court made its findings and conclusions of law on December 8, 1931. The findings establish the due incorporation of the district, the proper submission and favorable vote on the bond issue, and the fact that the same did not exceed 15 per cent. of the assessed valuation of the taxable property within the district.

The sufficiency of the evidence to support these findings is not questioned. Defendant attacks the legality of the proceedings and certain rulings of the court excluding evidence offered by him.

[1] The first contention is that the court had no jurisdiction to hear the proceeding because only 70 days had elapsed between the election and judgment of the court. The argument is that the act (section 7, subdivision (i) provides for a special proceeding which must be strictly followed, and that it gives taxpayers of the district 90 days from the date of the election to file an action to contest the validity of bonds or proceedings in relation thereto. This contention was not raised in the lower court, and, indeed, it is impossible to see how defendant can raise it at all, since he did make an appearance and set forth grounds of contest, and hence has had full protection of his right to a hearing. Nevertheless, an examination of the statute shows the error of defendant's interpretation. It provides that jurisdiction "shall be complete within ten (10) days after the full publication of such summons in the manner herein provided. Anyone interested may at any time before the expiration of said ten (10) days appear and by proper proceedings contest the validity of such bonds. * * *" Further on it is provided: "After the expiration of ninety (90) days from the date of the election authorizing the issuance of bonds, no action may be brought to contest or question the validity of said bonds and proceedings in relation thereto. * * *" It is clear that the second provision simply constitutes a limitation upon the right to bring actions to contest the validity of the bonds and proceedings after 90 days, and does not purport to authorize the bringing of such actions for a period of 90 days. Irrespective of any right of taxpayers to sue, the statute permitted the district to bring an action, and specified the time within which jurisdiction should attach. The proceedings taken herein followed the statute, and the court had jurisdiction to render the judgment.

[2] The second contention is that the ordinance of the district did not follow the statute. The particular provision alleged to be violated is that which specifies that, when the board, by ordinance, shall determine that the interests of the district and the public inter-

est or necessity demand the acquisition, construction or completion of "any public improvement," they must submit the proposition of incurring a bonded indebtedness to the voters, and that the ordinance shall recite, among other things, "the estimated cost of the public works or improvements." Defendant argues that the statute by this language requires the selection of some definite works or improvements, and an estimated cost of such particular works, prior to the election; and that the ordinance is indefinite as to the method or plan of bringing the water to the district. Obviously no such narrow meaning can be attributed to the general language of the act. There is no requirement that the precise location of the system be stated, and the description in the ordinance is as full as the statute demands. See Clark v. Los Angeles, 160 Cal. 30, 116 P. 722.

[3] The next contention of defendant is that the act violates article 11, sections 12 and 13, of the California Constitution, in permitting the appointive board of directors of the district to levy taxes. This question was fully considered by us and determined adversely to the contention of defendant in Golden Gate Bridge and Highway District v. Felt, 5 P.(2d) 585, and City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630.

[4] Defendant suggests also that the ordinance should not have included any reference to taxes because the directors have no authority to levy them until the revenues of the district are insufficient to meet its expenses and other charges, and that consequently the question of taxes is prematurely raised. The reference in the ordinance to the taxing power is a restatement of the provisions of the statute itself, and the current expenses of the district will have to be met by taxation, if necessary, before any revenue is produced from the new system. We see nothing improper in the ordinance in this respect.

[5] The final contention is that the court erred in excluding certain evidence offered by defendant. In brief, defendant offered to show that the district owned no water rights, and that the cost of bringing water from the Colorado river would be far in excess of $220,000,000. No charge of fraud was made, but counsel for defendant sought to examine the engineer and some of the officers of the district on the matters upon which their conclusions were based. It does not appear that anything was attempted save to dispute the facts upon which the board reached its conclusion. This was ruled immaterial by the court, and we think the ruling was proper. The board was required to make a plan and estimate of costs, which it did. The proposition to incur a certain indebtedness for the purpose of carrying out this plan was approved by the voters. If the good faith of the board is not attacked, there is nothing in the plan or estimate which is subject to judicial review.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; TYLER, Justice pro tem.; SEAWELL, J.

215 Cal. 518

CAPUCCIO v. CAIRE et al.

L. A. 12342.

Supreme Court of California.

May 23, 1932.

Rehearing Denied June 20, 1932.

1. Partition ⇨114(4).

Services performed by plaintiff's counsel in connection with controverted issues in partition action *held* for "common benefit," so that expenditures should be apportioned (Code Civ. Proc. § 796).

[Ed. Note.—For other definitions of "Common Benefits," see Words and Phrases.]

2. Partition ⇨114(4).

$75,000 *held* reasonable fee for plaintiff's counsel in proceeding to apportion expenses in partition action, where litigation was protracted and property was of great value.

3. Partition ⇨114(4).

Provision for apportionment of costs of partition "expended" by plaintiff includes counsel fees merely "incurred" (Code Civ. Proc. § 796).

[Ed. Note.—For other definitions of "Expend; Expended" and "Incur," see Words and Phrases.]

4. Partition ⇨114(4).

Segregating counsel's services in partition action is unnecessary, in proceedings to apportion expenses, where court considered only services for common benefit (Code Civ. Proc. § 796).

5. Partition ⇨114(4).

Plaintiff's agreement for transfer of property to her counsel *held* not to prevent apportionment of counsel fees for services rendered for common benefit in partition action.

In Bank.

Appeal from Superior Court, Santa Barbara County; Frank C. Collier, Judge.

Action by Aglae S. Capuccio against Arthur J. Caire and others. From certain orders or

decrees granting plaintiff's motion for counsel fees, fixing reasonable value of fees and apportioning the same, and denying application for special findings, defendant Santa Cruz Island Company appeals.

Affirmed.

Joseph F. Bluxome and Frank P. Deering, both of San Francisco, for appellant.

Ambrose Gherini, of San Francisco, Orrin K. McMurray, of Berkeley, and James E. Lyons, of San Francisco, for respondent.

WASTE, C. J.

This is an appeal from certain orders or decrees granting the plaintiff's motion for counsel fees, fixing the reasonable value of the fees at $75,000, apportioning the same between the parties to this partition action, and denying the appellant's application for special findings.

The litigation out of which this appeal arises is of long standing, having received the attention and consideration of this court on several occasions. Its protracted character, and the effect upon this appeal of what has gone before, may best be illustrated by quoting from our most recent decision in the cause (207 Cal. 200, 277 P. 475, 73 A. L. R. 8) in part as follows:

"The legal troubles and disputes of the parties to this action, in so far as these relate to their contentions upon these and certain former appeals, date their inception from the year 1912, when a certain corporation, known as the Santa Cruz Island Company, and of which the parties to this litigation, or the predecessors of some of them, were the stockholders, failed to pay the corporate license tax due under the provisions of the act of March 20, 1905, and the amendments thereto, and in consequence forfeited its corporate charter. In May, 1912, Edmund A. Rossi, one of the appellants therein, acquired from Amelia A. Rossi her shares and interest as a stockholder in and to the property and assets of said corporation, and thereupon commenced an action against the directors or trustees of said corporation, the purpose of which action was to enjoin the said directors and trustees from continuing to carry on the business of said defunct corporation and to compel them as the trustees thereof to wind up its affairs, pay its debts and distribute its assets among its stockholders according to their respective interests therein. When that action reached this court upon appeal one of the questions presented for determination related to the nature of the interest which the stockholders of such corporation had respectively in its real and personal properties and assets from and after the date of the forfeiture of its corporate charter, and this court, while holding that this question was incidental to the relief which was the main object of the action, nevertheless deemed it necessary to determine that, the corporation having ceased to exist and being thus no longer capable of holding the title of property, such property belonged to the persons who were its stockholders at the time it ceased to be a corporation, subject to the temporary possession of its directors who upon its dissolution had become its trustees for the purpose of winding up the affairs of the former corporation and making distribution of its assets to the real owners thereof, which owners, in so far as the real estate was concerned, were held to have become tenants in common thereof. There were certain other matters determined upon said appeal not necessary now to be referred to, but the orders appealed from were reversed and the cause remanded to the trial court for further proceedings. The decision of this court upon that appeal was handed down on December 16, 1916, and the remittitur therein was duly issued 30 days thereafter (174 Cal. 74, 161 P. 1161). Thereafter, and on August 8, 1917, another action was instituted by said Edmund A. Rossi, which had for its purpose that of obtaining an accounting and distribution among the former stockholders of said corporation according to their respective interests in its property arising from the forfeiture of its corporate charter. The principal questions presented in that action and upon appeal from the judgment rendered therein related to an attempted revival of said corporation under certain later amendments to the earlier statute under the terms of which it had suffered the forfeiture of its charter. When that action reached this court upon appeal it was held, in conformity with the earlier decision above referred to, that said corporation, having ceased to exist under the state law as it stood when its said charter was forfeited, it could not be the subject of a revival, at least in the absence of a consent on the part of all its former stockholders whose respective rights in and to its properties had become vested when such corporation had ceased to exist. This court in the state of said appeal did not deem it necessary to determine the precise nature of the interests of the former stockholders of said defunct corporation in its properties, but apparently assumed that that question had been correctly decided upon the former appeal. The judgment of attempted revivor was reversed and the cause remanded to the trial court for further proceedings not inconsistent with the views expressed in the opinion. The decision of this court upon that appeal was handed down on July 28, 1921, and in due course became final (186 Cal. 544, 199 P. 1042). In the meantime, and while this latter action was pending upon appeal in this court, and in the month of May, 1918, the plaintiff herein instituted in said superior court the present action, which had for its purpose the partition of the lands of Santa Cruz Island among the parties to this action who, the plaintiff al-

leged, were tenants in common thereof. Santa Cruz Island, which is the largest of the so-called Channel islands, is situate off the coast of the county of Santa Barbara, but is included within its boundaries and consists of about 58,800 acres of land; and prior to the dissolution of the aforesaid Santa Cruz Island Company had constituted the real estate holdings of said corporation and the lands and real properties thereof, to which, according to the terms of the first case of Rossi v. Caire, 174 Cal. 74, 161 P. 1161, the former stockholders of said defunct corporation had succeeded as tenants in common thereof. The trial court, upon the issue joined in this latter action, determined that the plaintiff therein was entitled to an interlocutory decree of partition of said real properties among the parties thereto and who constitute the tenants in common thereof in conformity with the earlier decision of this court in the first case of Rossi v. Caire. Upon appeal to this court the judgment of the trial court to that effect was affirmed in an opinion filed on September 14, 1922 (189 Cal. 507, 514, 209 P. 367, 374), and which in due course became final. Upon the going down of the remittitur upon that appeal the trial court proceeded to carry into effect its interlocutory decree through the appointment and activities of certain referees selected to make and to report a proper distribution of said real estate in conformity with the terms of said interlocutory decree in order to enable said court to enter its final decree of partition therein. Upon the return and report of said referees, and during the time when the said court was proceeding to hear such matters as had relation to the form and content of its said final decree of partition, the plaintiff herein gave and duly caused to be served a motion to the effect that on Monday, September 28, 1925, 'the plaintiff will move the said court for reasonable counsel fees herein in favor of the plaintiff to be paid by the parties respectively entitled to share in the land divided in proportion to their respective interests. Said motion will be made on the ground that said plaintiff is entitled to such allowance and that it is just and equitable that the same should be made.' At the time fixed for the hearing of said motion counsel for the moving parties therein in presenting the same stated to the court that the moving parties to said motion were making the same under the provisions of section 796 of the Code of Civil Procedure. The parties to said action other than the plaintiff and Edmund A. Rossi, one of the defendants therein, appeared and presented certain objections to the hearing and determination of said motion. The first of these objections related to the form of the notice of said motion, and was based upon the ground that in said notice of motion it had not been expressly stated that said motion was to be a motion 'for reasonable counsel fees expended by plaintiff for the common benefit,' as required by the provisions of section 796 of the Code of Civil Procedure. The second objection which was urged to the hearing and determination of said motion was the objection that in said action, which purported to be an action for partition, the defendants thereto other than said Edmund A. Rossi had denied and contested the existence of a cotenancy between the parties to said action, and hence that in the presence of and existence of such denial and contest counsel fees of plaintiff in said action were not allowable under the provisions of said section of the Code of Civil Procedure. This objection also went further, to the extent of setting forth that in said action certain other contested issues had been presented and determined, and that as to all contested matters in said action both the plaintiff and defendants had been represented by counsel, and for this additional reason counsel fees were not recoverable to any extent whatever by the plaintiff in the action. Upon the presentation of the foregoing objections to the hearing and determination of said motion the moving parties thereto offered to produce witnesses in support of their motion, but the trial court, while holding that as to the first of said defendants' objections that it was technical and that the plaintiff's motion was sufficiently noticed under the provisions of section 796 of the Code of Civil Procedure and was so understood by counsel for the defendants, refused to permit the production of such or any evidence in support of said motion upon the ground urged in the defendants' aforesaid second objection, and thereupon made and entered its order dismissing said motion. * * *"

From this order the plaintiff appealed. 207 Cal. 200, 277 P. 475, 477, 73 A. L. R. 8. Upon that appeal, and in support of the order dismissing plaintiff's motion for counsel fees, the defendant (appellant upon this appeal) urged "that in a contested action for partition the plaintiff was [is] not permitted to recover any counsel fees whatever under the * * * provisions of section 796 of the Code of Civil Procedure." In answer to this contention, and in reversing the order of the court below, this court said (at pages 206, 209 of 207 Cal., 277 P. 475, 477, 73 A. L. R. 8):

"We are satisfied that the foregoing objection to the hearing and determination of the plaintiff's motion for an allowance of counsel fees as made in the trial court under the provisions of section 796, Code of Civil Procedure, was and is not sustainable either under the provisions of said Code applicable to actions for the partition of real property, or under the authorities cited by counsel for the respondents in support thereof, or under the facts and circumstances in the instant case. This, as we have seen, was an action for the partition of certain real property, which ac-

tion was instituted and has been thus far conducted under the provisions of chapter 4, pt. 2, title 10, of the Code of Civil Procedure. This chapter of said Code, commences at section 752 thereof and extending to section 801, inclusive, thereof, embraces a complete and elaborate scheme for the institution and maintenance of an action for partition. It provides in section 752 thereof that such an action may be brought by any one or more of several cotenants owning real property as joint tenants or tenants in common and having an estate of inheritance or for life or lives or for years therein. It imposes upon the plaintiff in such action the duty of setting forth in his complaint the full details as to the interests of all other persons in the property and the nature of such interests or ownerships so far as known to said plaintiff. It requires that the plaintiff shall immediately record in the office of the recorder of the county or of the several counties in which the property is situated a notice of the pendency of the action containing the names of the parties so far as known, the object of the action and a description of the property to be affected thereby. It directs the issuance of a summons containing much more in detail than is required in the ordinary process issued in civil actions. It provides for the publication by the plaintiff of such summons and its service by that method upon all parties to the action whose share or interest is unknown and who themselves either reside out of the state or cannot be found therein. It further provides that when necessary the plaintiff may procure an abstract of title of the property to be partitioned for the inspection and use of all the parties to the action, and requires that the expense reasonably incurred in procuring such abstract shall be allowed to the party incurring it. All of the foregoing requirements imposed upon the plaintiff in the first instance arise prior to any appearances on the part of the defendants in the action. This title of said Code further proceeds to set forth a considerable number of important matters in the further course of the proceedings for the partition of the real property involved in said action, including the ascertainment of the rights of lienholders, the procedure for the appointment, qualification, services, and report of referees to be appointed by the court for the purpose either of making a proper distribution of said property in kind and in severalty to those who may be found entitled thereto or to report and recommend a sale of said property, either in whole or part, and the distribution similarly of the proceeds of such sale. It will thus be seen that from the inception of an action for partition instituted by any one or more of several cotenants having the right as such and as plaintiffs to institute such an action there is a considerable succession of required procedural details which must be initiated and carried forward by the plaintiff or plaintiffs in the action and which at the final analysis inure to the common benefit of those parties to the action who shall be found to be respectively entitled to a share of the lands to be thus divided. It was doubtless for the purpose of making a just and equitable provision for the division of the expenses entailed either by the plaintiff or by any one or more of the defendants in pursuing the required courses for the partition of the property involved in said action whenever such expenditures could be shown to have been made for the common benefit that section 796 of the Code of Civil Procedure was formulated and embraced in said title thereof. Assuming that the action for partition was properly brought and that the trial court shall have so determined upon the issues as framed in said action and having so determined shall proceed to distribute said property or the proceeds thereof among the several persons so found to be the owners as cotenants of hitherto undivided interests therein, *we are of the opinion that the more just and equitable rule to be applied to such cases would require a proper division of the expenditures entailed in the maintenance of such actions for the common benefit among those who shall have been found to be entitled to their respective shares and interests in said property by the ultimate judgment of the court regardless of whether or not there had arisen and been litigated controversies either over the question as to whether or not the parties to the action were cotenants or over the extent of their respective interests as such in the property thus sought to be divided.* It is not to be understood that in so holding we are deciding that the cost of litigating purely controversial issues arising in such actions between parties thereto who have their own counsel and are incurring their own costs in the effort to sustain their adverse claims shall be chargeable or recoverable against the losing party or parties to such controversy. It is evident that such was not the intent of the framers of section 796, Code of Civil Procedure, since it is expressly provided therein that it is only when the costs, including counsel fees entailed in said action, shall be found to have been expended for the common benefit, that they shall be chargeable or recoverable by whichever of the parties, plaintiff or defendant, shall have so expended the same. The cases to which we have been referred by counsel for the respondents in support of said objection are not persuasive as furnishing to this court a sufficient reason for interpreting the provisions of the title of our Code of Civil Procedure relating to actions for partition otherwise than as we have thus construed it, since in the main such cases have arisen in jurisdictions the statutes whereof differ materially from our own; or in cases other than actions for partition. We have been cited by appellants and respondents

to the case of Watson v. Sutro, 103 Cal. 169, 37 P. 201, wherein in an action for partition in which the parties thereto were represented by opposing counsel and also in which certain parties had engaged in various controversies some of which at least involved their respective claims of title to the property in question and in which the attorney for the plaintiff sought to have allowed and apportioned among said parties certain counsel fees alleged to have been expended for the common benefit, the trial court took testimony as to the reasonable value of the services so rendered by plaintiff's counsel for the common good and made an award and allotment therefor among the parties which it had found respectively entitled to share in the lands divided in proportion to their respective interests therein. This court affirmed upon appeal such award and allowance and in so doing placed an interpretation upon section 796 of the Code of Civil Procedure which we are constrained to follow in the instant case. We are moved so to do by a consideration of the facts and circumstances which we have set forth in an earlier stage of this opinion and which have reference to the prolonged controversy between the parties to this action respecting the real estate which it was the purpose of this proceeding to partition between them."

The judgment was reversed and the cause remanded to the trial court for further proceedings upon the motion of the plaintiff for an allowance of counsel fees in accordance with the views expressed in the opinion. Upon the going down of the remittitur, plaintiff renewed her motion for counsel fees for services rendered for the common benefit, and the orders granting the motion and fixing the fees are the subject of the attack on this appeal.

In support of the motion, plaintiff's counsel testified at length as to the steps taken to bring the partition litigation to a successful conclusion. In view of the conclusion we have reached, we deem it unnecessary to here set out even a synopsis of his long and detailed testimony. It would unduly lengthen this opinion. In the witness' opinion, the reasonable value of the legal services rendered by plaintiff's counsel, over the eleven-year period during which the litigation progressed, was $75,000. In arriving at this figure, he excluded all services performed on the motion to modify the referees' report, on the motion to fix counsel fees, and on any and all collateral matters.

Plaintiff also offered in evidence the deposition of Mr. W. H. Devlin, a practitioner of long standing, who gave as his opinion that the reasonable value of the services rendered by plaintiff's counsel for the common benefit was $87,500. In arriving at this figure, the witness excluded from consideration all collateral matters, but kept in mind the protracted character of the litigation, as well as the great value of the property partitioned.

Defendants offered no evidence to controvert plaintiff's showing as to the reasonable value of the services rendered by plaintiff's counsel for the common benefit. Instead, by a series of objections, they attempted to exclude substantially all of the evidence offered by the plaintiff on the ground that the matters thus being elicited were controversial in nature, and therefore not competent to be considered on a motion to fix and apportion the reasonable value of the services rendered by plaintiff's counsel for the common benefit of all the parties to the action. The trial court overruled defendants' many objections, and awarded plaintiff $75,000 as the reasonable value of the services performed by her counsel for the common benefit; defendants' portion thereof being fixed at $64,500. The defendant Santa Cruz Island Company, having succeeded, pendente lite, to the rights of the other defendants, thereupon noticed this appeal.

[1] It is earnestly contended by the appellant that services performed by plaintiff's counsel in connection with the many controverted issues presented by the partition litigation may not be considered in fixing the reasonable value of the services rendered "for the common benefit." This is substantially the contention urged by and decided adversely to the appellant upon the last appeal (207 Cal. 200, 277 P. 475, 73 A. L. R. 8), from which decision we have quoted (supra). At the expense of repetition, we again quote briefly from our former decision. At page 208 of 207 Cal., 277 P. 475, 478, it is declared: "Assuming that the action for partition was properly brought and that the trial court shall have so determined upon the issues as framed in said action and having so determined shall proceed to distribute said property or the proceeds thereof among the several persons so found to be the owners as cotenants of hitherto undivided interests therein, *we are of the opinion that the more just and equitable rule to be applied to such cases would require a proper division of the expenditures entailed in the maintenance of such actions for the common benefit among those who shall have been found to be entitled to their respective shares and interests in said property by the ultimate judgment of the court regardless of whether or not there had arisen and been litigated controversies either over the question as to whether or not the parties to the action were cotenants or over the extent of their respective interests as such in the property thus sought to be divided.*"

By this language, it was our intention to declare that counsel fees may be allowed under the provisions of section 796 of the Code of Civil Procedure for services rendered for

the common benefit even in contested partition suits. Appellant can derive but little comfort from the following sentence, also appearing in our former decision: "It is not to be understood that in so holding we are deciding that the cost of litigating purely controversial issues arising in such actions between parties thereto who have their own counsel and are incurring their own costs in the effort to sustain their adverse claims shall be chargeable or recoverable against the losing party or parties to such controversy." This sentence was inserted in the opinion for the sole purpose of caring for the exception provided for in the Code section itself (section 796, supra), which, after providing that the plaintiff in a partition suit may recover reasonable counsel fees expended "for the common benefit," goes on to state: "When, however, litigation arises between *some* of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them."

The evidence upon which the court below based its finding as to the reasonable value of the legal services rendered fails, in our opinion, to disclose the inclusion of any services falling within the statutory exception, and which should have been excluded in determining such reasonable value. The trial court was careful. Evidence of a competent witness called as an expert by plaintiff was excluded upon the ground that the witness, in arriving at his conclusion, had considered matters other than the services rendered for the common good of the parties. We are satisfied that the services considered by the trial court were services "for the common benefit" within the meaning of section 796 of the Code of Civil Procedure, as that section has been judicially construed in this particular litigation. Capuccio v. Caire, supra.

[2] That the fee so fixed is a reasonable one is attested by the nature and quantum of the services performed, the protracted character of the litigation, and the great value of the property partitioned. The stipulated fee of $37,500, allowed to the referees for services performed over the comparatively short period of a year is also somewhat indicative of the reasonableness of the fee allowed by the court below for legal services performed "for the common benefit" over an extended period of time.

[3] We find no merit in the contention that an allowance of counsel fees under section 796, supra, is proper only when such fees have been actually "expended" or paid by the plaintiff, rather than merely incurred. A reasonable construction of the Code section seems to require that the word "expended" be construed to be the equivalent of the word "incurred." Chavez v. Scully, 62 Cal. App. 6, 8, 216 P. 46. Though not appearing on the face of the opinion, the point was, in effect, decided adversely to the appellant when heretofore we reversed the order denying the motion for allowance of counsel fees (207 Cal. 200, 277 P. 475, 73 A. L. R. 8), because the order there reversed was based in part upon the trial court's conclusion that only fees actually "expended" might be allowed under the Code section, and the present appellant vigorously contended for such an interpretation in his briefs filed on that appeal.

[4] What has been said sufficiently disposes of appellant's contention that it was entitled to findings "as to what services were upon required procedural details and what upon controversial issues." In fixing the counsel fees for services performed, the trial court properly excluded all evidence of services falling within the exception contained in the Code, and considered all other services testified to as having been rendered "for the common benefit." That being so, there was no necessity for findings designating and segregating the various services.

[5] Appellant next contends that plaintiff has transferred a two-sevenths part of her interest in Santa Cruz island to her counsel, who are, therefore, parties in interest and not entitled to a fee. The Code section provides for an allowance of counsel fees to the *plaintiff*, in which allowance the attorney has no personal interest. Chavez v. Scully, supra. Moreover, the uncontradicted evidence shows that the transfer, if any, was made in payment for work done for the individual benefit of plaintiff, and not for the common benefit, and that the agreement for such a fee was terminated and canceled upon the death of associate counsel. The transfer cannot, therefore, deprive *plaintiff* of her right to an award for counsel fees for services rendered for the common benefit. Any agreement which plaintiff might have had with her counsel looking to their reimbursement, while admissible in evidence for whatever assistance it might lend in measuring the reasonable value of the services performed, should not serve to deprive plaintiff of the fees provided for in section 796, supra. In addition, counsel for plaintiff testified, as already intimated, that the agreement introduced in evidence by the defendant had been terminated and canceled upon the death of associate counsel.

We find nothing further in the case requiring discussion.

The orders or decrees appealed from are, and each is, affirmed.

We concur: CURTIS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; TYLER, J. pro tem.

124 Cal.App. 86

ROBERTS LAND & IMPROVEMENT CO. v. DALLAS.

Civ. 8280.

District Court of Appeal, First District, Division 1, California.

June 4, 1932.

1. Husband and wife ⇐266.

Agreement between spouses that realty "held" by either was community property *held* to include property subsequently acquired.

The quoted word "held" in agreement that all real estate "held" by either party was community property without reservation, and should be held as such until agreement was revoked or annulled in writing by mutual consent, did not limit operation of agreement to property owned by parties at its date, but it included therein property subsequently acquired.

2. Husband and wife ⇐266.

Deed from husband to wife *held* pro tanto revocation of agreement that all realty held by either was community property until agreement was revoked or annulled in writing by mutual consent (Civ. Code, § 164).

Deed worked partial revocation of agreement, since it could not be presumed that parties intended merely an idle act, and deed met requirements as to writing, and consent was supplied by grantor's delivery and grantee's acceptance; and hence such agreement was properly rejected when offered to rebut presumption, raised by Civ. Code, § 164, that by such conveyance title became vested in wife as her separate property.

3. Husband and wife ⇐262(1).

It must be presumed that by deed from husband to wife parties intended change of character of property from community to separate (Civ. Code, § 164).

Such presumption is in accord with cardinal rules of interpretation, namely, that grantor intended result of his own voluntary act, that grantee accepted a deed beneficial to herself, and that deed was effective to accomplish its apparent purpose.

4. Assignments ⇐73.

Assignment of any moneys or properties, real or personal, due from another, *held* mere assignment of chose in action.

Such assignment did not convey an interest in realty, but operated merely as assignment of chose in action based upon claim that realty might be due.

5. Husband and wife ⇐263.

In quiet title action, assignment by husband of realty claim against wife *held* inadmissible to show transfer of title, where prior deed to wife conveyed property to her (Civ. Code, § 164).

Deed having vested title in wife as her separate property, assignment of any moneys or properties, real or personal, which might be due husband from wife's estate or her administrator on account of matters covered by a claim, was properly rejected as immaterial, since assignments could not have transferred any interest in property, especially where there was no showing at time of offer what nature of claim was, nor that it had been reduced to judgment, and where it subsequently appeared that litigation between estate and husband upon claim was then pending and undecided.

6. Stipulations ⇐18(3).

Appellate court could not consider alleged error in rejecting evidence attacking foreclosure proceedings, where proceedings were absent and stipulated to be regular.

7. Quieting title ⇐10(1).

In quiet title action, plaintiff must recover upon strength of own title, not upon weakness of defendant's.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Roberts Land & Improvement Company against M. Dallas. From an adverse judgment, plaintiff appeals.

Affirmed.

William H. Wylie and E. P. Sample, both of San Diego, for appellant.

Moote & Longcroft, of Los Angeles, for respondent.

GRAY, Justice pro tem.

[1-3] The plaintiff, in an action to quiet its title to certain property, appeals from an adverse judgment, assigning as error the exclusion from evidence of three documents and certain testimony offered by it. The parties stipulated that the property was conveyed by deed on December 21, 1914, to John L. Roberts, the common source of title, and that on August 27, 1917, the latter by deed transferred the property to Laura A. Roberts, his wife. To rebut the presumption raised by section 164 of the Civil Code that the title thereby vested in the wife as her separate property, plaintiff offered the following agreement made by the husband and wife on March 15, 1917 (formal parts omitted and italics supplied): "* * * It is mutually agreed * * * that all real estate * * * *held* by either party * * * is community property without reservation and it shall be held as such *until this agreement*

has been revoked or annulled in writing by mutual consent." Defendant's objection that the agreement was immaterial was sustained.

It is appellant's contention that, because of the terms of this prior agreement, the title conveyed by the subsequent deed still remained in the parties as community property and did not vest in the wife as her separate property. On the other hand, respondent argues that the italicized word "held" limited the operation of the agreement to property owned at the date of the agreement, and that the deed was a pro tanto revocation of the agreement, in accordance with the italicized phrase of the agreement. Neither grammatically nor by context did the word "held" limit the operation of the agreement to property owned by the parties at its date, but it included therein property subsequently acquired. Starr v. Case, 59 Iowa, 491, 13 N. W. 645. But the deed, being inconsistent with the agreement, did work its partial revocation, unless the husband by its execution and delivery, and the wife by her acceptance, intended merely an idle act. It cannot, however, be presumed that the deed was a nullity, but, on the other hand, it must be presumed that the parties intended the apparent effect of the deed, i. e., the change of the character of the property from community to separate. Such presumption is in accord with cardinal rules of interpretation, that is, that the grantor intended the result of his own voluntary act, that the grantee accepted a deed beneficial to herself, and that the deed was effective to accomplish its apparent purpose. Nor does the agreement prescribe that its revocation can only be accomplished by another agreement of revocation. It merely requires a written revocation consented to by both parties. The deed meets the requirement as to a writing, and the consent is supplied by the grantor's delivery and the grantee's acceptance. The trial court properly rejected the agreement.

[4, 5] In further deraignment of its title, appellant offered and the court upon respondent's objection rejected two assignments, one from John Roberts to Lee J. Roberts and the other from the latter to appellant. Each assignment was identical in form except as to parties and read in material parts as follows: "Assignment of claim and judgment against the Estate of Laura A. Roberts and the Security Trust & Savings Bank her administrator. The undersigned, John Roberts, * * * assigns, sells, and forever sets over unto Lee J. Roberts any * * * judgment * * * which may hereafter be in favor of the undersigned in any action and any * * * monies or properties real or personal which may be due the undersigned from the said defendant * * * on account of the matters covered by the above entitled claim; * * * and the said defendant * * * are hereby notified * * * to pay any monies due or to become due on account of the matters included in said claim * * * to the said Lee J. Roberts. * * *" The language used more aptly would describe an assignment of personal property rather than a conveyance of real property. Giving the greatest possible effect to the words "properties real" the instrument does not purport to convey any interest in real property, but rather assigns a chose in action based upon a claim that real property may be due. Not only was there no showing at the time of the offer what the nature of the claim was, nor that it had been reduced to judgment, but it subsequently appeared that litigation between the estate and the husband upon the claim was then pending and undecided. Furthermore, the above deed having vested title in the wife as her separate property, the assignments could not have transferred any interest therein, and so the trial court properly rejected them as immaterial.

[6, 7] In support of her title, respondent introduced proceedings in foreclosure of a mortgage upon the property in dispute given by the wife to the bank, which subsequently became the administrator of her estate, as security for the note of herself and husband. Appellant offered to prove that the bank, without consideration, assigned the note to a substituted plaintiff during the pendency of the action; that the bank in fact was the real plaintiff as mortgagee, and defendant as administrator; that the note prior to decree was paid by the wife's heirs and devisees; that respondent purchased the property as agent for such heirs and holds title as their trustee; and that the foreclosure action was merely a device to transfer title to such heirs in fraud of the husband's rights. The record does not permit our consideration of the alleged error in the rejection of such evidence, because the attacked proceedings are absent, and in lieu thereof appears a stipulation that such proceedings were regular. However, any error in that regard would not benefit appellant because it must recover upon the strength of its own title and not upon the weakness of respondent's. 22 Cal. Jur. 167.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 100

DEWING v. BLODGETT.

Civ. 7278.

District Court of Appeal, Second District, Division 1, California.

June 6, 1932.

1. Libel and slander ⇐80.

Complaint alleging plaintiff was official court reporter and that publication that court reporter had made false transcript was intended to refer to plaintiff *held* sufficient without setting out names.

2. Libel and slander ⇐112(1).

Evidence sustained verdict for plaintiff in court reporter's action for libel charging false transcript.

3. Appeal and error ⇐907(4).

Evidence must be assumed sufficient to establish necessary facts, where, on defendant's appeal, evidence produced by plaintiff is entirely omitted from bill of exceptions.

4. Libel and slander ⇐21.

Plaintiff, who alleged and proved readers of libelous publication believed plaintiff was intended, could recover, though plaintiff's name was not mentioned.

Appeal from Superior Court, Santa Barbara County; A. C. Finney, Judge.

Action by Henry A. Dewing against D. T. Blodgett. Judgment for plaintiff, and defendant appeals.

Affirmed.

D. T. Blodgett, in pro. per.

W. P. Butcher, Jr., of Santa Barbara, for respondent.

CONREY, P. J.

Pursuant to the verdict of a jury, judgment was entered against defendant in the sum of $5,000 and costs. Defendant appeals from the judgment. Appellant relies upon three points to sustain his appeal. These points are: First, that the demurrer to the complaint should have been sustained because the libels did not contain a name by which their readers knew the plaintiff, and that therefore said libels were not actionable per se as to plaintiff, and that, in order to recover damages for such a publication, the plaintiff must allege facts or circumstances known to the readers of the alleged libel by means of which the reader was reasonably certain that the plaintiff was defamed by the publication, or allege other facts which showed that plaintiff sustained special damage by the publication. Second, that the verdict was not sustained by the evidence, because it did not prove that the defendant intended to refer to the plaintiff in the libelous articles. Third, that the verdict cannot be sustained because the evidence showed that one Dewey C. Carson and not the plaintiff took and transcribed the stenographic notes in the case of Blodgett v. Trumbull, in connection with which the libelous articles were published.

Prior to the publication by appellant of the alleged libelous articles, there had been tried in the superior court of Santa Barbara county an action entitled Ida Blodgett, plaintiff, v. Grace Sherwood Trumbull, Defendant, and judgment therein had been entered in favor of the defendant Trumbull. The plaintiff, Ida Blodgett, appealed from that judgment. In the first of said articles published by appellant while said appeal was pending, it was stated that after decision of the action "the court reporter has since manufactured evidence to support Judge King's decision by making a false transcript in which it was pretended that McFadden testified 'yes, it was executed the 7th of February, 1923.'" It was further stated that "the court reporter committed a felonious crime," etc. In the second of said alleged libelous articles, published by appellant during the pendency of said appeal, it was stated that one Griffith, an attorney at law, "persuaded a court reporter to commit the required crime. That crime consisted of the making of a false transcript of the testimony given by McFadden in the Superior Court in Santa Barbara County. * * * What, if anything, is there to prevent the indictment of Johnston and the court reporter of the Superior Court of Santa Barbara County?"

The name of the plaintiff, Henry A. Dewing, is not contained in either of the said alleged libelous articles. But it is alleged in the complaint in this present action "that at all times plaintiff was and now is the duly appointed, qualified and acting official court reporter of the Superior Court of the State of California, in and for the County of Santa Barbara, and as such is the sole and only official court reporter of said Superior Court."

[1] The point, that defendant's demurrer to the complaint should have been sustained is without merit. Appellant says in his brief that, when an alleged libel fails to contain a name by which a reader of the alleged libel knows the plaintiff, the alleged libel is not actionable per se as to plaintiff, and that, in order to recover damages for such a publication, the plaintiff must allege facts and circumstances, known to the reader of the alleged libel, by means of which the reader was reasonably certain that the plaintiff was the person defamed by the publication, or allege other facts which show that plaintiff sustained special damage by the publication. This is not an altogether correct statement

of the law. Appellant has confused the rules of pleading with the rules of evidence. The complaint alleged, in language which we have quoted the fact that at the time of said publications, plaintiff was "the duly appointed, qualified and acting official court reporter" of said superior court. He also alleged that the publications were made by the defendant "of and concerning the plaintiff"; also "that at the time of said publication and prior thereto, plaintiff was the official court reporter of said county, known and recognized as such by the public and readers of said circular and publication; that by the publication of said words and language as aforesaid, defendant intended to and did refer to plaintiff, and did then and there charge and assert, and was understood by said readers as referring to, charging and asserting that plaintiff had committed a felony," etc.

So far as the rules of pleading are concerned, it is clear that the complaint stated a cause of action as for a libel published of and concerning the plaintiff. "In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken." Section 460, Code Civ. Proc. Referring to said section 460, the Supreme Court has said: "By this provision the inducement and colloquium are dispensed with, and, if the words charged are libelous in themselves, the plaintiff is only required to allege that the libelous words were spoken 'of and concerning the plaintiff.' This is an issuable fact, as was the colloquium under the former system, and, if denied, must be established at the trial." Harris v. Zanone, 93 Cal. 59, 65, 28 P. 845, 846.

[2-4] The suggested points relating to the contention that the evidence is not sufficient to justify the verdict, are likewise without merit. The bill of exceptions herein states that at the trial of this action "the following proceedings were had. * * * The plaintiff regularly presented to the court and jury evidence and testimony of witnesses in support of his complaint. The defendant then had called and sworn as a witness in defendant's behalf the plaintiff in the above entitled action Henry A. Dewing, who testified (giving the testimony). Dewey C. Carson called and sworn on behalf of defendant testified as follows: (giving the testimony)." The substance of the testimony of these witnesses was that the plaintiff Dewing did not make the stenographic notes of the testimony of the witness McFadden referred to in the alleged libels, and did not make the transcript, and had no personal knowledge that the transcript was correct; that Carson was employed in the office of Dewing, the official court reporter of the superior court, as stenographer. Carson also testified as follows: "Q. Have you ever taken oath as Court Reporter pro tempore? A. Yes sir." Witness Carson identified a certified copy of the transcript on appeal in the action in the Supreme Court of the state of California, entitled Ida Blodgett, Plaintiff and Appellant, v. Grace Sherwood Trumbull, Defendant and Respondent, and testified concerning said transcript as follows: "I personally made said transcript, and I made on the 14th day of March, 1928, the stenographic notes of the testimony of Norman E. McFadden." Witness then produced said stenographic notes and read them to the jury.

It will be observed that, as shown by the bill of exceptions, the evidence produced by the plaintiff in support of his complaint at the trial of this action is entirely omitted from the bill of exceptions. Therefore it must be assumed, in support of the judgment and verdict, that there was evidence sufficient to establish the fact that at all of the times referred to in the complaint the plaintiff, Dewing, was the official court reporter in said superior court. The only qualification modifying such statement is the fact shown in Carson's testimony that he at some time did take oath as court reporter pro tempore, and that he did report and transcribe the testimony in the case of Blodgett v. Trumbull. Directly or by necessary inference it thus appears that the plaintiff regularly presented to the court all evidence necessary to support his complaint, subject, of course to such contradiction thereof as can be found in the evidence produced by the defendant as shown by the bill of exceptions. The fact that the name of the plaintiff was not contained in the libelous articles does not deprive the plaintiff of his remedy, when those articles without using the plaintiff's name gave a description which was capable of directing attention to him, and when, as here, it was alleged and (presumably, under the circumstance above shown), proved that readers of the articles understood them as referring to the plaintiff. This being so, the further fact that the testimony of McFadden in the action of Blodgett against Trumbull was taken down in shorthand and transcribed by Carson and not by the plaintiff does not make the evidence insufficient to support the verdict in this case. "To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him. Burkhart v. North American Co., 214 Pa. 39, 63 A. 410; Clark v. North American Co., 203 Pa. 346, 53 A. 237; Bohan v. Record Publishing Co., 1 Cal. App. 429, 82 P. 634. The appellant takes the position that, since plaintiff's name is not mentioned in the letter, there is no libel per se, and therefore

no presumption of general damages. Her position in this regard is untenable. The letter, we think, is on its face libelous; and it is alleged and proven that the said letter referred to the plaintiff." Peterson v. Rasmussen, 47 Cal. App. 694, 698, 191 P. 30, 32.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

124 Cal.App. 109

In re WHITNEY'S ESTATE.

In re BURNHAM et al.

Civ. 936.

District Court of Appeal, Fourth District, California.

June 6, 1932.

Rehearing Denied June 30, 1932. Hearing Denied by Supreme Court Aug. 4, 1932.

1. Trusts ⇐240.

Each of two testamentary trustees was chargeable with full amount of cash received as such, in absence of circumstances relieving either from responsibility.

2. Trusts ⇐380.

Testamentary trustee's surety may become liable for full amount chargeable to principal, surety for one of two trustees may be solely liable for shortage, or trustee not in default may be held liable therefor because of negligence.

3. Subrogation ⇐8.

Order settling account of testamentary trustees, one of whom misappropriated part of estate's cash, *held* not to fix equal responsibility on cotrustee, so as to subrogate surety on both trustees' bonds to latter trustee's beneficial interest in estate to extent of half amount paid estate by surety (Civ. Code, §§ 2848, 2849).

The order settling the account stated that amount with which trustees "are charged" was stated sum, that one trustee unlawfully diverted and misappropriated to his own use certain part of such sum, without notice to or knowledge of cotrustee, and that interest in stated amount was lawfully chargeable on part of sum so misappropriated, "but without prejudice to any legal or equitable right between" trustees.

4. Subrogation ⇐1.

Subrogation is equity's method of compelling ultimate payment by one who should make it in justice and good conscience.

5. Subrogation ⇐1.

Subrogation is not absolute right, but depends on superior equities of one asserting it over those of one against whom it is sought.

6. Subrogation ⇐1.

Subrogation will never be enforced when equities are equal or rights not clear.

7. Trusts ⇐240.

Testamentary trustee *held* not liable for cotrustee's misappropriation of trust fund, unless negligent.

8. Trusts ⇐240.

Testamentary trustee *held* entitled to application of funds, bequeathed to cotrustee, to cover cost of audit necessitated by latter's defalcations.

The court, in settling trustee's account, found that expense of audit was incurred by him because of cotrustee's misapplication of funds, but disallowed it as charge against estate without prejudice to trustee's rights against cotrustee, and former trustee's negligence necessitating audit was not shown.

9. Trusts ⇐248.

Separate action by testamentary trustee against cotrustee for expense of audit necessitated by latter's defalcations *held* unnecessary; probate court having jurisdiction to order payment thereof from funds bequeathed to defaulting trustee.

10. Principal and surety ⇐175.

Surety to which defaulting testamentary trustee's beneficial interest in estate was assigned took it subject to payment of expense of audit necessitated by trustee's known defalcations.

11. Trusts ⇐233.

Expense of audit necessitated by testamentary trustee's defalcations *held* payable from his beneficial interest in estate as funds became available.

12. Trusts ⇐315(1).

Substituted testamentary trustee *held* entitled to payment of compensation from funds bequeathed to trustee, removed for defalcations, as compensation for his services.

13. Subrogation ⇐33(1).

Court having control of fund, bequeathed to testamentary trustee removed for defalcations, had power and owed duty to order payment of just claims therefrom before paying it to trustee or his surety.

Appeals from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

In the matter of the estate of Willard W. Whitney, deceased. From an order and decree settling the account of George Burnham and another as trustees under the will of decedent and directing partial distribution, named trustee and another appeal.

Affirmed in part, and reversed in part, with directions.

A. Haines, of San Diego, and B. J. Bradner, of Los Angeles, for appellant Burnham.

Robert Whitson and Bailie, Turner & Lake, all of Los Angeles, for appellant National Surety Co.

Hamilton, Lindley & Higgins, of San Diego, for respondent bank.

BARNARD, P. J.

George Burnham and Herbert E. Anthony were coexecutors under the will of Willard Whitney, who died about January 1, 1923, leaving a large estate. In due course, the estate was distributed in accordance with the terms of the will to Burnham and Anthony, as trustees. Each of said trustees gave a separate bond for the faithful discharge of his duties in the sum of $188,000; each bond being executed by the National Surety Company, as surety. During the lifetime of Whitney, both Burnham and Anthony had assisted him in looking after his affairs and properties; Burnham looking after the management of his real properties, and Anthony attending to other matters. After the death of Whitney, this arrangement seems to have been largely continued; Burnham managing and selling the real properties and turning the proceeds over to Anthony for deposit in the bank account kept by the trustees, and Anthony handling the other securities. Prior to the death of Whitney, Anthony was vice president and general manager of the Merchants' National Bank, in which Whitney kept his bank deposit and in which he deposited his securities. The executors and trustees continued to use this bank and its successors as such depositary. Anthony was manager of this bank until 1924, when it was taken over by the Bank of Italy and operated as a separate branch, with him as vice president and manager, until November, 1929, when that branch was consolidated into the main San Diego office of the Bank of Italy. Burnham was vice president and employee of the Southern Trust & Commerce Bank of San Diego up to 1927, when this bank was taken over by the Bank of Italy and conducted as a separate branch, and thereafter remained with that bank until it also was consolidated into the main office of the Bank of Italy in San Diego in November, 1929, after which he continued as a vice president and employee of this consolidated bank.

Between 1925 and 1929 Burnham and Anthony filed with the court five joint accounts as trustees of this estate, which accounts were, respectively, approved by the court. The last of these was filed on August 5, 1929. Shortly after consolidation of these two branches of the Bank of Italy, about November 23, 1929, it was discovered that while manager of the Merchants' National Bank, both before and after it was taken over by the Bank of Italy, Anthony had committed heavy defalcations from that bank. Upon the advice of his attorney, Burnham immediately employed a firm of accountants to make a complete audit of the affairs of the estate and of the trust estate, from the death of Whitney, for the purpose of finding out whether or not Anthony had misused any of the estate funds. Prior to that time Burnham had had no suspicion as to any lack of integrity upon the part of Anthony. This audit revealed that there was an actual cash shortage in the amount reported as being on deposit in Anthony's bank at the time the estate was distributed to the trustees, and also at the time each subsequent report was filed and approved by the court. It also revealed that Anthony had collected certain sums without depositing them in the bank account of the estate, and that he had also furnished the information for reports to the court showing that he had received certain sums as interest and dividends which he had not received, due to the fact that he had sold and appropriated the proceeds of the corresponding securities. The audit showed an aggregate shortage in the estate of $36,851.70. On receiving this audit, Burnham obtained an order of the court suspending Anthony from his trusteeship. Subsequently he filed his separate sixth account and obtained a citation for Anthony to make his separate report on that account. Such an account was filed by Anthony, which confirmed and admitted every item of his misappropriations as revealed by the audit and as shown by Burnham's sixth account. All interested parties were represented at the hearing of these accounts, and on March 25, 1930, the accounts were approved by the court, and the decree and order approving the same was accepted by all parties and has become final. At the same time, Anthony was removed as a trustee of said estate and the Security Trust & Savings Bank of San Diego was appointed as one of said trustees, in his place. Shortly thereafter, the Bank of America, formerly the Bank of Italy, paid into the trust estate the sum of $24,828.72, which represented that portion of the shortage of Anthony in the trust funds which occurred through Anthony's manipulation of the books of the bank. About the same time, the National Surety Company paid into the trust estate $13,518.39, covering those portions of Anthony's existing shortage not covered by the first item referred to. Both of these items included interest as found due by the court in the order settling the sixth account.

By the will of Whitney, both Burnham and Anthony were given a certain interest in the estate as recompense for their services as executors and as trustees. On December 31, 1929, Anthony assigned to the Bank of Italy his said interest in the estate, and on April 4, 1930, this interest was assigned by the Bank of Italy to the National Surety Company; notice of these assignments being filed in the estate. On April 28, 1930, Burnham and the Security Trust & Savings Bank, as cotrustees,

filed in the superior court a seventh account and report with a petition for partial distribution. On May 21, 1930, the National Surety Company filed a petition asking to be subrogated to the right of Burnham in and to the share of the estate given to him in the will of Whitney as compensation for his services as executor and trustee, to the extent of one-half of the $13,518.39 it had paid following the order of the court approving and settling the sixth account. After answers filed, the account and petitions were heard together. In addition to the other facts stated, evidence was received to the effect that Burnham had made no effort to audit or verify the figures furnished him by Anthony and set forth in the several accounts previously filed by the trustees or to familiarize himself with the records kept by Anthony, other than in a general way; that during the period of the trusteeship he had never obtained from the bank in which the funds were deposited and of which Anthony was manager a statement in connection with the account of the trust estate; that he had not examined the books of that bank in reference to that account; that, as the various accounts were filed, Anthony gave to Burnham canceled checks evidencing the disbursements set forth therein, which checks were filed in court with the accounts; and that, while these checks were serially numbered, some of the numbers were missing, in which cases Anthony had noted on the corresponding check stub an explanation therefor. The court filed its decision on September 25, 1930, and a supplemental decree settling the seventh account and ordering partial distribution on October 2, 1930. From various portions of this order and decree, separate appeals have been taken by Burnham as trustee and individually, and by National Surety Company, respectively.

[1-3] The first point, raised by the National Surety Company, is that the court erred in denying its petition for subrogation as to the beneficial interest of Burnham in the trust estate, to the extent of the amount of the payment claimed to have been made by them upon his bond and in his behalf. In this connection, it will be remembered that this company is the surety both on the bond of Burnham and on the bond of Anthony. Evidence was introduced at the hearing to the effect that, when this company reimbursed the trust estate in the sum of $13,518.39, it placed upon the check by which payment was made the number of each of these bonds. There was also evidence that upon its own books it charged one half of the payment as made on the Burnham bond and the other half as made on the Anthony bond. Its present contention is that one-half of the payment made by it to reimburse the trust estate was made on account of its liability on Burnham's bond; that the order settling the sixth account has become final; that by this order it was settled that Burnham and Anthony were equally liable for all of the shortage; that in a spirit of fairness it accepted the court's ruling; that one-half of the amount paid was by it paid upon the liability of Burnham thus fixed by the order of the court; and that, having paid this amount because of its liability upon Burnham's bond, it is entitled, by sections 2848 and 2849 of the Civil Code, to be subrogated to Burnham's interest in the estate to the extent of the payment thus made in his behalf. While this appellant concedes that Anthony could not recover any portion of the loss from Burnham, it contends that, having paid as surety for Burnham, it is entitled to so recover under the Code sections named. It is argued that, while prior to the order settling the sixth account there might have been a primary and secondary liability as between Anthony and Burnham, and while the court could have separately settled the respective accounts of Burnham and Anthony and charged the full amount of the defalcation against Anthony and relieved Burnham from liability, the court has not done so, but has finally fixed an equal responsibility upon Burnham and Anthony, so that the beneficiaries of the estate could hold either one of them responsible for the loss, and therefore, under section 2848, this surety has the same right as the beneficiaries and may proceed against its principal. The company argues that it thus paid an obligation on the part of Burnham which was fastened upon him by the court because of his negligence, and then states that, in view of this final adjudication of the joint liability of Burnham and Anthony, it was not for them to question the order, but in common honesty they accepted the decision and paid one-half of the amount for each of the trustees. An interesting speculation would be whether this company would take this same position had they been surety on Burnham's bond alone, with other sureties upon the bond of Anthony.

The portion of the order settling the sixth account, upon which this appellant bases its claim for subrogation, reads as follows:

"And the court upon the evidence heard and the stipulation made before the court by counsel for all of the parties appearing, finds that on and including March 4, 1930, the amount of cash of said trust estate with which said trustees George Burnham and Herbert E. Anthony are charged is the principal sum of $52,965.24.

"The court further finds that of this sum Herbert E. Anthony secretly and unlawfully, and without notice to or any knowledge of his co-trustee George Burnham, diverted and misappropriated to his own use the sum of $36,851.70; and that there is lawfully chargeable interest on $31,413.10 of said principal sum so misappropriated, at the rate of 7% per annum from August 1, 1929, to this date,

March 24, 1930, the sum of $1423.17; but without prejudice to any legal or equitable right between said George Burnham and said Herbert E. Anthony in the premises."

As we read this order it does not fix an equal responsibility on Burnham by reason of any negligence on his part. While reliance is placed upon the statement in the order that both trustees "are charged" with $52,965.24, this appellant did not of course pay this amount which was chargeable to both trustees, but, on the other hand, paid a portion of the other amount mentioned in the second paragraph as misappropriated by Anthony without the knowledge of Burnham. Both trustees were chargeable with the full amount of cash that had been received, by the general law governing trustees, in the absence of circumstances relieving either from responsibility. This order did not fix that liability, but merely fixed the amount which had been received and with which they were charged. After fixing this amount, the order proceeds to find there was a shortage which existed by reason of the defalcation of Anthony, and concludes with the statement that this finding is without prejudice to any legal or equitable right between Burnham and Anthony. While the order thus finds that both trustees are chargeable with the full amount, as they always were so far as the estate and the beneficiaries are concerned, it does not find that the two trustees are equally liable as between themselves, but specifically excepts any such holding from the force of the order. What effect did this order then have upon Burnham and his surety? In the ordinary case, the finding that a trustee is chargeable with a specific amount, that is the full amount received, does not necessarily mean that his surety must pay that amount. If chargeable to the trustee, and not produced, his surety may become liable. If there are two trustees and two separate bonds, one trustee and his surety may be liable for a shortage while the other is not. Or in such a case, where one trustee is in default, the other trustee may also be held liable by reason of his own negligence. In this case, the court did not hold that Burnham was negligent; the only finding being that, while both are charged, so far as the estate is concerned, with the full amount, a shortage existed by reason of the defalcation of one, unknown to the other. The effect of this order, with its "without prejudice" clause, is to impose a primary obligation and liability upon Anthony, the trustee in default. This is exactly what this appellant says the court could have done. And, in accepting this order and paying a portion of the shortage, it must be held that this appellant was not paying the amount charged to Burnham by this order, but was paying a part of the amount found by the order to be short by reason of the defalcation of Anthony alone, or, in other words, upon the obligation and liability imposed upon Anthony.

We think this order established that a shortage existed due to the defalcation of Anthony and fixed the liability on him to that extent. This liability is something different and in addition to the general liability resting upon Anthony, equally with Burnham, to account to the estate for the full amount received. The order fixed a definite amount as taken by Anthony, and an obligation and liability upon him to return that amount follows, without a specific order from the court to that effect. This obligation also rested upon his surety, and this company, in paying a portion thereof, must be held to have paid the same on account of this special obligation and liability of Anthony and not on account of the general liability of Burnham and Anthony to the beneficiaries. Unquestionably the amount was paid to cover this particular shortage of Anthony. As between the trustees, Burnham was entitled to have the shortage made up by or for Anthony, rather than himself being liable for one-half thereof. Nor is the fact that Burnham was chargeable with the entire estate inconsistent with the fact that he was not primarily liable for this particular shortage. This appellant concedes that this is true, but contends that the wording of this particular order of the court has settled the matter otherwise and fixed a definite obligation upon Burnham which they, as his surety, then paid. With this contention we cannot agree.

[4-6] While section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of his principal, is entitled to be subrogated to that extent to all remedies which the creditor has against the principal, the question whether the obligation which is satisfied is in fact the obligation of the particular principal is to be decided in accordance with the rules of law and principles of equity. As was said in Southern Surety Company v. Tessum, 178 Minn. 495, 228 N. W. 326, 329, 66 A. L. R. 1136: "Subrogation is equity's method of compelling the ultimate payment by the one who in justice and good conscience ought to make it—of putting the charge where it justly belongs. Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566. It is not an absolute right, but depends upon the superiority of the equities of him who asserts it over those of the one against whom it is sought. 'It will never be enforced when the equities are equal or the rights not clear.'"

In that case, in which a surety who had made good the default of one trustee sought to recover from a cotrustee, the court said:

"The next question is whether plaintiff may recover from Oluf Tessum and his sureties

through subrogation. The argument is that the judgment creditors paid by plaintiff, had such payment not been made, could have recovered from Oluf and his sureties, and that plaintiff should now recover as a subrogee of that right. On that theory judgment was ordered for the full amount of plaintiff's payment against Oluf Tessum.

"The general rule is that an executor, administrator, or guardian is not liable for a devastavit committed by his cotrustee. Peter v. Beverly, 10 Pet. 532, 9 L. Ed. 522; State v. Wyant, 67 Ind. 25; 24 C. J. 1189; 11 R. C. L. 409. It is equally the law that by negligent inattention to his duties, by delinquency therein far short of active participation in the conversion of trust funds by a coguardian, a guardian may render himself liable. Cheever v. Ellis, 144 Mich. 477, 108 N. W. 390, annotated 11 L. R. A. (N. S.) 296; 11 R. C. L. 410; 24 C. J. 1191, 1192; 28 C. J. 1282. Those rules deal with the liability of trustees to beneficiary. A very different question may arise when we come to the rights or liabilities of trustees between themselves. It is settled law that 'though, as respects the remedy of the cestui que trust, each trustee is individually responsible for the whole amount of the loss, whether he was principal in the breach of trust, or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as the recipient of the money or otherwise, the responsibility ought in equity to fall.'"

In the case before us, the primary and principal obligation was upon Anthony. In re Sanderson, 74 Cal. 199, 15 P. 753. The order settling the sixth account, above quoted, and which is relied on as having changed this situation and finally and forever fixed the responsibility equally upon both trustees, in truth and in fact, was dealing with the default of Anthony, and fixed the primary obligation upon him, and only incidentally referred to the ultimate liability of both trustees as generally chargeable with the entire estate. This appellant now seeks to rely on the incidental part of the order only, applying thereto the strict letter of the statute without regard to the rules of equity applicable to the situation. That there is a difference between such a case as that before us and one involving the general responsibility of a trustee to the estate itself was pointed out in American Bonding Company v. Richardson (C. C. A.) 214 F. 897, 901, as follows: "This suit is not brought by the beneficiaries of the trust, nor by any one in their behalf or in privity with them. On the contrary, the surety for hire upon the separate bond of a defaulting trustee is seeking to recover for itself from a cotrustee, who has been guilty of no active wrongdoing, the amount of the defalcation upon the sole ground that the honest trustee did not prevent the malfeasances of the dishonest one This fact alone is sufficient to distinguish the present case from Caldwell v. Graham, 115 Md. 122, 80 A. 839, 38 L. R. A. (N. S.) 1029; In re Beatty's Estate, 214 Pa. 449, 63 A. 975; Bermingham v. Wilcox, 120 Cal. 467, 52 P. 822, and similar cases upon which counsel for plaintiff place their chief reliance."

[7] While Burnham was chargeable with the entire estate and must account therefor, he was not liable for this default of Anthony even to the beneficiaries, unless he became so by reason of his own negligence. Neither in the order here appealed from nor in the order settling the sixth account, which is relied upon by appellant as fixing the liability of Burnham, is any negligence on the part of Burnham found by the court, nor is such negligence to be implied from the findings made. Appellant largely relies upon certain evidence in the record to the effect that Burnham accepted figures, reports, and statements furnished him by Anthony and did not personally examine the original records and accounts, as establishing negligence on the part of Burnham. Whether or not Burnham was justified in accepting the reports and statements from a manager of a bank as to what the record of his bank showed, and whether or not it was his duty to personally examine the books of a rival bank operated by Anthony, may be a close question. However that may be, while of great importance as affecting the beneficiaries of this trust, it is unimportant as between Burnham and Anthony, and any possible negligence in that regard would not make the shortage of Anthony the obligation of Burnham, in the sense here contended for.

As conceded by this appellant, this entire matter rests upon the proposition that one-half of the payment made was paid upon the obligation of Burnham, as his surety. The only part of the order which fixed the amount of the shortage, $36,851.70, also fixed the fact that it was taken by Anthony. The bank of which Anthony had been manager, paid $24,828.72 of this shortage, covering that portion represented by manipulation of the books of that bank. This appellant paid $13,518.39 representing the other amount which Anthony had become obligated to return to the estate. Under its bond it stood responsible for him. Having paid this amount, it seeks to recover one-half thereof from Burnham as having been paid upon his obligation and because the beneficiaries might have collected this one-half from him. If the beneficiaries could have established negligence on the part of Burnham, they might have collected the entire amount from him and not merely one-half thereof. By attempting to collect from Burnham a part of the amount paid instead of all, this appellant, in effect, admits that the matter is

not governed entirely by the strict letter of the statute, but by equitable rules and considerations. In the light of these rules, it must be held that the amount thus paid was paid in satisfaction of an obligation owed by Anthony and not by Burnham.

A further equitable consideration is that at the time this amount was paid by this appellant, it obtained an assignment of the interest of Anthony in this trust estate. On the original appraisement of the estate this interest amounted to $21,860.72. Estate of Whitney, 78 Cal. App. 638, 248 P. 754. However, the evidence shows that, while the estate was originally appraised at $561,000, there has already been distributed to the beneficiaries $780,000, and about $300,000 remains to be distributed. While the exact figures are not before us as to the final value of Anthony's interest in the estate, or as to what portion thereof has already been paid to him, it would seem that Anthony's remaining interest in the estate, which has been assigned to this appellant, would leave it a handsome profit, were its present contentions sustained.

In this connection we may consider the appeal of George Burnham, individually, from that portion of this order refusing to allow the claim of the appellant surety company for subrogation as to his interest in this estate, which provides that this refusal to allow such subrogation is "without prejudice"; it being contended that the order should have been absolute. For the reasons above set forth, we think this whole question is not dependent upon what the appellant surety company finally receives from their assignment of Anthony's interest in the estate, nor on any future determination as to negligence on the part of Burnham, important as such a question might be if raised by the beneficiaries, but that upon the issue raised by this surety company the obligation paid by them was that of Anthony, and that this portion of the order appealed from should be modified by striking out the words "without prejudice."

[8] The next question, presented by the appeal of George Burnham, as trustee, is whether he is entitled to an order for the application of sufficient of the trust funds now distributable or to be hereafter distributed under the bequest to Anthony, to cover the cost of the audit of the affairs of the trust estate. In the sixth account, as filed by Burnham, the expense of this audit was set forth as $1,867.64, and alleged to be chargeable to Anthony, with a prayer that the same be so charged. The court made no finding with respect to charging this expense to Anthony, but did find that the same was incurred by Burnham, as trustee, for a complete audit of the estate and trust estate; that this expense was incurred by reason of the misapplication of certain funds of the trust estate by Anthony as therein found; and also "that while said sum is a reasonable charge for the services rendered by said accounting firm, it is not a proper expense of said trust and for that reason the same is disallowed as a charge against said estate, but without prejudice to any legal or equitable right of said George Burnham against said Herbert E. Anthony in the premises." In effect, the court, in this order reserved its decision upon this question. The matter was again presented in the seventh account, and the court found as follows: "I have no doubt, and so find, that such an audit was necessary, that Burnham acted in the utmost good faith and rendered a great service to the estate by his employment of such accountants to find defalcations caused solely by the misappropriation of funds by his co-executor, but having obtained no order authorizing such employment, and this item being disallowed in a former account, I see no authority to now allow it or to declare it a lien upon the beneficial interests of Herbert E. Anthony, as much as I believe it should be; but I shall adopt the words of the former order: 'but without prejudice to any legal or equitable right of said George Burnham against said Herbert E. Anthony in the premises.'"

It is the contention of the National Surety Company that the expense of this audit cannot be charged to Anthony's interest in the trust estate, for the following reasons: That the audit was made necessary because of Burnham's negligence; that the court denied it as a charge against the estate and at the same time charged the entire estate equally to Burnham and Anthony; that the matter is res adjudicata, since the court held that it was not to be charged against the estate; that it is merely an individual claim on the part of Burnham, which must be prosecuted, if at all, in a separate action; and that the court had no authority to act on the matter at the hearing on this seventh account because Anthony was not then before the court and his interest in the trust estate was then held by a third party, namely, this surety company.

As we have already pointed out, the court, in its order settling the sixth account, neither finally settled the matter of this audit expense, nor adjudicated that Burnham was equally liable with Anthony, as between themselves. Nor do we think the necessity for this audit can be attributed by the surety company to any negligence on the part of Burnham. There was evidence to the effect that Burnham had not himself kept a full set of books, and that he had not checked up on the reports made to him by Anthony. While this is relied on as establishing negligence on his part, it also appears from the evidence that the methods used by Anthony in manipulating the records, even to the extent of carrying double ledgers in his bank,

were not only calculated to deceive his cotrustee, in spite of any care that might have been used, but were also sufficient to deceive the bank examiners for many years. It appears that reports turned over by Anthony to Burnham, and the various reports filed in the estate actually set forth the true condition of the estate as it should have been, but the trouble largely lay in Anthony's secret manipulation of the funds of his own bank. It even appears that he allowed and reported interest on funds reported as then being in his bank. Burnham could hardly be expected to go into the bank operated by his rival and there ascertain more than the bank examiners were able to find. Even taking the evidence as conflicting, the court found that this expense for an audit was incurred solely by reason of the defalcations of Anthony. The court's order did not charge this expense against the trust funds, but made its order without prejudice as between the two trustees.

[9-11] While the question of negligence on the part of Burnham might be important with reference to an attempt to hold the trust estate for this expense, a different situation is presented where the only question is as to the power of a probate court, in equity, to reimburse Burnham for this expense through Anthony's interest in the trust estate, which is still under the control of the court. It has been held that probate courts have both probate and equity jurisdiction, and that, where necessary to do justice, a probate court may exercise equitable jurisdiction. Verdier v. Roach, 96 Cal. 467, 31 P. 554, 557; Bauer v. Bauer, 201 Cal. 267, 256 P. 820. In this instance, in its order settling the sixth account, the court particularly reserved both the legal and the equitable rights of Burnham, in this respect. Nor do we think a separate action by Burnham against Anthony was necessary, as contended for by the surety company. The matter arose out of this trusteeship, the item of expense claimed was, in fact, a part of the cost of handling the trust, it was necessitated by actions of Anthony in connection therewith, and the only question presented is whether it may be charged against Anthony's beneficial interest in the trust estate. In Verdier v. Roach, supra, the court said: "Our superior courts have both probate and equity jurisdiction, so that whenever, in the course of the administration and settlement of estates, our probate statutes are found to be inadequate to authorize and accomplish all that a court of equity is authorized to do in such cases, our superior courts may exercise their equity powers in connection with, and as incidental to, their powers in probate matters, to the extent necessary to a complete administration and distribution of estates: provided, of course, that nothing be done in contravention of any statutory provision."

It would be contrary to all principles of equity to hold that this beneficial interest in the trust estate must first be distributed and paid out, and that thereafter incidental claims as to who is equitably entitled thereto should be separately litigated. This audit was both necessary and valuable to the estate, and, even though the cost thereof should not be borne by the estate itself, this cost should be paid by Anthony who made it necessary, and not by Burnham. And the probate court, having control over both the subject-matter and the body of the estate, including Anthony's interest therein, has jurisdiction to complete its work by ordering the amount paid out of that interest. Nor do we think this is changed by the fact that the beneficial interest of Anthony in the trust estate was assigned to the bank and later to this surety company. The order settling the sixth account fixed the fact of Anthony's liability, but expressly reserved these other questions which go to the amount of that liability. Anthony was liable not only for his shortage, but for the costs and expenses which were necessitated thereby. He could not claim his beneficial interest in the estate until these costs and expenses have been paid, in addition to the amount of his defalcations, and we think his surety is in no better position. The surety company, for a consideration, agreed to stand responsible for his actions. His defalcations had occurred and were known before any assignment of his interest in the estate was made, and by assignment this interest is now held not only by a party who acquired it with full knowledge of the facts, but by one who has assumed responsibility for the very acts of Anthony which caused the expense. For this reason, we think the cases cited by the surety company, involving the assignment of interests in estates to innocent parties before other rights had vested, have no application here. This surety company stands in the shoes of Anthony, and it must be held to have taken his interest in the estate as it then was, subject to all of its burdens.

In our opinion, it must be held to be the duty of Anthony to fully reimburse the estate and his cotrustee for all amounts taken and all expenses necessarily caused by his defalcations, before he may withdraw his beneficial interest in the estate or before this may be withdrawn by the surety who stood sponsor for him. Under the circumstances here shown, the court should have ordered the expense of this audit paid out of the beneficiary interest of Anthony in the trust estate, as the same becomes available through distribution.

[12, 13] The only other question presented is the contention of the National Surety Company that the court erred in subjecting the beneficial interest of Anthony in the trust estate to payment of the compensation for services rendered and to be rendered by the trustee appointed in place of Anthony, after his removal. The new trustee appointed to take

his place is, of course, entitled to compensation. Such compensation is a regular expense of the trust, and stands upon the footing of costs. By the will of the deceased, Anthony was given a certain fixed interest in the trust estate, in full compensation for all of his services as executor and as trustee, until the final distribution of the estate to the beneficiaries of the trust. This definite interest having been given to Anthony as compensation for these services, which he has made it impossible for him to complete, equity demands that his substitute be paid from this fund and not by the other beneficiaries of the trust. Where, as here, the court still has this fund in its control, we are of the opinion that it has the power and that it is its duty to subject the same to the payment of claims justly chargeable thereto, before paying said fund to the defaulting trustee, or to this assignee.

For the reasons given, the order here appealed from is affirmed in all respects, except as follows: That portion of the order disallowing the petition of National Surety Company for subrogation to the beneficial interest of George Burnham in the trust estate, without prejudice, is reversed, with directions to enter an order denying said petition. That portion of the order denying, without prejudice, the application of George Burnham to subject the beneficial interest of Anthony in said trust estate to the payment of the expense of the audit in the sum of $1,867.64, with interest thereon, is reversed with instruction to enter an order in conformance with the views herein expressed, and providing for the payment of said expense from the beneficial interest of Anthony as the same becomes available for distribution.

We concur: MARKS, J.; SCOVEL, Justice pro tem.

123 Cal.App. 142

FIREMAN'S FUND INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 8435.

District Court of Appeal, First District, Division 2, California.

May 28, 1932.

Hearing Denied by Supreme Court June 27, 1932.

1. Master and servant ⇐371.

That injury arose out of and occurred in course of employment is essential to power to grant award.

2. Master and servant ⇐403.

Compensation claimant has burden of showing that injury arose out of and occurred within course of employment.

3. Master and servant ⇐375(2).

Railroad laborer, who, having quit work when fifteen miles from town wherein paymaster's office was located, was injured while accompanying engineer thereto in truck, *held* not entitled to compensation.

It appeared that railroad construction laborer, having gone to timekeeper to obtain statement of his time and amount due him, and hearing that a locomotive had broken down, and that it was necessary for engineer to go to certain town, at which there was a railroad, obtained permission from engineer to accompany him to a town 15 miles away at which paymaster's office was located. There was no evidence whether, on request, pay checks would be forwarded from such town to construction camp, or that employers, if requested, would not have furnished transportation.

Proceeding under the Workmen's Compensation Act by Pete Novak, claimant, opposed by Worden & Forsythe, employers, and the Fireman's Fund Indemnity Company, insurance carrier. The Industrial Accident Commission dismissed the proceeding as against the employers, but granted an award against the insurance carrier, and the insurance carrier applies for a writ of review.

Award annulled.

Superseding former opinion 11 P.(2d) 13.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Matthew A. McCullough, of San Francisco, for respondent Pete Novak.

PER CURIAM.

Good cause appearing therefor, it is ordered that the opinion herein filed April 28, 1932 [11 P.(2d) 13], be set aside, and that the following stand in the place thereof:

Pete Novak applied to the respondent commission to fix the amount of his compensation growing out of an injury received. A hearing was had, and the commission made an award in favor of the claimant in the sum of $131.39 against the Fireman's Fund Indemnity Company, but dismissed the application as against the employer. The indemnity company has applied to this court for a writ of review.

In the early part of August, 1931, Pete Novak started to Boulder Dam to seek employment. He stopped at Lassco and temporarily took employment under Worden & Forsythe as a laborer in constructing a railroad in the vicinity of Westwood. At the

time he was employed nothing was said regarding transportation to or from Westwood. At the time he took employment, the construction work was about one mile distant from Lassco. As the work progressed, the camp was moved north from Lassco. Novak continued as an employee until the evening of August 27, 1931. The next morning he quit. He went to the timekeeper and obtained a statement of his time and the amount due him. While in the timekeeper's office waiting to obtain that document, he heard the engineer of the locomotive stating that one locomotive had broken down, and that it was necessary for the engineer to go to Westwood to obtain some parts to repair the locomotive. Novak asked the engineer if he could ride with him and the engineer consented. The engineer was using a Chevrolet automobile that had been converted into a small truck. The automobile was the property of another laborer, but was loaned to the engineer. The engineer sat at the wheel and did the driving. The fireman sat on the front seat by the side of the engineer. Novak took a seat on the bed of the truck. There was evidence that prior to August 28th the laborers on the construction job were in the habit of riding on the locomotives as far as they ran and were then transferred to the dumping trucks and in that manner rode to their work and returned in a similar manner. Worden & Forsythe paid off at the camp at stated times, but at other times they did not maintain a paymaster at the camp. Time slips were issued by the timekeeper and were directed to the paymaster, who was at Lassco. At the time of the accident the camp was fifteen miles distant from Lassco. Lassco was on the road to Westwood and at the latter point there was another railroad on which the claimant could be taken on his way to Boulder Dam. There is no evidence whether upon application pay checks would be forwarded from Lassco to the camp in the event that one of the employees quit work. There was evidence that when the claimant left the camp he intended to go to Boulder Dam. As the automobile truck proceeded on its way it overtook another vehicle. The driver turned to one side and accelerated his speed to pass the vehicle in front. As he did so, the wheels of the truck hit a chuck hole and the jar was such that the claimant was thrown off of the truck and broke his left collar bone. After the accident he was put on the truck and the truck continued on its way to Lassco. At that point the claimant received a check for his pay and a card authorizing admission into the hospital at Westwood. He was admitted to that hospital, and later was sent to Greenville in Plumas county and was there placed in another hospital.

In making its award, the respondent commission made findings which, among others, found that the accident occurred to the claimant "while employed as a laborer, * * *" and while so employed he "sustained injuries occurring in the course of and arising out of his employment. * * *" This petitioner claims that said findings are not sustained by the evidence. Before proceeding it should be stated there is no evidence that any person had the authority to do so or that he attempted to direct Novak to ride on the automobile truck, or that the automobile truck was an instrumentality of the employer in any respect whatsoever except as hereinabove set forth.

The respondent commission in support of the award cites and relies on 27 California Jurisprudence, page 383, § 85, where it is said: "When transportation is furnished to convey a workman to and from the place of work, as an incident of the employment, an injury sustained by him while going or coming, in the vehicle so furnished by the employer and under his control, arises out of and in the course of the employment. But when transportation is not furnished as a necessary incident of the employment or as a requirement imposed by the nature or the location of the work, and the use of transportation on the part of the employee is entirely voluntary and optional and bears no relation to the contract of employment, the dangers involved are not risks of the employment, and therefore an injury incurred while using means of transportation is not compensable." Continuing, the respondent commission argues "that the nature and location of the work in the case at bar necessarily implies that the furnishing of transportation by the employer was incidental to the employment. Surely the workman could not be expected on hiring out or quitting to walk a matter of fifteen miles to the company camp or nearest town." In reply, the insurance carrier asserts that in the instant case the employer did not furnish any transportation, but that the engineer did, and that the transportation as furnished was not incidental to the employment or in any way connected therewith.

[1-3] The respondent commission makes the claim frequently that the claimant's acts were "necessary"; but it does not quote any evidence to support those claims. There is no evidence that, if requested, the employers would not have furnished within a reasonable time and in a reasonable manner transportation to Lassco or perhaps to Westwood. But they were not requested to do so. There is no evidence that the pay check would not on request have been forwarded from Lassco or that the request was made. There is evidence that the claimant took the transportation which he did entirely of his own volition and not on the request of his employers or with their knowledge or consent. It is essential to the power to make an award and

the burden is upon an applicant for compensation to show, not only that the injury arose out of, but also that it occurred within, the course of the employee's employment. 27 Cal. Jur., p. 341. On August 28, 1931, by mutual consent and acting on the request of the claimant, the contract of employment was terminated. After that moment the employers did not have, and did not attempt to exercise, any power of direction or control over the activities or movements of the claimant. There is no claim that after that moment the claimant directly did anything in furtherance of the master's business; but the sole claim is that some of his acts were incidental thereto. If so, the claimant should have shown the facts, the burden rested on him to bring himself within any exception to the general rule. He failed to do so and he was not entitled to compensation. Awards in favor of the claimant were annulled in Parker v. Pont, 105 L. T. 493; London Guarantee & Accident Co. v. Industrial Acc. Com., 190 Cal. 587, 213 P. 977; New York Indem. Co. v. Industrial Acc. Com., 87 Cal. App. 105, 261 P. 1106, and Highway Com. v. Industrial Acc. Com., 61 Cal. App. 284, 214 P. 658. Yet in each of those cases the facts were more favorable to the claimant than in the instant case.

The respondents cite and rely on Hackley-Phelps-Bonnell Co. v. Industrial Commission, 165 Wis. 586, 162 N. W. 921, L. R. A. 1918A, 277. In that case it was decided that, where a logging employee was engaged in Chicago, sent to Phelps, Wis., and there sent on to the logging camp and required to return to Phelps for his pay, and was injured while riding on the employer's logging train, as was the custom of the employees to do, to Phelps, for his pay, after having told the foreman that he would take a few days' lay-off, his employment had not terminated and the employer was liable for his injuries. Based on the distinction that the transportation was furnished by the master and/or that the contract had not been terminated, there are many similar rulings. Dominguez v. Pendola, 46 Cal. App. 220, 188 P. 1025; Rock County v. Industrial Commission, 185 Wis. 134, 200 N. W. 657; Lamm v. Silver Falls Timber Co., 133 Or. 468, 286 P. 527; Lowry v. Sheffield Coal Co., 1 B. W. C. C. 1; Nelson v. Belfast Corporation, 1 B. W. C. C. 158. But where, as here, there was no contract for transportation and the relation of master and servant had been terminated, and the claimant was merely proceeding to get his pay or on some other personal errand, and the accident did not occur on the master's premises, the rule is otherwise. Royalty Indemnity Co. v. Madrigal (Tex. Civ. App.) 14 S.W. (2d) 106; Ames v. New York Cent. R. Co., 178 App. Div. 324, 165 N. Y. S. 84; Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, 172 N. Y. S. 492, 495. In the case last cited, at page 495 of 172 N. Y. S., 184 App. Div. 678, the court said: "In view of this opinion, I do not see how it is possible to hold that this accident was within the purview of the act [Workmen's Compensation Act]; for this workman was off duty, was on his way to his dentist, and did not have to report back for duty for two hours. The injury was therefore not received while he was doing the duty he was employed to perform, nor was it a natural incident of the work." However, it will be noted that in that case, as in this case, the claimant was traveling on two errands, one of which was to collect his pay, and, furthermore, that he was traveling on a conveyance operated by the employer, but not under the terms of the contract.

In the petition for a rehearing the respondents made the claim that the accident happened while the claimant was leaving, but while he was still on, the master's premises and they cite Makins v. Industrial Acc. Com., 198 Cal. 698, 247 P. 202, 49 A. L. R. 411. To apply that rule to the facts of this case is to expand the elements of space and of time to unlimited bounds and thus transcend the provisions of the Workmen's Compensation Act. (St. 1917, p. 831, as amended).

The award is annulled.

The petition for a rehearing filed in the above-entitled action is denied.

124 Cal.App. 68

IMLAY v. CALIFORNIA CAB CO. et al.

Civ. 7273.

District Court of Appeal, Second District, Division 1, California.

June 3, 1932.

1. Appeal and error ⇐207.

Counsel's alleged misconduct, objection to which was not made below, will not be considered on appeal, where admonition to jury would have removed effect thereof.

2. Appeal and error ⇐970(2).

Effect of questions, objections to which were sustained and answers stricken, upon jury, is addressed to trial court's discretion.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Jane Imlay against the California Cab Company and others. From a judgment in favor of plaintiff, defendant C. L. Minert appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Bryce P. Gibbs, of Los Angeles, for appellant.

Walter I. Lyon and Heap & Butler, all of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

This is an appeal from a judgment awarding plaintiff damages for personal injuries suffered by her while alighting from a taxicab owned and operated by defendant, and driven, at the time of the accident, by an employee of defendant and appellant.

Appellant's first assignment of error is that both the trial court and plaintiff's counsel, during the argument to the jury, were guilty of misconduct highly prejudicial to appellant and which prevented him from having a fair trial.

[1] From an examination of the record presented upon this appeal it is extremely doubtful whether or not the appellant suffered prejudice by reason of any statements of counsel of which he complains. Even if plaintiff's counsel had been guilty of misconduct, an admonition from the court would have removed the effect thereof in every instance.

In Scott v. Times-Mirror Co., 181 Cal. 345, 368, 184 P. 672, 682, 12 A. L. R. 1007, the court in deciding the question presented here, and under very similar circumstances, said: "In no case was the court requested to instruct the jury that the conduct objected to was improper and that it was to be disregarded by them. Where the action of the trial court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof." See, also, Olsen v. Standard Oil Co., 188 Cal. 20, 26, 204 P. 393.

Appellant cites the following remark made by the court during the course of plaintiff's argument: "Now, then, you are out of order. The objection is improper, and I will request you now not to interfere with the argument, with the proceedings, by any objection, unless it is obviously well founded." Counsel made no objection to this remark other than to state: "I think that I am unjustly criticized for this remark."

The remarks of the court, it would seem, were not of such a nature, when considered as a part of the whole colloquy had at the time between the court and counsel, to justify counsel's above-quoted characterization of them. Counsel, with perhaps laudable persistence, attempted to impress upon the court his view as to the objection he had just made; the "unjustly criticized" is directed as applying to the court ruling on the objection rather than the court's personal conduct in making the ruling. Counsel studiously refrained from directing the court's attention to what he now, for the first time upon this appeal, calls misconduct on the part of the court.

"It seems clear that counsel should have called the attention of the trial judge to anything deemed prejudicial, thus giving him an opportunity to withdraw anything objectionable and state his real intent and meaning. Of course, the matter was of such a nature that all possible prejudicial effect would have been obviated by proper instruction and admonition to the jury." Price v. Northern Electric Ry. Co., 168 Cal. 173, 182, 142 P. 91, 95.

[2] Appellant next assigns as error certain questions asked by plaintiff's counsel during the taking of evidence. The record in this regard discloses that in a majority of the instances where error is thus assigned, the court sustained the objection and struck out the answer. In some cases the court on its own motion admonished the jury as to its duties in the premises. The matter as to the effect of these questions upon the mind of the jury is one addressed to the sound discretion of the trial court. "The trial court having heard and seen the witnesses on the trial, and having knowledge as to those circumstances of a case which cannot be reproduced in the printed record, is in a better position than is the appellate court to determine as to the effect of the shown irregularity upon the result of the trial." Merralls v. Southern Pacific Co., 182 Cal. 19, 23, 186 P. 778, 779. The appellant failed also to invoke the aid of the court by requesting proper instruction as to the alleged misconduct. Scott v. Times-Mirror Co., supra.

Appellant complains that the damages awarded by the jury were so excessive as to bear evidence of having been made under the influence of passion or prejudice. In this contention, the record here fails to support appellant's position. There is evidence sufficient to support the finding of the jury in that regard.

In Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 585, 203 P. 768, 771, the court quotes with approval from Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 P. 83, as follows: "The amount of damages in such cases is committed first to the sound discretion of the jury and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'"

In the instant case, we cannot say that the verdict is excessive as a matter of law.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; YORK, J.

123 Cal.App. 756

JOHNSON v. FIRST NAT. BANK OF BAY POINT.

Civ. 8099.

District Court of Appeal, First District, Division 2, California.

May 31, 1932.

Banks and banking ⇐226.

In action for return of money advanced to bank during impairment of its capital, complaint *held* not demurrable.

Complaint alleged that plaintiff's testator was a stockholder in the defendant bank; that during the time when its capital had become impaired he executed a note to the bank for $2,750, which the bank agreed to hold for the benefit of creditors and depositors; that the note was subsequently paid with interest; that the impairment of the bank had since been removed and the bank was in a sound financial condition; and that, notwithstanding the removal of such impairment, the bank had not repaid the sum or any part thereof.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Hilma S. Johnson, executrix of the estate of C. B. Johnson, deceased, against the First National Bank of Bay Point. From a judgment for plaintiff, defendant appeals.

Affirmed.

A. Walter Allen, of San Francisco, for appellant.

J. F. Resleure and Resleure & Hill, all of San Francisco, for respondent.

SPENCE, J.

Defendant's demurrer to plaintiff's amended complaint was overruled, and, upon defendant's failure to answer after notice, its default was entered. From the default judgment thereupon rendered in favor of plaintiff, defendant appeals.

The question of the sufficiency of the amended complaint against the attacks made upon it in appellant's demurrer is the only question raised on this appeal. The essential allegations contained in said amended complaint were that respondent's testator was a stockholder in the appellant bank; that in 1921 an impairment existed in the capital stock of said bank amounting to approximately $13,450; that in December, 1921, at a meeting of the board of directors, respondent's testator was induced to enter into an agreement with the appellant bank whereby respondent's testator agreed to loan his credit to said bank by executing and delivering to it his promissory note in the sum of $2,750, which note or the money received thereon said bank agreed to hold for the benefit of creditors and depositors during such time that said impairment existed; that said bank further agreed to return said note or the money received thereon upon the termination of said impairment; that respondent's testator executed and delivered said note to the appellant bank pursuant to the said agreement, and that on or about the 22nd day of June, 1923, he paid to said bank the principal sum of said note, together with interest thereon amounting in all to $3,004.40; that the said impairment has been removed, and that said bank is now in a sound financial condition with its capital stock unimpaired; that, notwithstanding the removal of said impairment, neither said sum nor any part thereof has been paid, and that said sum is due, owing, and unpaid to respondent.

In our opinion the complaint was sufficient against the general demurrer, and we do not believe appellant seriously questions its sufficiency in this regard. This action arises out of the dealings between the appellant bank and its stockholders during its financial difficulties which are considered at some length in Peterson v. First National Bank of Bay Point, 101 Cal. App. 532, 281 P. 1104. Appellant's demurrer contained twenty-six other grounds of attack. Not all of these are urged on this appeal, but appellant contends that the amended complaint was uncertain in numerous particulars. We find no merit in this contention. The essential facts were set forth with sufficient particularity, and these facts as well as the other facts alleged were peculiarly within the knowledge of the appellant bank. The rule under such circumstances is set forth in Goldstein v. Healy, 187 Cal. 206, where the court said, at pages 210 and 212, 201 P. 462, 463: "All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action. * * * Less particularity is required in the allegations of a complaint where, as here, the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them." It follows that the trial court properly overruled appellant's demurrer to the amended complaint.

The judgment is affirmed.

We concur: NOURSE, P. J; STURTEVANT, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

CALIFORNIA REPORTER

IN VOLUME

12 PACIFIC REPORTER

SECOND SERIES

215 Cal. 531

LEACH v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13222.

Supreme Court of California.

May 23, 1932.

Rehearing Denied June 20, 1932.

1. Criminal law ⊂=1011.
Prohibition ⊂=3(4).

Neither prohibition nor certiorari lies to review or restrain execution of judgment after time for appeal.

2. Prohibition ⊂=5(4).

Prohibition, restraining entry of judgment of conviction for violating Corporate Securities Act, should not issue so that time served therefor may be applied immediately on sentence for grand theft (St. 1917, p. 673, as amended).

3. Prohibition ⊂=3(1).

Remedy by habeas corpus *held* to bar application for writ of prohibition restraining commitment on conviction for violating Corporate Securities Act (Code Civ. Proc. § 1103; St. 1917, p. 673, as amended).

In Bank.

Application by Martin A. Leach for a writ of prohibition to the Superior Court of the State of California, in and for the County of Los Angeles, and Hartley Shaw, Judge thereof.

Application denied.

See, also, (Cal. Sup.) 12 P.(2d) 3.

Henry G. Bodkin, of Los Angeles, Archibald M. Johnson, of San Francisco, and Bodkin & Lucas, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Ralph O. Marron, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondents.

CURTIS, J.

Petition for writ of prohibition directed to the superior court of the county of Los Angeles to restrain that court from issuing, or causing to be issued, a commitment based upon the conviction of the petitioner herein of a violation of the Corporate Securities Act (St. 1917, p. 673, as amended). Upon conviction of the petitioner, he appealed from the judgment to the District Court of Appeal. That court affirmed the judgment in an opinion in which the facts in the case are set forth in detail. People v. Leach, 106 Cal. App. 442, 290 P. 131. After the rendition of said decision of the District Court of Appeal, petitioner made an unsuccessful attempt to file in this court a petition for a hearing herein, but due to the fact that this petition was not filed within the time provided by the Constitution and statutes of the state, it was not considered on its merits. On the going down of the remittitur after decision of the District Court of Appeal, petitioner applied for probation and the same was granted as to all offenses of which he was finally adjudged guilty, except as to count 3 of the indictment charging the petitioner with the violation of the Corporate Securities Act and count 14 charging petitioner with the crime of grand theft. The judgment as to count 14 was, by the trial court, made to run consecutively with the judgment based upon count 3 of said indictment. Petitioner now seeks by this proceeding to restrain the trial court from enforcing against him said judgment of conviction upon the charge of violating the Corporate Securities Act.

The principle contended for in this proceeding is not a novel one in so far as this court is concerned. In the early case of Bennett v. Wallace, 43 Cal. 25, a writ of certiorari was sought to review an appealable judgment of a court after the time for appeal had lapsed. In denying the petition the court said: "It is not denied on the part of the petitioner that the final judgment and the orders of the District Court in question might

have been examined here upon appeal taken in time for that purpose; but it is insisted that, as the time limited by statute for the taking of the appeal has been suffered to elapse, the case has thereby become one in which there is no appeal, and is thus brought within the terms of the statute referred to. This view is answered by the case of Milliken v. Huber, 21 Cal. 166. The statute was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself. Writ dismissed."

The case of Faut v. Mason, 47 Cal. 7, was also a proceeding in certiorari to review and set aside a judgment after the time for appeal had passed. The county court granted the writ, but on appeal the order was reversed. The court, upon the authority of Bennett v. Wallace, supra, held that the statute providing for the remedy by writ of certiorari " 'was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself.' " The court in Faut v. Mason, supra, on page 9, further said: "In this case defendants might have appealed from the judgment rendered against them by the Justice of the Peace, and have obtained any relief to which they were entitled. They let the time for taking an appeal go by without taking one, but that was their fault, and they must bear whatever consequences it entails."

In the more recent case of Valentine v. Police Court, 141 Cal. 615, 75 P. 336, the two cases just cited were approved and the principles of law enunciated therein were applied to proceedings in prohibition, as will appear from the following excerpts therefrom: "It is * * * here urged that the ordinance upon which the prosecution was based was void for several different reasons, that the complaint filed in the police court did not state any offense, and that the judgments of the police court, and the warrant based thereon, are also void. All these questions were the proper subject of investigation and determination upon the appeal taken to the superior court. And it is not the purpose of the law that these same questions should be reinvestigated and redetermined by the Supreme Court or by any other court upon application for a writ of certiorari or prohibition, or upon an application for both of those writs. The writ of certiorari issues only in cases where there is no remedy by appeal. Code Civ. Proc. § 1068; White v. Superior Court, 110 Cal. 54, 42 P. 471. And this rule applies with equal force where the right of appeal has been lost by laches. Faut v. Mason, 47 Cal. 7; Bennett v. Wallace, 43 Cal. 25. It is equally clear that the rule continues to apply after the appeal has been heard and determined, as in this case, adversely to appellants. 'The statute (section 1067, Code Civ. Proc.) was intended to supply a remedy where none existed in the first instance.' Bennett v. Wallace, supra [43 Cal. 25]. It was never intended that it should be substituted for an appeal. Faut v. Mason, supra [47 Cal. 7]. It is also settled that prohibition cannot be resorted to where, as here, there is a plain, speedy, and adequate remedy by appeal."

We quote also from the case of Jones v. Police Court of Alhambra, 86 Cal. App. 332, 338, 260 P. 919, 921, as follows: " ' "The statute (Code Civ. Proc. § 1067) was intended to supply a remedy where none existed in the first instance." Bennett v. Wallace, 43 Cal. 25. It was never intended that it should be substituted for an appeal. Faut v. Mason, 47 Cal. 7.' Valentine v. Police Court, 141 Cal. 615, 617, 75 P. 336. In Postal, etc., Co. v. Superior Court, 22 Cal. App. 770, 774, 136 P. 538, 539, it was also said: '*It is not, of course, the consideration whether the petitioner takes advantage of the right of appeal, but whether the right of appeal exists in his favor that is decisive of the question.* For instance, he cannot allow the time for appeal to lapse and then successfully urge this circumstance as a legal justification for the writ of certiorari.' * * * We may well conclude this opinion with the following: 'That the defendant might have appealed to the superior court from the * * * judgment there can be no question. And it is well settled that when an appeal may be taken resort cannot be had to a writ of review. The cases so holding are numerous and need not be cited.' "

[1] It is true that the case of Jones v. Police Court of Alhambra, supra, and some of the cases cited therein are cases involving the right to the writ of certiorari and not prohibition, but the same principles in the main govern the courts in their right to issue either the writ of prohibition or the writ of certiorari. In neither case should the writ issue where the petitioner therefor has had a right to appeal from the order or judgment in question, and has permitted his time to elapse without perfecting an appeal therefrom. Petitioner herein has cited us to a large number of authorities both from this state and from other jurisdictions wherein the writ of prohibition has been used to arrest an inferior tribunal from enforcing an order in excess of its jurisdiction and where an appeal would lie from said order, but these authorities are all cases in which either there was no appeal from the order complained of, or were cases in which the right to appeal might still be exercised in the future in case the writ were denied. We have been cited to no authority which gives to a party the right to review or restrain the execution of an appealable order after the right to appeal therefrom has expired.

[2] Petitioner contends that as the sentence of imprisonment based upon the charge of violating the Corporate Securities Act must first be served by him before he can begin to serve time upon his conviction for grand theft, we should issue the writ restraining the trial court from entering its judgment finding the petitioner guilty of violating the Corporate Securities Act, so that he may have the time served by him applied immediately thereafter upon his judgment of conviction of grand theft. There is no merit in this contention. If the petitioner should be imprisoned under a judgment which is in part void, and in part valid, he would be entitled to his release after he had satisfied the valid portion of said judgment. In re Morck, 180 Cal. 384, 181 P. 657; In re Rosencrantz, 205 Cal. 534, 541, 271 P. 902.

[3] It might be appropriate to here state that petitioner has before this court a petition for a writ of habeas corpus in which he contends that the judgment of conviction against him is void in toto, not only as to the charge of violating the Corporate Securities Act, but also upon the charge of grand theft. In that proceeding it will become necessary for us to pass upon the validity of the judgment under which the defendant is now suffering imprisonment for the violation of the Corporate Securities Act. The fact that the petitioner has this remedy by habeas corpus is a complete answer to his petition for a writ of prohibition. The latter writ is issued only "where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Code Civ. Proc. § 1103. The writ of habeas corpus is a remedy provided by law and there can be no question but that it meets the requirements of the section in being "plain, speedy and adequate."

Upon this ground, as well as those stated in the previous portions of this opinion, petitioner's application for a writ of prohibition is denied.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

215 Cal. 536

Ex parte LEACH.

Cr. 3488.

Supreme Court of California.

May 23, 1932.

Rehearing Denied June 20, 1932.

1. Licenses ⇐18½.

General purpose of Corporate Securities Act is to protect public against unsubstantial schemes and securities based thereon (St. 1917, p. 673, as amended).

2. Licenses ⇐18½.

Statute prohibiting corporations from issuing notes secured by mortgages on realty *held* applicable only to securities offered to public, and hence not unconstitutional as depriving corporation of right to issue such notes to individuals for loans (St. 1925, p. 963, § 2, subd. 7(c, d), amending St. 1917, p. 674).

3. Statutes ⇐47.

Statute so vague and uncertain that person of ordinary intelligence cannot understand it is invalid.

4. Criminal law ⇐13.

Statute defining corporate securities, sale of which without permit is prohibited, as evidences of indebtedness, except bills of exchange and promissory notes "not offered to public," *held* not so vague, uncertain, and ambiguous as to be unconstitutional (St. 1925, p. 963, § 2, subd. 7(c, d), amending St. 1917, p. 674).

5. Licenses ⇐18½.

Whether securities were issued by corporation for purpose of being offered for sale to public, so as to require permit, must be determined from particular facts in each case (St. 1925, p. 963, § 2, subd. 7(c, d), amending St. 1917, p. 674).

6. Habeas corpus ⇐85(1).

Evidence *held* to show that corporation issued mortgage notes to loan company for sale to public without permit from corporation commissioner in violation of statute (St. 1925, p. 963, § 2, subd. 7(c, d), amending St. 1917, p. 674).

7. Licenses ⇐18½.

Real estate mortgage is "security" within statute prohibiting sale of corporate securities without permit (St. 1925, p. 963, § 2, subd. 7(c, d), amending St. 1917, p. 674).

8. Habeas corpus ⇐96.

Objection that trial court failed to send up certain exhibits on appeal cannot be raised in habeas corpus proceeding.

9. Habeas corpus ⇐92(1).

Insufficiency of indictment to allege offense or facts constituting offense charged cannot be questioned in habeas corpus proceeding.

10. Habeas corpus ⇐92(1).

Insufficiency of indictment for violating Corporate Securities Act to state offense charged cannot be considered in habeas corpus proceeding (St. 1917, p. 673, as amended).

11. Habeas corpus ⇐22(1).

One held in custody under valid judgment of conviction for violating Corporate Securities Act is not entitled to discharge on habeas

corpus (St. 1917, p. 673, as amended; Pen. Code, § 1486).

In Bank.

Application by Martin A. Leach for a writ of habeas corpus to the Sheriff of Los Angeles County.

Writ discharged, and petitioner remanded.

See, also, (Cal. Sup.) 12 P.(2d) 1.

Archibald M. Johnson, of San Francisco, and Henry G. Bodkin, of Los Angeles, and A. A. De Ligne, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Ralph O. Marron, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CURTIS, J.

Petitioner herein, claiming that he is illegally imprisoned and restrained of his liberty by the sheriff of the county of Los Angeles, filed herein his petition for a writ of habeas corpus for the purpose of securing his release from the alleged illegal imprisonment. His first petition for said writ was filed on July 13, 1931. In that petition he alleged that he was found guilty upon twenty-six counts of the indictment filed against him in the superior court of the county of Los Angeles; twelve of said counts charged him with the crime of grand theft, and fourteen of said counts charged him with the violation of the Corporate Securities Act (St. 1917, p. 673, as amended); that on appeal to the District Court of Appeal said court affirmed the judgment of conviction as to three of said counts charging grand theft and as to thirteen of said counts charging a violation of the Corporate Securities Act, and reversed said judgment as to the balance of said counts (People v. Leach, 106 Cal. App. 442, 290 P. 131); that petitioner, after filing a petition for a rehearing of the decision of the District Court of Appeal, and after the same had been denied, attempted to file in this court a petition for a hearing and transfer of said action to this court, but that this court refused to entertain or consider the same on its merits on the ground that it had not been filed within the time provided by the Constitution and statutes pertaining thereto, and as a result thereof the decision of the District Court of Appeal had become final. The petition for the writ of habeas corpus as first filed herein then proceeded to set forth the grounds upon which petitioner contended that his imprisonment was illegal which we will later refer to more fully in the course of this opinion. Before said petition was heard by this court it was withdrawn by petitioner. Thereafter, and on August 28, 1931, petitioner filed herein a second petition for a writ of habeas corpus, basing it upon the same grounds as those upon which his first petition was presented. In this second petition he referred to his first petition, and made the same a part of his second petition. The second petition further showed that after the dismissal of his first petition, petitioner applied to the superior court, in which the judgment against him had been rendered, to be admitted to probation upon the charges of which he had been convicted. The result of his application for probation was that said superior court granted petitioner probation upon all of said charges except those contained in counts three and fourteen of said indictment. Under count 3 petitioner was convicted of violating the Corporate Securities Act, and under count 14 he was convicted of the crime of grand theft. By the judgment of said superior court the term of imprisonment under count 14 was made to run consecutively with the judgment under said count three. Petitioner now contends that the provisions of the Corporate Securities Act, which he was found guilty of violating, are unconstitutional and void, and also that section 484 of the Penal Code, defining the crime of grand theft, violates the terms of the Constitution.

We will first consider the judgment of conviction of petitioner under the Corporate Securities Act and the claim of the petitioner that the same is invalid by reason of the unconstitutionality of the provisions of that act under which he was convicted.

Count 3 of the indictment charges the petitioner, Martin A. Leach, and some twenty or more associates, with the violation of the Corporate Securities Act, a felony, committed as follows: "That the said Martin A. Leach (and his said associates) who were then and there officers, agents and employees of the Pacific Southwest Loan and Mortgage Corporation, a corporation, did on or about the 18th day of February, 1927, wilfully, unlawfully, knowingly and feloniously sell, authorize, and direct the sale to Mrs. Annie Stimson of eleven (11) mortgage notes of the face value of One Thousand Dollars ($1,000.00) each, said notes being an evidence of indebtedness of the said Pacific Southwest Loan & Mortgage Corporation, a co poration, without first having applied to, and received from the Commissioner of Corporations of the state of California, a permit authorizing the sale of said notes or any of them. Contrary to the form, force and effect of the statutes in such cases made and provided and against the peace and dignity of the People of the State of Californ a."

The facts in this case are quite fully stated in the opinion rendered in the case of People v. Leach, supra, and it will not be necessary for us to set them out in any minute detail. These facts show that the petitioner was the owner of a tract of land consisting of 320 acres situated in the county of San Diego for which he paid the sum of $0,-

600. That he caused a corporation to be organized under the laws of the state of Delaware by the name of Pacific Southwest Loan & Mortgage Corporation, of which he was the owner of a large amount, if not in fact practically all, of its capital stock. This corporation will be referred to herein as the mortgage corporation. Thereafter he conveyed said real property to this corporation in exchange for 12,500 shares of its preferred stock and 3,200 shares of its common stock of the par value of $10 per share. One hundred and sixty acres of said real property were then subdivided into blocks and lots 50 by 150 feet in size, but as the map thereof was never accepted by the planning commission, all descriptions of lots were by metes and bounds. In the meantime the National Loan Company of Los Angeles had been organized, and Leach became the sole owner of all of its stock. We will refer to this corporation as the loan company. The plan was then evolved by Leach of having the mortgage corporation execute to the loan company a large number of separate mortgages each securing the payment of a promissory note either for $500 or $1,000, executed by the mortgage corporation in favor of the loan company, and secured by a mortgage upon one lot when the note secured was for $500, and upon two lots in said subdivision when the note was for $1,000. These notes and the mortgages securing them were delivered to the loan company under an agreement that it would sell, or attempt to sell, the same, and upon a sale being made it would pay to the mortgage corporation 50 per cent. (later reduced to 40 per cent.) of the face of each note, the loan company retaining the excess as compensation for its services in making said sales. The loan company employed a force of salesmen and carried on an intensive campaign to dispose of said mortgage notes to the public, and among the sales made was one to Mrs. Annie Stimson of eleven of said mortgage notes of $1,000 each. This sale forms the basis of count 3 of the indictment under which Leach was convicted, and from the judgment of conviction thereof, he now seeks to be released by this proceeding.

[1, 2] As will be observed by the reading of count 3 of the indictment above, the petitioner was charged with the violation of the Corporate Securities Act in the sale of eleven mortgage notes, issued by the mortgage corporation without said corporation having first received a permit for such sale from the commissioner of corporations. The different types of securities issued by corporations coming under the ban of the Corporate Securities Act are designated and described in subdivision 7 of section 2 of the act (as amended by St. 1925, p. 963), which provides, in part as follows: "The word 'security' includes: * * * (c) All bonds, debentures, and evidences of indebtedness issued by any company; and (d) * * * excepting therefrom * * * bills of exchange and promissory notes not offered to the public by the drawer, maker, or underwriter thereof, and all mortgages and deeds of trust of property situated in this state, executed to secure the payment thereof. * * *" It is this provision of the act which, when applied to the facts charged against petitioner, he contends is in violation of both our state and federal constitutions.

It is first contended that under this section of the Corporate Securities Act, specifying promissory notes issued by a corporation and secured by a mortgage upon real property as a class of property which cannot be sold or negotiated except after a permit has been issued by the corporation commissioner authorizing such sale, a corporation is, in effect, denied the right to sell and dispose of a note secured by a mortgage upon its real property even though the transaction involved is simply between the corporation and an individual who may desire to make a loan to the corporation upon its promissory note secured by a mortgage upon its property. If the provision of the act has such effect, without question it runs counter to those fundamental provisions of our organic law which have for their purpose the protection of property and the right of the owner thereof to acquire, possess, transfer, and otherwise enjoy the same.

In People v. Pace, 73 Cal. App. 548, 238 P. 1089, 1091, it was held that the provisions of the Corporate Securities Act, requiring the owner of securities before he could make successive sales thereof to procure a permit authorizing such sales, from the corporation commissioner, was unconstitutional and void as it deprived the owner of the right to dispose of his own property where the sale thereof might require "repeated and successive transactions." In so holding the court pointed out the general provisions of said act defining the powers of the commissioner in issuing permits thereunder, which gave to the commissioner absolute authority under certain conditions to refuse a permit to a person applying for the same, and that the effect of such refusal would be to deny to such applicant the right to sell or dispose of his own property. These same provisions of the act relative to the powers of the corporation commissioner to issue permits for the sale of the securities involved in the case of People v. Pace, supra, are applicable to permits required for the sale of securities herein involved. In either case the commissioner under the act has the absolute power to deny the permit. If, therefore, the provisions of the act regulating the sale of securities by a corporation would have the effect of depriving said corporation of the right in the general course of its business to issue one or more of its promissory notes and secure the

same by a mortgage or trust deed upon its real property in case it found it necessary or desirable so to do, then said act, to that extent, would be contrary both to the spirit and direct mandate of the state and federal Constitutions. However, we think the plain reading of the act has no such effect. It applies only to securities of the class designated which are offered for sale to the public. It has no application to private or individual notes or obligations issued by a corporation. When the act explicitly excepted from its terms such securities as were "not offered to the public," it expressed the clear and unequivocal intent that private and individual transactions were not the subject of such legislation, but that it was concerned only with those securities which the public might be called upon to purchase. There may be certain provisions of the Corporate Securities Act which are directed in the first instance at individual transactions, but the provisions we are now dealing with are not included in that class. The general purpose and tenor of the Corporate Securities Act, as was said by the Supreme Court of the United States in the case of Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 220, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643, in which that court sustained the constitutionality of legislation of that character, are, "to protect the public against the imposition of unsubstantial schemes and the securities based upon them." If that is its purpose, and we think the authorities with scarcely an exception support that view, then we can see no real distinction between a scheme to float a bond issue by a corporation and one to place upon the market and dispose of to the public an issue of mortgage notes, even though the latter may be severally secured by liens upon separate and distinct pieces or parcels of property. Each of these two types of securities is placed under the supervision of the corporation commissioner by the Corporate Securities Act, and we can see no legal or reasonable grounds upon which the courts would be justified in drawing a distinction between them and in holding one to be a valid exercise of power by the legislature and the other contrary to constitutional restrictions. Our conclusion, therefore, upon this phase of petitioner's case is that the provisions of the Corporate Securities Act requiring a permit from the corporation commissioner before a corporation may issue and dispose of its promissory notes and other evidences of indebtedness, secured by mortgage or trust deed, applies only to such securities as may be offered to the public, and that as so construed it is not obnoxious to any provision of the state or federal Constitutions.

[3, 4] It is next contended that the provisions of the Corporate Securities Act defining securities as evidences of indebtedness issued by any company, excepting bills of exchange and promissory notes not offered to the public, are so vague, uncertain, and ambiguous as to render it unconstitutional on that account. This criticism of the act is directed to the exception which excludes bills of exchange and promissory notes "not offered to the public" from the definition of securities as they are defined in the act. Petitioner contends that the word "security" by reason of said exception used in the act is not defined with that degree of clarity and certainty required of criminal statutes creating a new offense and providing for its punishment. The gist of petitioner's argument is that the words "not offered to the public" are so uncertain, vague, and indefinite that a person of ordinary intelligence cannot understand their meaning. It is not necessary to cite authorities in support of the proposition that when a statute is so vague and uncertain that a person of ordinary intelligence cannot understand its meaning, it may not be upheld as a valid statute, for as was said by this court, "So important is the liberty of an individual that it may not be taken away even from the most debased wretch in the land, except upon conviction of a crime which has been so clearly defined that all might know in what act or omission the violation of the law should consist." In re Lockett, 179 Cal. 581, 178 P. 134, 135. In the case of People v. Pace, supra, at page 563 of 73 Cal. App., 238 P. 1089, 1096, the court held that the section of the Corporate Securities Act making it unlawful for an owner of securities to sell such securities "in the course of repeated and successive transactions" without first procuring a permit from the corporation commissioner was so indefinite as to render it void. This court in Ex parte Daniels, 183 Cal. 636, 646, 192 P. 442, 447, 21 A. L. R. 1172, held that a section of the California Vehicle Act making it unlawful to travel at "an unreasonable or unsafe speed and punishing the violation of such law as a crime" was not so vague and uncertain as to render it unconstitutional. In the recent case of People v. Associated Oil Company, 211 Cal. 93, 105, 294 P. 717, it was held by this court after an extensive review of the authorities upon the subject that section 8b of the Oil and Gas Conservation Act of this state (St. 1915, p. 1404, as amended by St. 1929, p. 923, § 9), declaring unlawful the "unreasonable waste" of natural gas was not so vague, uncertain, and indefinite as to be devoid of any guide or standard as to what should constitute reasonable or unreasonable use of natural gas. While this was not a criminal statute, the right was given by the terms thereof to the director of the department of natural resources to institute proceedings in the name of the people of the state to enjoin such unreasonable waste by any operator and owner of an oil or gas producing well.

The term "offered to the public," or one of similar import, is found in frequent use in the statutes of the various states which have enacted legislation like or similar to the Corporate Securities Act of this state. Our attention has been called to statutes of eleven states where such legislation is to be found. It would appear from this that the term is one of general use, and that it has a well-accepted and recognized meaning throughout many jurisdictions and especially among those dealing with corporate securities. Our attention has not been called to any instance, as shown by any reported case, where the meaning of the words "offered to the public" has ever been called in question, or where any claim or contention has been made that their meaning was vague or ambiguous. This point was not even raised by petitioner, or at least it was not considered by the court in the appeal in the case of People v. Leach, supra. We think the meaning of the words is reasonably plain and free from any serious ambiguity, and that the ordinary person dealing in this class of securities would have no real difficulty in determining their meaning, and in conforming with the requirements of the section of the act governing the issue and sale of this class of securities.

[5, 6] The dividing line between securities which are issued for the purpose of being offered for sale to the public and those which are not may not be readily discernible in every instance. Each case must be decided upon its own particular set of facts. No difficulty obtains, however, in the instant case against petitioner. There is no dispute in the evidence but that the mortgage notes issued by the mortgage corporation to the loan company, in each of which companies the petitioner was the controlling factor, were not only executed in large numbers, but were issued for the express purpose and intent, and were actually, by the petitioner through an organized force of salesmen, offered generally and sold to the public. The sale of the eleven mortgage notes to the complaining witness mentioned in the indictment in this action was not an isolated transaction between the loan company and said purchaser, but was only one of a large number of sales of like character made by the petitioner to various other individuals. Petitioner seeks to limit our inquiry to the one transaction between his companies and said complaining witness, but the undisputed facts as brought out at the trial of the petitioner show that this sale was simply a part of a general scheme of the petitioner to float a large issue of mortgage notes and that they were offered and sold to any person whom petitioner or his force of salesmen might induce to invest therein. The evidence, therefore, before us made out a plain case against petitioner of offering to the public the class of securities mentioned in the act for the sale of which a permit must be obtained from the corporation commissioner.

[7] Petitioner makes the further contention that a real estate mortgage is not a security within the purview of the Corporate Securities Act of this state. In support of this contention petitioner argues that: "The intent and purpose of the Corporate Securities Act of this state, as of all other states, was to restrict only the sale of such securities, that give the investor a right to participate in the earnings or assets of a company. It was never the intent or purpose of such laws to regulate the ordinary business transactions of an individual or a company, nor to restrict an individual or company in its right to sell or mortgage property owned by it, whether real or personal." This contention was made by petitioner on his appeal before the District Court of Appeal, and it was decided adversely to him. We are satisfied with the disposition which that court made of this question. It is not necessary to repeat here the discussion of the District Court of Appeal in reaching its conclusion that real estate mortgages of the class involved herein were within the purview of the Corporate Securities Act. This discussion may be found on pages 448, 449, and 450 of the reported decision of that case. People v. Leach, 106 Cal. App. 442, 290 P. 131, 134, 135.

[8] The objection made by petitioner that the trial court failed to send to the District Court of Appeal certain original exhibits in the case to be used in the consideration of said appeal, and that the District Court of Appeal decided said appeal without a reference to or a consideration of said original exhibits, cannot be raised in this proceeding. The District Court of Appeal had jurisdiction of said appeal, and if any error was committed by said court in its consideration thereof, it cannot be corrected by a proceeding in habeas corpus.

[9, 10] Complaint is also made that the indictment against petitioner fails to charge any offense known to the law. It is well settled that while the constitutionality of the law under which an indictment is found may be raised on habeas corpus, the failure of the indictment to sufficiently allege the offense, or to allege facts sufficient to constitute the offense charged, may not be questioned in such a proceeding. "The scope of inquiry upon habeas corpus into the sufficiency of an indictment or information is limited, for, although the petitioner may be discharged if the pleading totally fails to charge an offense known to the law, if there is attempted to be stated an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into." 13 Cal. Jur. p. 232. The same principle is enunciated in the

following cases: In re Kavanaugh, 180 Cal. 181, 182, 180 P. 533; In re Wilson, 196 Cal. 515, 238 P. 359. The indictment charged a violation of certain provisions of the Corporate Securities Act, which we have held to be valid and constitutional. It follows, therefore, that any defect in the indictment in attempting to set forth the offense charged, if there exist such defect, cannot, under the decisions of this court just cited be examined into or considered in this proceeding in habeas corpus.

[11] This disposes of all of the objections made by petitioner to the judgment of conviction based upon count 3 of the indictment charging a violation of the Corporate Securities Act. It thus appears that the petitioner is held in custody by virtue of a valid judgment of a court of competent jurisdiction. He is not, therefore, entitled to his discharge. Pen. Code, § 1486; In re Steiger, 205 Cal. 408, 271 P. 201. It becomes unnecessary for us, therefore, to pass upon the validity of the judgment rendered under count fourteen of the indictment charging petitioner with the crime of grand theft. Neither is it advisable for us to do so, as whatever determination we might make on that question would avail the petitioner nothing. Besides, it would be mere dictum and not binding either upon the petitioner, or the state officials, in any subsequent proceeding which might be brought to test the validity of petitioner's imprisonment under said count fourteen. After the petitioner has satisfied the demands of the law for the violation of the Corporate Securities Act, it will then be proper, if he is so advised, to test the legality of his further imprisonment under the judgment based upon the charge of grand theft.

The writ is discharged and the petitioner is remanded.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

215 Cal. 572

THUESEN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 14503.

Supreme Court of California.

June 2, 1932.

Rehearing Denied July 2, 1932.

1. Habeas corpus ⇨3.

Statute providing exclusive method of judgment debtor's release from imprisonment did not preclude court from entertaining habeas corpus to determine validity of judgment under which debtor was arrested (Code Civ. Proc. §§ 478–504, 682, 684, 1143–1154; Const. art. 1, § 15).

Habeas corpus could be entertained for such purpose, because the proceedings provided by Code Civ. Proc. §§ 1143–1154, are supplementary to the judgment and execution, against person of judgment debtor, and do not contemplate an attack on the judgment under which they were taken.

2. Habeas corpus ⇨113(3).

Judgment on habeas corpus discharging from imprisonment judgment debtor arrested on final process *held* not appealable (Pen. Code, § 1506; Code Civ. Proc. §§ 478–504, 682, 684, 1143–1154; Const. art. 1, § 15).

In Bank.

Application for writ of mandate by Godfred Thuesen to be directed to the Superior Court for the City and County of San Francisco and Hon. John J. Van Nostrand, Judge, and another.

Writ denied.

Everette C. McKeage, of San Francisco, for petitioner.

Morris, Jaffa & Thompson, of San Francisco, for respondents.

PER CURIAM.

This is a petition for a writ of mandate to compel the respondent court to order and the respondent clerk to issue an execution for the arrest and imprisonment of one Charles H. Zentini.

On May 22, 1931, the petitioner filed an action against said Charles H. Zentini to recover damages sustained by the alleged fraud and conversion on the part of the defendant in a certain stock transaction. Judgment by default in that action was entered for the plaintiff. The judgment recited the trial court's findings of fraud on the part of the defendant in securing from the plaintiff certain securities and in converting them to his own use, and ordered that the plaintiff, on the return of execution against the goods and property of the defendant unsatisfied in whole or in part, was entitled to an execution for the arrest and commitment of the defendant, etc. Executions against the property of the defendant were returned wholly unsatisfied. The plaintiff thereupon invoked the remedy of execution against the person of the defendant as provided by the Code of Civil Procedure. Code Civ. Proc. §§ 682, 684, 478-504; section 15, art. 1, Const. of Calif.; 3 Cal. Jur. 152, 153. Thereafter an execution was issued against the person of said Charles H. Zentini, pursuant to which he was arrested and taken into custody. On the day fol-

lowing his arrest Zentini procured a writ of habeas corpus returnable before the Superior Court of the city and county of San Francisco. The sheriff made his return to the writ, admitting the matters hereinbefore stated, and contended as a defense to the application for the writ that the court had no jurisdiction to discharge the prisoner under sections 1143 to 1154 of the Code of Civil Procedure, which provides the manner in which a discharge of a prisoner arrested pursuant to such an execution may be obtained. A motion to dismiss the habeas corpus proceedings on that ground, and to remand the prisoner, was made and denied. On August 18, 1931, the Superior Court ordered the discharge of Zentini on the ground that the judgment in the tort action, in so far as it decreed the plaintiff entitled to body execution against Zentini, was invalid, in that the relief thus granted was not justified by the complaint. Thereafter, on September 10, 1931, the plaintiff again applied to the respondent court for an order directing the issuance of execution against the person of Zentini, but the application was denied by said court on the ground that the defendant could not be rearrested after his discharge on the writ of habeas corpus. Whereupon this proceeding was commenced.

The basis of the petition for the writ of mandate is that the Superior Court had no jurisdiction to entertain the proceedings in habeas corpus. The petitioner's contention is that sections 1143 to 1154 of the Code of Civil Procedure provide the exclusive method by which a judgment debtor arrested on final process may obtain his release and discharge from imprisonment, and, relying on In re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500, he asserts that, where a remedy is otherwise provided by statute, the writ of habeas corpus is not available.

The position of the respondents is that proceedings in habeas corpus are always available to the defendant for a determination of the question whether the court rendering the judgment pursuant to which the defendant was imprisoned has exceeded its jurisdiction. They also rely on the rule that in a collateral proceeding the question whether a judgment is void must be determined from an inspection of the judgment roll (People v. Davis, 143 Cal. 673, 77 P. 651), and that the court on habeas corpus proceedings has jurisdiction to inquire into the validity of the judgment pursuant to which the defendant has been arrested to determine whether it was within the jurisdiction of the court rendering it (13 Cal. Jur. 223–225, 278; Pen. Code, § 1487). They concede that a debtor imprisoned on a valid judgment is exclusively relegated to the statutory method provided for his release.

The statutory method is provided in sections 1143 to 1154, inclusive, of the Code of Civil Procedure. Section 1143 provides that any person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged therefrom upon the fulfillment of the conditions specified in the chapter of which that section is a part. Then follow two sections providing for notice of the application for discharge and service thereof. Section 1146 provides for an examination of the imprisoned judgment debtor under oath by a judge, "concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor." Section 1147 permits written interrogatories to be propounded to and answered in writing and signed and sworn to by the prisoner. Section 1148 requires that, if the judge conducting the examination is satisfied that the prisoner is entitled to his discharge, he must administer to him an oath that he is not possessed of any estate, and that he has not conveyed or concealed any estate with intent to defraud. Section 1149 provides for an order of discharge. By section 1150 it is provided that, if the prisoner do not obtain his discharge, he may reapply in the same manner at the end of every succeeding ten days. Section 1151 makes his discharge in such proceedings final as to the same debt, unless the prisoner be convicted of having sworn falsely. Section 1152 provides that the judgment remains in force after the prisoner's discharge and may be executed against any future estate of the debtor. Section 1153 allows the plaintiff voluntarily to discharge the debtor from his imprisonment, and by the provisions of section 1154 the plaintiff is required to advance funds for the support of the prisoner while in custody.

[1, 2] It is true that in the case of In re Alpine, supra, we stated at page 739 of 203 Cal., 265 P. 947, 950, 58 A. L. R. 1500, that the writ of habeas corpus may not be invoked where the accused has a plain, speedy, and adequate remedy under the orderly provisions of a statute designed to rule the specific case upon which he relies for his discharge. That pronouncement was applicable to the case there involved, but in the present case it is quite obvious that sections 1143 to 1154 of the Code of Civil Procedure do not rule the case presented by the petitioner. The proceedings provided by those sections are supplementary to the judgment and the execution thereof, and do not contemplate an attack upon the judgment under which they are taken. They are, in fact, based on the assumption that the judgment pursuant to which they are taken is valid. It is true that such proceedings have their foundation in the Constitution, and, when based on a valid judgment, they prescribe the exclusive rem-

edy for release from custody. But the right to apply for a writ of habeas corpus is also grounded in the Constitution, and this right may not be lightly set aside. In the face of a valid judgment, it is assumed, and is in fact conceded by the respondents, that the Code specifies the exclusive method for discharge. But such method does not deprive a court of competent jurisdiction of the power to determine whether the judgment on its face is or is not sufficient upon which to base a body execution, and this inquiry may be made on habeas corpus. The respondent court had jurisdiction to entertain the writ and to determine the rights of the applicant thereunder. It did so, and decided that the court rendering the judgment exceeded its jurisdiction in ordering the imprisonment of the debtor on execution of the judgment. That determination has become final. There was and is no appeal therefrom, for the reason that it is not such an adjudication on habeas corpus as is made appealable or reviewable by section 1506 of the Penal Code. Ex parte Page (Cal. Sup.) 5 P.(2d) 605; Ex parte Mefferd (Cal. Sup.) 6 P.(2d) 71. See, also, Ex parte Zany, 164 Cal. 724, 130 P. 710; 13 Cal. Jur., p. 284, and cases there cited. Whether rightly or wrongly discharged in the habeas corpus proceeding, Zentini was discharged by a court having jurisdiction of the matter; the order of discharge has become final; and the prisoner may not again be imprisoned for the same cause. Pen Code, §§ 1496, 363.

We conclude that the petitioner is not entitled to the relief sought in the present proceeding.

The peremptory writ is denied, and the alternative writ is discharged.

215 Cal. 559

MT. SHASTA POWER CORPORATION v. SUPERIOR COURT IN AND FOR SHASTA COUNTY et al.

S. F. 14565.

Supreme Court of California.

May 31, 1932.

1. Exceptions, bill of ⇐50.

Party delivering proposed bill of exceptions and proposed amendments thereto to clerk need not state that they are so delivered for judge (Code Civ. Proc. § 650).

2. Exceptions, bill of ⇐50.

When proposed bill of exceptions and proposed amendments thereto are timely delivered to clerk for judge, no further obligation rests on proponent of bill until he receives notice of time designated for settlement (Code Civ. Proc. § 650).

3. Exceptions, bill of ⇐50.

When proposed bill of exceptions and amendments thereto are timely served and presented to judge personally for settlement, five days' notice of presentment must be given to adverse party (Code Civ. Proc. § 650).

4. Exceptions, bill of ⇐50.

When proposed bill of exceptions and amendments thereto are timely delivered to clerk for judge, five days' notice of presentment for settlement is not required (Code Civ. Proc. § 650).

> In such case, under Code Civ. Proc. § 650, it is the duty of the clerk immediately to deliver the proposed bill of exceptions and amendments thereto to the judge, who, on receipt of same, is required to designate a time when he will settle the bill, and notice of the time so designated must thereupon be given by the clerk to the parties.

5. Exceptions, bill of ⇐50.

When proposed bill of exceptions and amendments thereto were timely delivered to clerk for judge, and, although no notice of time designated to settle bill was given to parties, matter of settlement was placed before judge prior to default of either party, continuances of matter *held* not sufficient to place either party in default (Code Civ. Proc. § 650).

6. Pleading ⇐214(1).

Demurrer to petition admits truth of averments therein contained.

In Bank.

Application by the Mt. Shasta Power Corporation for a writ of mandate against the Superior Court of the State of California, in and for the County of Shasta, and Walter E. Herzinger, Judge thereof, to compel settlement of a bill of exceptions.

Writ granted.

William B. Bosley, of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, of San Francisco, for petitioner.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

PER CURIAM.

This is an application for a writ of mandate to compel the respondent judge to settle a proposed bill of exceptions.

On June 4, 1923, Anna McArthur commenced an action in Shasta county (No. 6319), against the petitioner corporation, alleging

that her lands situated on Pit river above the confluence of Pit river and Fall river were riparian to Fall river as well as to Pit river in the summertime; and that the corporation was unlawfully diverting from her lands the waters of Fall river for electric power purposes. She sought an injunction to restrain the corporation from continuing the diversion, and damages in the sum of $90,000. Upon the trial of the action and on March 22, 1929, the jury returned a verdict for the plaintiff in the sum of $32,500 as damages on account of the alleged unlawful diversion. Judgment was entered accordingly. A motion for a new trial was denied. Notice of appeal to this court was duly given and filed. Within due time and on July 12, 1929, counsel for the corporation served upon the attorneys for the plaintiff in said action, and delivered to the clerk of the court the original of a proposed bill of exceptions. The trial of the action occupied thirty-one trial days. The reporter's transcript consists of 2,220 pages and the proposed bill of exceptions consists of 533 typewritten legal cap sheets, exclusive of exhibits. About ten months thereafter, to wit, on May 10, 1930, counsel for the plaintiff served and filed with the clerk of the court 113 amendments to the proposed bill. It is not contended that the amendments were not served and filed within time.

During the pendency of the contemplated settlement of the bill in this case, referred to by counsel as the Anna McArthur case, there were other companion cases pending in said court brought against the same defendant, the petitioner herein, by numerous other plaintiffs, in which the issues were the same in that they were all brought to obtain an injunction and damages for unlawful diversion of water. The petitioner's power plant is the one involved in the case of Fall River Valley Irrigation District v. Mt. Shasta Power Corporation, 202 Cal. 56, 259 P. 444, 56 A. L. R. 264. Counsel for the parties in all of the companion cases are and have continued to be the same. The other cases are noted in the petition, with the superior court numbers, as Merton Crum et al. v. Mt. Shasta Power Corporation, No. 6312; William J. Albaugh v. Mt. Shasta Corporation, No. 6316; Luther McArthur v. Mt. Shasta Power Corp., No. 6317, and Roderick McArthur v. Mt. Shasta Corporation, No. 6318. In these cases the trials likewise resulted in judgments for the plaintiffs, and, after the entry thereof and notices of appeal, bills of exceptions on behalf of the defendant were in course of preparation and settlement. The records on appeal were completed in the Crum and Albaugh cases, and on the appeals the judgments were reversed on October 21, 1931. Crum v. Mt. Shasta Power Corporation (Cal. App.) 4 P.(2d) 564; Albaugh v. Mt. Shasta Corporation (Cal. App.) 4 P.(2d) 574. The judgments of reversal became final on December 20, 1931. On June 12, 1931, the matter of the settlement of the bills of exception in the three McArthur cases, including the case involved in the present proceeding, was brought up in open court at the request of counsel for the defendant. Counsel for the respective parties were then present in the court, and the matter was specially set for July 17, 1931. Thereafter the matter was continued by the court from time to time until December 15, 1931, at which time counsel for the plaintiffs in said actions first objected to the settlement of said bills of exceptions on the ground that the same had not been presented for settlement within the time and in the manner provided by law; that the presentation thereof on June 12, 1931, was more than ten days after the service of the proposed amendments, and that the defendant had thereby abandoned and lost its right to a settlement of the same. The settlement of the bills and the objections thereto were presented to the court and submitted for decision. On February 5, 1932, the respondents made and entered an order sustaining the objections and dismissing the proceedings on the ground that the proposed bills and amendments "were not presented to the judge or delivered to the clerk for the judge within ten days after the service of said proposed amendments." The present proceeding was commenced on February 13, 1932. The petition is rather voluminous, and, in addition to the facts above noted, which are undisputed, sets forth correspondence between counsel and between counsel for the petitioner and the respondent judge with reference to the progress of negotiations between counsel as to an agreement on the proposed bills and amendments; with reference to the desire of counsel for the petitioner to have the bills settled and with reference to conferences between counsel in an endeavor to arrive at an agreement, during all of which time counsel for the plaintiffs in said actions made no objection to the delay in pressing the bills for settlement until December 15, 1931. Upon the facts as so alleged, the petitioner claims that the plaintiffs' counsel waived and is estopped to assert his objections to such settlement.

The respondent judge has filed a demurrer to the petition, a motion to strike certain allegations thereof, and an answer, as the return to the alternative writ. The answer denies for want of information or belief the allegations with reference to what took place by correspondence and conference between counsel, but admits the facts alleged of which the respondent judge had personal knowledge and which have hereinbefore been stated as undisputed.

At the outset the essential and undisputed facts are that both the proposed bill of exceptions and the proposed amendments thereto were prepared, presented to, and filed with

the clerk of the respondent court within due time, and that they were not presented to the trial judge personally. The question first to be considered relates to the obligations of litigants and the powers and duties of the trial judge under section 650 of the Code of Civil Procedure, as applied to these undisputed facts. That section has had consideration and been applied under varying statements of facts in numerous cases in this state. To set at rest any confusion that may exist as to the application of the section to the facts here presented, a fuller discussion will be indulged in than would otherwise seem necessary.

Where the preparation and settlement of a bill of exceptions is the appropriate method of presenting a record on appeal, said section 650 provides that the party desiring same may, within the time prescribed, prepare the draft of a bill and serve the same, or a copy thereof, upon the adverse party. Within ten days after such service the adverse party may prepare amendments thereto and serve the same or a copy thereof on the adverse party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried the case upon five days' notice to the adverse party or be delivered to the clerk for the judge. When received by the clerk it is made his duty to deliver them immediately to the judge if he is in the county, etc. "When received from the clerk the judge must designate the time at which he will settle the bill and the clerk must notify the parties of such designation. At the time designated the judge must settle the bill."

From the foregoing provisions of the Code section it is observed that two methods of procedure are plainly provided for: First, the party seeking the settlement of the bill may present the same to the judge personally for settlement. When this method is pursued, the required notice must be given within the specified time. Secondly, the party desiring the settlement of the bill may deliver the same to the clerk for the judge, and it is made the duty of the clerk to deliver the same immediately to the judge, whose duty in turn is to designate the time at which he will settle the bill, followed by notice from the clerk to the parties as to the time so fixed. In such case no notice from the party seeking the settlement of the bill to the adverse party of the delivery of the bill and amendments to the clerk is required, and, when they are so delivered to the clerk, the party proposing the bill cannot thereafter be placed in default in advance of notice from the clerk of the time designated by the judge for settlement. It appears in the present proceeding without contradiction that the proposed bill and the proposed amendments were filed with the clerk of the court within time. The parties received no notice of the time of settlement except as may be inferred from the fact that in open court on June 12, 1931, which was a regular law and motion day in said court, and, in the presence of counsel for both parties, the matter of the settlement of said bill was fixed for July 17, 1931. At that time the matter was continued from time to time until December 15, 1931, when counsel for the plaintiff first objected to the delay in the settlement of the bill. We are of the opinion that the petitioner herein was not in default when the matter came on for disposition on that day.

[1, 2] It is alleged in the petition that the proposed bill and proposed amendments were delivered to the clerk for the judge within time. The answer does not challenge this allegation in so far as it avers a delivery of the same to the clerk, but denies that the same were so delivered for the judge. No issuable fact is thus presented. There is no provision of the statute requiring that the party delivering the proposed bill to the clerk, or the party delivering the proposed amendments to the clerk, must state that the same are so delivered for the judge. When they are delivered to the clerk, they are so delivered for the judge. The clerk in such case is the agency through which the bill is delivered for the judge. It could be so delivered for no other purpose, and was in his possession for the judge. Keating v. Keating, 169 Cal. 754, 757, 147 P. 974. The point is without merit. The form of the order of the court sustaining the objections to the settlement would indicate, however, that the point was determinative in character. There is no showing or contention that the proposed bill and proposed amendments were ever presented to the judge personally. They were, however, delivered to the clerk for the judge within time, and when so delivered no obligation rested on the proponent of the bill to do more until he received notice from the clerk of the time designated by the judge for settlement. No such notice appears to have been given in this case, and after the matter of settlement came on in open court on June 12, 1931, the continuances thereafter appear to have been regular and in no sense due to any default or neglect on the part of the petitioner.

The foregoing is in line with numerous decisions of this court and the District Courts of Appeal in applying sections 650 and 659 of the Code of Civil Procedure to similar statements of fact. Section 659 formerly provided for the preparation and settlement of a statement of the case on appeal, but the procedure was in all material respects the same as is now required for the preparation and settlement of a bill of exceptions. After quoting the pertinent similar provisions of the two sections, this court said

in Mellor v. Crouch, 76 Cal. 594, at page 596, 18 P. 685: "The obvious purpose of these provisions is that the parties may have notice of the time when the statement will be settled. When the statement and amendments are presented directly to the judge there is no provision for any notice of the time of settlement to be thereafter given by either the judge or clerk; and in such case, therefore, the five days' notice mentioned in section 659 must be given by the party himself. But when the papers are delivered to the clerk for the judge, the purpose of the Code is effected through the requirement that then the judge must designate a time for the settlement, and the clerk must give notice of it. The provision about the five days' notice in section 659 qualifies, we think, only the preceding clause of the sentence, and is not applicable to the case when the statement and amendments are delivered to the clerk for the judge." The foregoing language and holding were quoted and approved by the court in Curtin v. Ingle, 155 Cal. 53, 56, 99 P. 480; and the holding was later approved in Keating v. Keating, supra. To the same effect are Woody v. Security Trust & Savings Bank, 104 Cal. App. 64, 285 P. 356, and Lester v. Superior Court, 105 Cal. App. 258, 287 P. 132. These cases present a correct interpretation of the requirements of section 650 of the Code of Civil Procedure.

The cases relied upon by the respondents are not in point on the facts. Two of them, however, are so strongly urged as controlling precedents that they require notice. The first is Parry v. Campbell, 72 Cal. App. 755, 238 P. 130. That case involved a motion to strike the transcript on appeal from the files and to dismiss the appeal on the ground that the bill of exceptions, which constituted the transcript upon appeal, "was not prepared, proposed, served, or presented to the clerk or the court or counsel within the time allowed by law, nor was proper notice of the time of settlement given counsel." The trial court had settled the bill, holding "that the law does not require the presentation of said proposed bill of exceptions or of said proposed amendments thereto within 10 days after service of said proposed amendments." The statement of facts does not disclose what occurred in the trial court except by inference. If it was the fact in that case that the proposed bill and amendments were not presented to the judge personally or to the clerk for the judge within ten days after service of the proposed amendments, the holding of the trial court was clearly erroneous and the motions were properly granted. The opinion goes on to say that the trial court also held that the law "does not require the giving of 5 days' notice to the adverse party of the time of said settlement when the bill of exceptions and amendments thereto are presented to the clerk for the judge who tried the case instead of to the judge personally." The correctness of the holding of the trial court as to when the five days' notice is required is not directly passed upon, and, whether or not it was pertinent to the facts as presented by the record in that case, the ruling of the trial court was correct. After quoting from said section 650 the opinion then states: "The limitation as to time seems to apply as well to a delivery to the clerk for the judge as to a delivery to the judge himself." The limitation mentioned obviously referred to the limitation of ten days after service of proposed amendments for the presentation of the bill to the judge personally or to the clerk for the judge, and such must have been deemed the effect of the opinion when the petition for a hearing in this court was considered and denied.

The other case especially relied upon by the respondents is Wilson v. Wilson, 207 Cal. 364, 278 P. 440, wherein it was held, under the peculiar circumstances disclosed, that there was some duty imposed on counsel for the proponent to have the proposed bill presented to the new judge after the death of the judge who tried the case, and that the successor in office of the deceased judge had not abused his discretion in refusing to settle the bill. The ruling in that case may not be extended beyond the limitations of the particular facts presented. The requirements of section 650 were not mentioned nor commented upon, and that case may not be considered as having overruled or disturbed the holding in the Keating and other cases above referred to.

In order to indicate definitely the two methods of procedure to be followed under said section 650, the following should be observed:

[3] First. When the draft of the proposed bill of exceptions has been prepared and served as required by the first and second paragraphs of the section, and proposed amendments have been prepared and served, as required by the next paragraph of the section, the proposed bill and amendments may be presented by the party seeking the settlement to the judge who tried the case within ten days after service upon the proponent of the proposed amendments. In such case the five days' notice of such presentation must be given.

[4, 5] Second. When the proposed bill and amendments are prepared and served within due time and are not presented to the judge himself, but are delivered to the clerk for the judge before the expiration of ten days from and after the service of the proposed amendments, the five days' notice is not required. In such case it is the duty of the clerk immediately to deliver the proposed bill and amendments to the judge, who,

upon receipt of the same, is required to designate a time when he will settle the bill. Notice of the time so designated must thereupon be given by the clerk to the parties. When, as in the present case, such notice is not given, but the matter of the settlement is placed on the law and motion calendar or otherwise placed before the judge prior to the default of either party, continuances of the matter to some future date are not in and of themselves sufficient to place either party in default.

[6] The demurrer to the petition herein admits the truth of the averments setting forth facts which it is claimed constitute a waiver of the delay on the part of the appellant in said action in pressing the settlement of the bill, and an estoppel to insist upon the objections. We are of the opinion that the petition states sufficient facts in these and other respects to entitle the petitioner to the relief sought. The demurrer is therefore overruled. In order to clear the record, the motion to strike from the petition certain allegations is denied. The answer of the respondent judge, as above stated, denies for want of information or belief certain allegations having to do with negotiations between counsel looking to an agreement on the settlement of the bill. These denials present controverted issues of fact on the questions of waiver and estoppel and would require a reference were it not for the fact that upon the undisputed showing and the proper construction of section 650 of the Code of Civil Procedure the petitioner should prevail.

It is the duty of the respondents to designate a time for the settlement of said bill of exceptions, and, after due notice to the parties to said action, to proceed to settle the same.

Let the peremptory writ issue as prayed.

215 Cal. 569

McARTHUR v. MT. SHASTA POWER CORPORATION.

Sac. 4709.

Supreme Court of California.

May 31, 1932.

Appeal and error ⇨622.

Where mandate had issued to compel judge to settle proposed bill of exceptions, time for filing record commences to run on settlement.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Anna McArthur against the Mt. Shasta Power Corporation. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal.

Motion denied.

William B. Bosley, Thomas J. Straub, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

PER CURIAM.

This is a motion to dismiss an appeal from a judgment for the plaintiff in an action brought in the respondent court for an injunction and damages by reason of an alleged wrongful diversion of water by the defendant. The motion is made on the ground that no record on appeal has been prepared, certified, or filed in this court within the time prescribed by law. This matter was heard and submitted at the same time as the application for a writ of mandate to compel the trial judge to settle a bill of exceptions proposed by the appellant. The mandamus proceeding is entitled. Mt. Shasta Power Corporation v. Superior Court (Cal. Sup.) 12 P.(2d) 10, and the peremptory writ has this day been ordered. The time for filing the record on appeal herein will not commence to run until said bill of exceptions is settled by the trial judge.

The motion to dismiss the appeal is therefore denied.

215 Cal. 570

McARTHUR v. MT. SHASTA POWER CORPORATION.

Sac. 4710.

Supreme Court of California.

May 31, 1932.

Appeal and error ⇨622.

Where mandate had issued to compel judge to settle proposed bill of exceptions, time for filing record commences to run on settlement.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Luther McArthur against the Mt. Shasta Power Corporation. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal.

Motion denied.

William B. Bosley, Thomas J. Straub, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

PER CURIAM.

This is a motion to dismiss an appeal from a judgment for the plaintiff in an action brought in the respondent court for an injunction and damages by reason of an alleged wrongful diversion of water by the defendant. The motion is made on the ground that no record on appeal has been prepared, certified, or filed in this court within the time prescribed by law. This matter was heard and submitted at the same time as the application for a writ of mandate to compel the trial judge to settle a bill of exceptions proposed by the appellant. The mandamus proceeding is entitled Mt. Shasta Power Corporation v. Superior Court (Cal. Sup.) 12 P.(2d) 10, and the peremptory writ has this day been ordered. The time for filing the record on appeal herein will not commence to run until said bill of exceptions is settled by the trial judge.

The motion to dismiss the appeal is therefore denied.

215 Cal. 571

McARTHUR v. MT. SHASTA POWER CORPORATION.

Sac. 4711.

Supreme Court of California.

May 31, 1932.

Appeal and error ⊂=622.

Where mandate had issued to compel judge to settle proposed bill of exceptions, time for filing record commences to run on settlement.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Roderick McArthur against the Mt. Shasta Power Corporation. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal.

Motion denied.

William B. Bosley, Thomas J. Straub, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

PER CURIAM.

This is a motion to dismiss an appeal from a judgment for the plaintiff in an action brought in the respondent court for an injunction and damages by reason of an alleged wrongful diversion of water by the defendant. The motion is made on the ground that no record on appeal has been prepared, certified, or filed in this court within the time prescribed by law. This matter was heard and submitted at the same time as the application for a writ of mandate to compel the trial judge to settle a bill of exceptions proposed by the appellant. The mandamus proceeding is entitled Mt. Shasta Power Corporation v. Superior Court (Cal. Sup.) 12 P.(2d) 10, and the peremptory writ has this day been ordered. The time for filing the record on appeal herein will not commence to run until said bill of exceptions is settled by the trial judge. The motion to dismiss the appeal is therefore denied.

215 Cal. 771

MT. SHASTA POWER CORPORATION (a Corporation), Petitioner, v. SUPERIOR COURT OF STATE OF CALIFORNIA, IN AND FOR COUNTY OF SHASTA, and Honorable Walter E. Herzinger, Judge thereof, Respondents.

S. F. 14566.

Supreme Court of California.

May 31, 1932.

In Bank.

Application for writ of mandate prayed to be directed to the Superior Court of Shasta County, Walter E. Herzinger, Judge, to compel settlement of bill of exceptions. Writ granted.

William B. Bosley, of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, of San Francisco, for petitioner.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

PER CURIAM.

Mandate to compel respondent judge to settle a bill of exceptions on appeal from a judgment for the plaintiff in an action brought in the respondent court entitled Roderick McArthur v. Mt. Shasta Power Corporation (No. 6318). The facts presented by the record herein are the same, so far as pertinent, as those involved in the case of Mt. Shasta Power Corporation v. Superior Court (Cal. Sup.) 12 P.(2d) 10, this day decided. On the authority of that case it is ordered that the peremptory writ issue as prayed.

215 Cal. 772

MT. SHASTA POWER CORPORATION (a Corporation), Petitioner, v. SUPERIOR COURT OF STATE OF CALIFORNIA, IN AND FOR COUNTY OF SHASTA, and Honorable Walter E. Herzinger, Judge thereof, Respondents.

S. F. 14567.

Supreme Court of California.

May 31, 1932.

In Bank.

Application for writ of mandate prayed to be directed to the Superior Court of Shasta County, Walter E. Herzinger, Judge, to compel settlement of bill of exceptions. Writ granted.

William B. Bosley, of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, of San Francisco, for petitioner.

Jesse W. Carter, of Redding and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

PER CURIAM.

Mandate to compel the respondent judge to settle a bill of exceptions on appeal from a judgment for the plaintiff in an action brought in the respondent court entitled Luther McArthur v. Mt. Shasta Power Corporation (No. 6317). The facts presented by the record herein are the same, so far as pertinent, as those involved in the case of Mt. Shasta Power Corporation v. Superior Court (Cal. Sup.) 12 P.(2d) 10, this day decided. On the authority of that case it is ordered that the peremptory writ issue as prayed.

215 Cal. 587

WALSH v. STANDARD ACC. INS. CO.

S. F. 14587.

Supreme Court of California.

June 3, 1932.

Rehearing Denied July 2, 1932.

1. Licenses ⇐26.

In action on securities broker's bond, that relation of principal and agent did not exist between parties *held* not controlling, where broker acted as such (St. 1917, pp. 673, 677, § 2, subd. 11, and § 5, both as amended by St. 1925, pp. 965, 967, §§ 1, 3).

2. Licenses ⇐18½.

Business of securities brokers *held* proper subject for police regulation (St. 1917, p. 673, as amended).

3. Licenses ⇐7(1).

Statute requiring securities broker to furnish bond for faithful and honest performance of obligations in purchase or sale of securities *held* constitutional (St. 1917, p. 677, § 5, as amended by St. 1925, p. 967, § 3).

4. Statutes ⇐121(1).

Title of Corporate Securities Act *held* sufficient to authorize provision requiring broker to furnish bond for faithful performance of undertakings in purchase or sale of securities (St. 1917, p. 673 and § 5, as amended by St. 1925, p. 967, § 3).

> Corporate Securities Act, St. 1917, p. 673, is entitled "An act providing for the regulation and supervision of companies, brokers, agents, and sales of securities as the same are therein defined, and to prevent fraud in the sale of securities; providing for the enforcement of said act and penalties for the violation thereof. * * *"

5. Licenses ⇐26.

In action on securities broker's bond, evidence *held* to sustain finding that broker purchased securities in brokerage transaction covered by bond (St. 1917, pp. 673, 677, § 2, subd. 11, and § 5, both as amended by St. 1925, pp. 965, 967, §§ 1, 3).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by R. J. Walsh against the Standard Accident Insurance Co. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondent.

PRESTON, J.

Appeal by defendant from judgment for plaintiff in an action to recover upon a broker's bond. The main question to be determined is whether or not the transaction upon which the cause of action is based was a "brokerage" transaction within the meaning of the Corporate Securities Act (St. 1917, p. 673, as amended) and covered by the bond issued in accordance with the requirements of said act (section 5, Corporate Securities Act, as amended in 1925, St. 1925, p. 967, § 3).

The amended complaint alleged that on December 6, 1926, J. Arthur Snowden, doing business at the J. Arthur Snowden Company, as principal, and defendant, as surety, executed and delivered a $5,000 bond to the commissioner of corporations as a condition precedent to the issuance to said Snowden of a broker's license under said act. The condition of the bond, in almost the identical language of the statute, was that, if said Snowden should faithfully and honestly perform all obligations and undertakings in the purchase or sale of securities by him, then the obligation of the bond should be void, otherwise to remain in full force and effect, and that any person injured might bring an action in his own name upon it to recover damages.

Said complaint further alleged that on and prior to January 28, 1927, J. Arthur Snowden, purported to be the fiscal agent of James K. Nelson, Inc., engaged in the business of purchasing and selling its capital stock, of which 238 shares were owned by plaintiff; that on said day Snowden told plaintiff he desired to purchase his 238 shares for the purpose of reselling them to investors; that an agreement was thereupon entered into whereby a purchase price of $6,000 was fixed, $2,000 of which said Snowden paid plaintiff in cash, giving a 30-day promissory note for $4,000 to cover the balance; that said Snowden failed, refused, and neglected to pay said $4,000 note when due or at all, and that plaintiff therefore commenced an action against him in the superior court and recovered judgment for $4,872.85, no part of which has been paid or satisfied, wherefore plaintiff prayed judgment in this action against defendant surety company upon said bond for said sum of $4,872.85, interest and costs.

Issue was joined and the cause went to trial. The evidence included the judgment roll and part of the testimony taken in the action brought by plaintiff against said Snowden. At the conclusion of the trial, the court found that the allegations of said amended complaint were true and supported by competent evidence. Judgment, accordingly, went for plaintiff, and defendant appealed.

Appellant claims that obviously this transaction was not a brokerage transaction within the meaning of said act and the terms of the bond, but that it was a straight sale of stock by plaintiff to said Snowden, as a principal and not as a broker. From the very essence of its relationship, appellant argues, brokerage implies the existence of a principal, and a broker is and always has been one who acts as agent for another. Respondent relies upon the finding that said Snowden purchased the stock for resale to investors and urges that the common-law definition of an ordinary broker has been abrogated by the more liberal definition contained in the act itself, to which latter definition we must look when passing upon the scope of the provisions of a bond issued thereunder. The definition referred to (section 2, subd. 11, of said act as amended by St. 1925, p. 965, § 1) reads in part: "The word 'broker,' as used in this act, includes every person or company, other than an agent, who shall * * * engage either wholly or in part in the business of selling * * * negotiating for the sale of, or otherwise dealing in any * * * 'securities' issued by others, * * * or of purchasing such 'securities' with the purpose of re-selling them, or of offering them for sale to the public."

Clearly this was not a transaction between plaintiff and Snowden, as an individual, and in reality it was more than a purchase for resale, for the evidence establishes beyond a doubt that Snowden was in fact acting in the interests of the Nelson Company, as its broker or agent, in the pursuit of his regular brokerage business, and that his admitted purpose in making the purchase was not to resell to the public, but primarily to protect the proposed market price of the remainder of the capital stock of the Nelson Company, which he was endeavoring to promote.

Mr. Snowden gave a complete history of his relationship with the Nelson Company. He stated that just as he was completing the successful financing of a certain interlocking transportation company, the president of said company, who was also a director of the Nelson Company, consulted him with reference to procuring capital for expansion of the latter company, representing that it was financially sound; that it was about to secure a permit for the sale of treasury stock to increase its capitalization, but that pending the issuance of such permit, Mr. Nelson was willing to advance for sale $100,000 worth of issued stock which he personally owned and to transfer the proceeds to the company in return for an account receivable; that when the legality of the increased capitalization was completed, he would then ask for the right to take back stock from the treasury for said account receivable, thus eliminating the obligation on the books of the company, but giving it the interim funds. Mr. Snowden testified that he thereupon investigated the Nelson Company with the result that in the spring of 1926, in aid of the above plan, he was given a written option to purchase the

personal stock of Mr. Nelson at a gross cost of $100 per share, that is, he was to pay Mr. Nelson $75 per share in cash and was to set up an account receivable in his favor of $25 a share additional to be paid when the new release of treasury stock should be authorized and the Snowden Company should receive for sale to the public a block thereof large enough to give it a fiscal operation of some importance. The price at which the stock taken under the option agreement was to be sold to the public, based upon the principal assets of the company, was fixed at $125 per share.

Mr. Snowden testified that the financing of this company was his major business from May, 1926, to January, 1927; that for several weeks prior to January 28, 1927, he had been told by Mr. Nelson, by the director of the Nelson Company above mentioned, and by another interested party, that plaintiff owned 238 shares of its capital stock, which he contemplated dumping on the open market; that, therefore, about January 28th, he telephoned plaintiff, who in response came to his office, stating that he had made a loan of $6,000 on his 238 shares of stock and would sell them for that amount in cash. Plaintiff testified: "Mr. Snowden told me that he was in a position to purchase that stock, and I told him that I had wanted to get rid of the stock. 'Well,' he says, 'I am the only one who has got a place to put it.' 'Well,' I says, 'I will tell you, I have been working with Jimmy Nelson, the president of your organization, and he was negotiating to buy it.' He said, 'I am working 100% with Jimmy Nelson, and we have got a place to put the stock,'" etc. Mr. Snowden testified that he could pay plaintiff only $2,000 in cash, so the transaction was consummated by the giving of his note for $4,000 to cover the balance. Plaintiff and Mr. Snowden then went to the bank and placed the stock and note in escrow for 30 days, at the end of which time the note was to be paid and the stock delivered. The escrow agreement expressly provided that no rescission thereof should be made without the consent in writing of all the parties. On the very next day, January 29th, Mr. Snowden learned that the Nelson Company was in financial difficulties and he endeavored to rescind his escrow agreement and get back his note and $2,000 cash payment. The stock became worthless and plaintiff refused to consent to any rescission. The note was never paid and this litigation resulted.

Aside from Mr. Snowden's testimony that his major business was that of fiscal agent for the Nelson Company, his office door, at the time in question, advertised that he and his company were "Financial Agents of James K. Nelson, Incorporated." He also issued a lengthy prospectus, setting forth the assets and prospects of the company, wherein he offered its stock for sale and represented: "These are the only shares of the company in any way available at this time. * * * Practically a closed corporation. Never a public offering of its securities. * * * A most limited number of shares are available for purchase. * * *" In view of these representations, it was obviously to the best interests of Mr. Snowden, as a broker and as financial agent of the Nelson Company, to prevent, if possible, the marketing of the shares held by plaintiff. Moreover, Mr. Snowden testified directly that such was his real purpose.

He stated: "I remember telling him (plaintiff) that these three officers of the company had been bedeviling me for several weeks with the fact that he owned this stock and was going to throw it on the market at a ridiculous price, thereby damaging our market, and that was why I was interested in discussing it with him.

"Q. When you say by dumping the stock he would damage 'our market' you refer to your ability to resell the stock of Mr. Nelson. * * * A. Yes, obviously if he had stock which he had acquired at a few cents on the dollar and dumped it and advertised it in the newspapers, he would damage the existing sale price of the stock, justified by its book value. * * *

"Q. As I understand it, your reason for buying the stock was to prevent the dumping of the stock so as to interfere with your operations in the sale of the stock of the company; is that correct? A. That is one reason; the other was that it was in the general line of our business of buying and selling stocks.

"Q. So that it was your policy, when you were engaged in the sale of stock of the corporation, to remove from the market any floating supply of stock; is that correct? A. No, that is not correct.

"Q. Just so that I will get it correct, what was your interest in buying this stock? A. The interest was accelerated by these three officers of the company urging us to absorb that stock so that he would not at a sacrifice price reflect upon the book value and market value of the stock then existing.

"Q. So it was to your interest to see that that stock was not sold on the market at a price such as Mr. Walsh sold to you for? A. It would have been to our interest had the company not collapsed and the new issue of stock been released and offered to the public.

"Q. You did not know anything about the collapse of the company at the time you agreed to buy this stock of Mr. Walsh? A. No, sir."

It appears too clearly for controversy, even from the excerpts of testimony above set forth, that said Snowden, in purchasing the stock from plaintiff, was endeavoring to protect the market for the remainder of the stock which he was financing and that it was undoubtedly a transaction in the course of his

regular brokerage business. The market would undoubtedly have been injured by a sale of 238 shares of stock for $6,000—about $25 a share or one-fifth of the alleged book value of $125 per share. In this connection, Mr. Snowden testified:

"Q. Did you ever figure out at what price per share you were paying Mr. Walsh for this stock? A. No, sir; I never did. * * * I never figured it.

"Q. There were 238 shares for which you were paying $6,000, and $25 a share would be a little less than $6,000. * * * Did you tell Mr. Walsh when he offered to sell this stock to you at approximately $25 a share that the book value of the stock was over $125 a share? A. I don't know as I did. * * *

"Q. Until this morning you say you have never attempted to figure what prices per share you were paying for this stock? A. Frankly, I never did.

"Q. Did you know it was approximately one-fifth of the price you were selling the stock for? A. I never arrived at that conclusion. I knew it was a reasonable price for the stock."

[1-3] Appellant urges a construction of the said act which would exclude its application to a private transaction between a broker and another, and urges the invalidity of the act if such construction is compelled by it. But we have thus gone at length into the facts of this case, which show that the broker here was not acting in his individual capacity, but purely as a broker, as defined by the act. The fact that the relation of principal and agent did not exist between plaintiff and the broker does not seem to be controlling so long as the broker, in the transaction, was acting strictly in that capacity and not in his individual capacity. The regulation under the act is in the interest of the general public and this remedy to the injured party is a part of the regulatory scheme. Under this legislation, both benefits and burdens result to trustworthy members of the class, but the public are entitled to protection from the unworthy members thereof, and the business is, therefore, a proper subject for police regulation. The provision requiring a bond for the faithful and honest performance of "all obligations and undertakings in the purchase or sale of securities" is distinctly germane to and in aid of this regulation. A wealth of authority could be cited in support of this principle. See, among other cases, the following: In re Cardinal, 170 Cal. 519, 524, 150 P. 348, L. R. A. 1915F, 850; People v. Eiseman, 78 Cal. App. 223, 249, 248 P. 716; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 37 S. Ct. 224, 61 L. Ed. 493; Merrick v. Halsey & Co., 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498.

[4] The title of the act is quite sufficient to authorize this legislation. McClure v. Riley, 198 Cal. 23, 243 P. 429; In re Estate of Wellings, 192 Cal. 506, 221 P. 628; and Heron v. Riley, 209 Cal. 507, 289 P. 160.

[5] Without further comment, we may state in conclusion that the above review of the evidence shows clearly the correctness of the findings and judgment of the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; TYLER, Justice pro tem.

CITY OF LOS ANGELES v. ABBOTT et al.*

L. A. 13122.

Supreme Court of California.

May 26, 1932.

Rehearing Granted June 23, 1932.

1. Appeal and error ⇐712.

Generally, appellate court will determine parties' rights on record as presented on appeal.

2. Appeal and error ⇐714(2).

Only in exceptional case can appellate court take cognizance of another judgment rendered by it but not made part of record.

3. Appeal and error ⇐714(2).

Appellate court *held* not authorized to go outside record on appeal from judgment dismissing city's action to condemn property for purpose of considering effect of another judgment not referred to by record.

4. Eminent domain ⇐197.

Statute authorizing city to abandon condemnation proceedings by passing ordinance *held* not to preclude court's declaring abandonment of proceeding in fact existing (Deering's Gen. Laws 1923, Act 8198, § 14).

5. Eminent domain ⇐197.

That city was compelled to discontinue condemnation proceedings by judgment determining invalidity thereof because of defects *held* as much "abandonment," of proceedings within statute, from property owners' standpoint, as voluntary discontinuance (Deering's Gen. Laws 1923, Act 8198, § 14).

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words and Phrases.]

SHENK, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by the City of Los Angeles against Sadie D. Griffith Abbott and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Superseding opinion of District Court of Appeal in 300 P. 854.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and C. N. Perkins, Deputy City Attys., all of Los Angeles, for appellant.

Hyams & Himrod, W. W. Hyams, Aubrey Devine, Schusterman & Pugh, Charles Schusterman, Harriet W. Pugh, Andreani & Haines, Andreani, Haines, Bisher & Carrey, and Harold E. Prudhon, all of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 2. Upon further consideration, we are satisfied that said court has properly determined the issues involved herein, and we adopt the opinion of Mr. Justice Ira F. Thompson in part as the opinion of this court. It reads as follows:

This is an appeal from a judgment of dismissal rendered in an action brought by the plaintiff for the purpose of acquiring certain property for the opening of a street. The complaint, filed November 24, 1923, is in the usual form, alleging the passage of an ordinance of intention on January 22, 1923, designated as Ordinance No. 45,501 (new series) with the object of opening, widening, and extending Mines avenue in the city of Los Angeles. The answer of the defendant Halperin put in issue the value of the property and the severance damage. On the 8th day of May, 1929, the defendant gave plaintiff notice that on the 16th day of May he would move the court for a judgment of dismissal on the ground and for the reason that the case had been abandoned. The notice further stated that the motion would be based upon all the files and records in the action and the affidavit of William B. Himrod. The affidavit in effect averred that subsequent to the filing of the answer the plaintiff had abandoned the action and had commenced another suit, which it was said was then pending. Thereafter and on July 26th the court rendered its judgment wherein it was recited that the plaintiff had abandoned the action and ordering and adjudging that the action be dismissed with costs to the defendant.

It is now argued that the court erred in rendering a judgment of dismissal for the following reasons:

(1) There was no abandonment of the action by the appellant.

(2) The appellant did not abandon because the requirements for abandonment imposed by the Street Opening Act of 1903 were never complied with.

(3) Assuming an abandonment by appellant, it was not of such character as to entitle respondent to his costs under section 1255a of the Code of Civil Procedure.

(4) The court could not allow costs because it had previously enjoined appellant from paying "any costs or expenses incurred in connection with the improvement provided for by Ordinance No. 46,537 (New Series)."

The last point is the same as that determined adversely to the contention of appellant in the case of City of Los Angeles v. Abbott (Cal. App.) 299 P. 807, decided May 18, 1931, and as to this particular point appellant is concluded thereby.

[1, 2] However, before considering the argument of appellant upon the first three assignments we must dispose of that advanced by the respondent to the effect that we are governed solely in the disposition of this cause by the record contained in the transcript on this particular appeal; that inasmuch as there is no suggestion in that record of the pendency or disposition of an action entitled O. T. Johnson, etc., v. City of Los Angeles, and inasmuch as appellant's theory is entirely founded upon the assumed effect of the judgment in that case, there is no necessity for us and, indeed, we have no right to determine the points thus advanced by appellant. There can be no doubt that generally speaking the court will determine the rights of the parties upon the record as it is presented upon the appeal. As an example we find this language in Reed v. Cross, 116 Cal. 473, 48 P. 491, 495: "We know from the appeal by plaintiff in the case just what the judgment roll in the former case contained, but we may not avail ourselves of that knowledge on this appeal, for the reason that, as before stated, the appeal here does not include in the record that judgment roll." It is to be observed in connection with the quoted matter that the court was there speaking of two appeals in the one action, the one numbered 53 and the other 70, and yet the record in the one could not supplement the record in the other or aid the court in the disposition of the same. Like all valid and subsisting uncodified rules of law, it is supported by sound reason and logic. Without reference in the record to the judgment upon which the appellant relies, his adversary is denied the opportunity to destroy, if he may, its legal effect. Furthermore, remembering that the rule of judicial notice is one of evidence and not of pleading, it may be added that it is not and should not be the function of an appellate tribunal to be the triers or finders of fact. Its duty is to determine whether the parties have had a fair and impartial trial in

accordance with law in the court below. The rule, however, is not an inflexible one. Sewell v. Johnson, 165 Cal. 762, 134 P. 704, 706, Ann. Cas. 1915B, 645, illustrates and recites the exceptions. A careful study of that authority, however, will convince the reader that the decision of this court of which we may take notice, so far as the facts therein adjudged are concerned, is one which is rendered subsequent to the taking of the appeal. As thus viewed, it falls in the same category as those instances where, by reason of some fact occurring after the appeal, the question is rendered moot, or where after an appeal from a judgment a new trial is granted. As is indicated by the concurring opinion of Mr. Justice Angellotti, to which two other justices agreed, the real question was not one of judicial notice, but rather whether such matters might be brought before the court on motion and supported by evidence outside the record. We read, however, in the opinion of Mr. Justice Lorigan, also agreed to by two justices, as follows: "The cases cited by respondent sustain the general rule relied on by him that there must, in the record on appeal to which the doctrine is invoked, be some pleading or matter referring to or involving the record and action of this court in another case before it may be judicially noticed. It will be found, however, in an examination of all these cited cases that the rule of judicial notice was sought to be invoked under circumstances where it was clear that no basis in or outside the record in the immediate appeal could be presented for its application. The parties endeavoring to have the court apply it had plainly neglected or failed in their pleadings in the court below to avail themselves of the right to have incorporated in their record on appeal the record or action in the trial court, or in this court, of another action so as to permit reliance on the doctrine of judicial notice. In none of these cases was it sought to have this court take notice of *its judgment on appeal* in another case intimately connected with the judgment involved in the pending appeal and directly affecting it, *and where such judgment in the other case was rendered after a pending appeal was taken and no fault was attributable to the appellant in not incorporating any reference to such previous case in his record on appeal.* No such situation was presented in any of the cited cases, and, of course, in none of them was it decided that judicial notice of the court under no circumstances could be taken in a pending appeal by proof of matters aliunde its record. It was only held that judicial notice under the rule clearly could not be taken under the circumstances presented in those cases where it was sought to be invoked." (Italics ours.) For our purposes it is immaterial whether we agree with the views of Justice Angellotti or Justice Lorigan, because they both lead to the conclusion that only in the exceptional case can the appellate court take cognizance of a judgment rendered by this court when the same is not made a part of the record on appeal. Reference is made in the opinion from which we have just quoted to Ballard v. Searls, 130 U. S. 50, 9 S. Ct. 418, 32 L. Ed. 846, and Butler v. Eaton, 141 U. S. 240, 11 S. Ct. 985, 35 L. Ed. 713, and in both of the authorities cited particular care is taken to point out that the judgment became final subsequent to the taking of the appeal and when it was impossible for the party in whose favor it ran to have alleged its existence and relied upon it in the trial court. In U. S. v. Commercial Credit Co. (C. C. A.) 20 F.(2d) 519, 522, we note the same basis for the exception to the general rule in these words: "While ordinarily a writ of error must be passed upon in the light of the record brought up from the court below, certain exceptions to this rule are recognized, and we think that *the happenings subsequent to the suing out of the writ of error* bring this case within the exceptions." (Italics ours.) As a further indication of the procedure necessary to invoke the doctrine or rule of judicial notice we quote from Roberts v. Roberts, 81 Cal. App. 499, 253 P. 1112, 1113, as follows: "The affidavit avers that by a judgment of the superior court of Alameda county, in an action between the same parties numbered 83587, as shown by the register of actions in that court, the provisions of the contract which are sought to be enforced in the instant case were adjudged to be void, and that the judgment was not appealed from, and has become final. The record does not contain a copy of the judgment, nor was the latter made a part of the affidavit except by reference. Such reference, however, was sufficient to warrant the trial court in taking judicial notice thereof (Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 P. 704); and we must presume that the implied finding as to its effect, which was adverse to the allegations of the affidavit, was sustained by the terms of the judgment (Estate of Young, 149 Cal. 173, 85 P. 145; Fonner v. Martens, 186 Cal. 623, 625, 200 P. 405; Western California Land Co. v. Welch, 41 Cal. App. 435, 183 P. 169)."

[3, 4] There is nothing in the instant case to bring it within the exception to the general rule, nor do we find any sound reason to extend the scope of the exception. We are consequently compelled to the conclusion that we cannot go outside the record to determine that the lower court was in error in adjudging that there was an abandonment and that the character of the abandonment was such as to justify the court in awarding respondent his costs. It might be added, however, with respect to the contention that the assumed abandonment did not comply with the provisions of the Street Opening Act of 1903, found in section 14 thereof (Deering's Gen.

Laws, 1923, Act 8198, p. 3317), to the effect that the city may abandon the proceeding which it has instituted by the passage of an ordinance so declaring, and hence the lower court was in error in determining that it was sufficient, leaves out of consideration entirely the purpose of the act providing for the recovery of costs. It is obvious that if we were to adopt appellant's contention it would always lie with the municipality to pay or withhold costs by the simple expedient of refusing such an ordinance passage. We think it was never intended, by the section thus referred to, to do more than to empower the city to adopt such ordinance if it deemed it wise and expedient. It certainly cannot be construed to limit the authority of the court to declare an abandonment when one exists in fact.

[5] We desire to add that, even if the injunction decree were properly before this court, it would not constitute a defense to the motion to dismiss. It is true that the city was compelled to discontinue its proceedings by the judgment of the court which determined that they were void by reason of certain defects. But, in our opinion, this is as much an abandonment, from the standpoint of the property owner, as a voluntary discontinuance. The burden on him in each case is exactly the same, and the reason for the statutory protection given him applies with equal force in cases of voluntary and involuntary abandonment. It follows that the judgment of dismissal and award of costs was proper.

The judgment is affirmed.

I dissent: SHENK, J.

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie Griffith ABBOTT et al., Defendants; Leon Escallier et al., Defendants and Respondents.*

L. A. 13123–13145.

Supreme Court of California.

May 26, 1932.

Rehearing Granted June 23, 1932.

In Bank.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Joseph P. Sproul, Judge, of dismissal of an action in eminent domain to acquire certain property for the opening of a street. Affirmed.

Superseding decisions of District Court of Appeal in 300 P. 856–862.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom, and C. N. Perkins, Deputy City Attys., all of Los Angeles, for appellant.

Hyams & Himrod, W. W. Hyams, Aubrey Devine, Schusterman & Pugh, Charles Schusterman, Harriet W. Pugh, Andreani & Haines, Andreani, Haines, Bisher & Carrey, and Harold E. Prudhon, all of Los Angeles, for respondents.

PER CURIAM.

These are appeals from judgments of dismissal. The facts and issues of law are identical with those involved in the case of The City of Los Angeles v. Abbott et al. (Cal. Sup.) 12 P.(2d) 19, this day decided, and, in conformity with the decision in said case, the judgments are affirmed.

I dissent: SHENK, J.

124 Cal.App. 14

OLMSTEAD v. CITY OF SAN DIEGO et al.

Civ. 933.

District Court of Appeal, Fourth District, California.

May 31, 1932.

1. Municipal corporations ⇐221.

Charter giving San Diego power to hold realty, "sell," "convey," and "dispose" of same *held* to grant power to determine use to be made of pueblo lands for common benefit.

The words "sell" and "convey" were used in the charter in the usual accepted meaning, implying an alienation or transfer. The word "dispose" means to direct or assign for a use.

[Ed. Note.—For other definitions of "Convey," "Dispose of," and "Sell," see Words and Phrases.]

2. Dedication ⇐13.

Charter vests in city of San Diego power to dedicate pueblo lands as park.

3. Dedication ⇐17.

Ordinance of San Diego dedicating certain lands for use of citizens forever as public park *held* to effectively dedicate such lands as park.

4. Dedication ⇐13.

Statute relating to dedication of land for park in San Diego *held* not to limit authority given to city by subsequent charter to set aside land for park purposes (St. 1869–70, p. 49).

5. Dedication ⇐58.

San Diego having dedicated lands for park purposes cannot change use merely be-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 17 P.2d 993.

cause private property rights were not invaded thereby.

6. Municipal corporations ⇐299.

Notwithstanding improvement act vests in city council exclusive power to construct roads, San Diego park board having control and management of park property could determine whether proposed road through park was consistent with park purposes (St. 1911, p. 730).

7. Municipal corporations ⇐323(3).

Evidence justified park board's refusal to permit construction of road through park.

Refusal was justified on ground that proposed road would injure the park and because another route for the highway would solve the traffic problem and not injure the park.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by L. T. Olmstead against the City of San Diego and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

M. W. Conkling, City Atty., and C. L. Byers, Asst. City Atty., both of San Diego, for appellants.

Harrison G. Sloane, Wright & McKee, and C. M. Monroe, all of San Diego, for respondent.

SCOVEL, Justice pro tem.

This is an action to enjoin the city council of the city of San Diego from constructing a road through Torrey Pines Park. At the time the action was filed, the main highway between Los Angeles and San Diego ran through a portion of the park. The highway contained many curves and, becoming inadequate for the traffic thereover, the city council were preparing to construct a new highway through the park area involved in this action. The first question involved in the appeal is whether Torrey Pines Park is in fact a park. A consideration of this problem necessitates a brief sketch of the history of the lands involved.

The city of San Diego was originally a Spanish, and then a Mexican, pueblo. The lands in question were a portion of the "pueblo lands" of the original town. Under the Spanish and Mexican law these "pueblo lands" were held in trust by the pueblo for the benefit of the community and could only be used and disposed of in accordance with the order and direction of the king or sovereign power. U. S. v. Santa Fe, 165 U. S. 675, 17 S. Ct. 472, 41 L. Ed. 874; Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005; Richert v. City of San Diego, 109 Cal. App. 548, 293 P. 673. The pueblo of San Diego was incorporated as the city of San Diego in 1850, the pueblo lands here involved being recognized as owned by the city, but not located within its corporate limits. Thereafter they were held by the city under the trusts attaching to them as pueblo lands, their use and disposition being subject to the control of the Legislature as successor to the sovereign power of the king (Thompson v. Thompson, 2 Cal. Unrep. 32; Thompson v. Thompson, 52 Cal. 154, 157; Hart v. Burnett, 15 Cal. 530, 580; Ames v. City of San Diego, supra), except the power of "rent, sale or lease," which was expressly given to the city. In 1872 the Legislature passed an act whereby the boundaries of the city were extended to include these pueblo lands, and authorizing the city to "provide for the use, care, custody, and regulation of all the commons, parks, cemeteries, and property, both real and personal, belonging to the city," restricting its power only as to the manner of sale and disposition. St. 1871–72, p. 285.

It will thus be seen that as early as 1872 the Legislature had delegated to the city the unrestricted power of determining how its real property should be used.

[1] In 1889, a freeholders' charter was ratified by the Legislature (see St. 1889, p. 643) whereby the former city of San Diego was continued as a municipal corporation under the same name, with the same boundaries and "vested with all the property rights * * * now belonging to the City of San Diego" (article 1, c. 1, § 3), and was empowered to "hold, and enjoy real and personal property * * * and sell, convey, and dispose of the same for the common benefit" (article 1, c. 1, § 2). It further provided, however, that the sale, conveyance, or lease of any lands should be made only at public auction after publication of notice of sale. The charter of 1889 also vested the city with "all the property rights" belonging to the city under the act of 1872. This would seem to be sufficient to include by reference the power to "provide for the use" of city property as granted in the act of 1872. A determination of this question is not necessary, inasmuch as the charter of 1889 gave to the city, as above set forth, the right to hold real property and "sell, convey and dispose of the same for the common benefit." That a distinction was recognized between the power to "sell" or "convey" and the power to "dispose" is apparent from the further provision in the charter that the lands could only be "sold" or "conveyed" at public auction after published notice of sale, no restriction being made as to the method of "disposing" of such lands. It is thus quite apparent that the words "sell" and "convey" were used in the usual accepted meaning, implying an alienation or transfer, the interest of the public therein being protected by restrictions providing for publicity and competitive bidding

in order to insure a fair price. If the lands were merely "disposed of" by the city in the sense of classifying the same or setting them aside for a specified or particular use, no such necessity for public protection would arise, the public's beneficial interest in the lands not being thereby affected. "To dispose of" is defined in Webster's New International Dictionary, 1929 edition, as meaning "to direct or assign for a use." We therefore conclude that the charter of 1889 granted to the city of San Diego the power to determine and specify what use should be made of these pueblo lands for the common benefit.

The charter of 1889 then conferred upon the common council power "to provide for the execution of all trusts confided to said city" (article 2, c. 2, § 1, subd. 49), together with the right "to make all rules and regulations necessary to carry into execution all powers vested by this Charter, or by law in said city, or in any department or office thereof" (article 2, c. 2, § 3). Pursuant thereto, the city council in 1889 adopted Ordinance No. 648, wherein a portion of the lands now known as Torrey Pines Park were "set aside * * * and dedicated for the use of the citizens of the said City of San Diego now and forever as a public park, and that the same shall be hereafter used for no other purpose." In 1924 a similar ordinance was enacted covering the remaining portions of these lands.

[2, 3] Appellant concedes that the city's "pueblo lands" may be set aside as a park for the benefit of the community, providing it be done by the proper authority. We are of the opinion that by the charter of 1889 the Legislature vested this power in the city of San Diego as above set forth, and that the ordinance of the city council above effectually set apart and dedicated these lands as a park.

[4] Appellent asserts, however, that an act of the Legislature (St. 1869–70, p. 49) indicates that the Legislature did not intend to vest such power in the city. This was a statute confirming an ordinance of the city of San Diego setting apart a portion of its pueblo lands as a park to be known as Balboa Park. The statute provided that such lands "and none others" are so dedicated. Appellant argues that this language shows a legislative intent to deny any authority in the city to so dedicate any other land. Conceding such effect at the date of the statute, it could not in any way limit the authority given to the city by a later act of the Legislature, and any such attempted limitation implied from the statute of 1869 was annulled by the charter of 1889. Harter v. San Jose, 141 Cal. 659, 75 P. 344, 346.

[5] Appellant further contends that, even though the park had been properly dedicated, the city might change the use thereof where private property rights are not invaded, citing Mulvey v. Wangenheim, 23 Cal. App. 268, 137 P. 1106; Spires v. City of Los Angeles, 150 Cal. 64, 87 P. 1026, 11 Ann. Cas. 465; Slavich v. Hamilton, 201 Cal. 299, 257 P. 60.

In Mulvey v. Wangenheim, supra, the city of San Diego attempted to construct a road along the west side of Balboa Park, a portion of the land included in the road being pueblo lands theretofore dedicated as a part of the park. The opinion states at page 271 of 23 Cal. App., 137 P. 1106, 1108: "Upon the facts herein stated we are of the opinion that the acts complained of constitute a diversion of a portion of the park property from the uses to which it has been dedicated, and will be in violation of the trusts upon which said property is held by the city. It is well established that where a grant is made for a specified, limited, and definite purpose, the subject of the grant cannot be used for another and a different purpose"—citing cases.

In Spires v. City of Los Angeles, supra, our Supreme Court permitted the erection of a library upon pueblo lands dedicated by the city of Los Angeles as a park, basing its decision on the ground that the establishment of a library is consistent with the use of the property as a park, and tends to enlarge the public enjoyment thereof, pointing out particularly, however, that the lands so dedicated could not be used for a purpose inconsistent with its use as a park.

In Slavich v. Hamilton, supra, the Supreme Court had before it the question as to whether a veterans' memorial hall could be erected on property dedicated as a park. The defendant relied upon what the court refers to as a "well settled principle of law," that land dedicated as a public park must be used in accordance with such dedication, and that municipal authorities cannot divert the land from such use. On page 303 of 201 Cal., 257 P. 60, 61, the following language is used: "There can be no dispute as to the general rule relied upon by the respondent, but the real question seems to be whether the use in a particular case, and for a designated purpose is consistent or inconsistent with park purposes."

In our case the court found upon sufficient evidence that the proposed road would "result in material defacement of the natural terrain and in the destruction of at least 14 of the indigenous pines known as Pinus Torreyana."

Torrey Pines Park consists entirely of uncultivated and unimproved land bordering on broad reaches of the Pacific Ocean, covered with trees, shrubs, and indigenous flora in its wild and natural state. Its use by the public for recreation, picnicking, and bathing is enhanced by the natural and undisturbed condition of the environment. Its chief charm lies in the silence and lure of its natural surroundings, unmarred by changes of man, and the park board undoubtedly had this in mind when, as hereinafter noted, it refused consent to the construction of the road, perhaps visioning the accompanying rumble and noise

of commercial vehicles and the seemingly necessary intrusion of adjoining roadside refreshment establishments. We are of the opinion that the evidence supports a conclusion that the proposed road would seriously interfere with the use of these lands as a park under the particular conditions involved.

[6] Appellant insists, however, that the city charter and the Improvement Act of 1911, incorporated in the city charter by reference, gives to the city council exclusive power to construct roads and claims the right thereby to construct the proposed road through Torrey Pines Park. The sections of the charter relied upon are contained in article II, chapter 1, sections 1, 2d and 2e, and article II, chapter 2, section 1, subsection 44, which vest in the common council all executive and administrative powers relating to public streets, giving the council power to open and lay out any new street or highway on public or private property, and incorporating the general law of the state of California as to the mode and manner of making such improvements where an assessment is levied to pay therefor. That portion of the Improvement Act of 1911 (page 730) relied upon is section 1, wherein the legislative body of each municipality is empowered to order any of the work to be done mentioned in the act, including the construction of roads and highways.

The charter, however, also provides for a board of park commissioners, vesting in them the exclusive control and management of all parks then or thereafter dedicated with power to lay out, regulate, and improve the same. The Legislature, by the city charter, thereby delegates its power over pueblo lands in a twofold manner: To the city council was given the authority to "dispose" of them as hereinbefore set forth, and thereafter, should the council in its wisdom see fit to set aside a portion thereof as a park, the exclusive right to control and manage the same was given to a board of park commissioners. Appellant concedes that the park board may lay out roads within the park area for ingress thereto and egress therefrom and for the convenient use of the park. If the Improvement Act of 1911 also gives the council the right to construct main highways through the park, a conflict of authority within two departments of the city is the inevitable result, and there would ensue the amazing spectacle of each body tearing up roads laid by the other, whenever necessary in the furtherance of their own plans, each acting under lawful authority flowing from the same source. It may be noted that the Improvement Act of 1911 also gives the council power to lay out and construct sewer lines for sanitary purposes with the necessary outlets, catch basins, cesspools, septic tanks, etc. If, under the act, the city council has paramount authority, it could thus convert a public park, dedicated for pleasure and recreation purposes, into a sewer farm. Appellant answers that the statute only gives such supreme authority to the council when the contemplated act does not conflict with the purpose for which the property involved was dedicated. To whom, then, is given the power of determining the question as to this conflict? If it is vested in the council, then the council may not only act, but may also determine the propriety of its action, and the same result accomplished as though no restraint were placed upon it.

As above set forth the charter gives to the park board the power to "control and manage" the property. In Harter v. San Jose, supra, the Supreme Court intimates that "power to control and manage the park" includes the authority to lease a portion thereof for a hotel, if the same adds to the comfortable enjoyment of the park. We are of the opinion that, when the power to "control and manage" was given exclusively to the park board by the charter, the board was thereby vested with the duty of determining whether any act contemplated by the council would or would not be consistent with the use of the property dedicated as a park.

The well-settled rule as to statutory construction is set forth in 23 California Jurisprudence, at page 762, as follows: "It is a settled rule of statutory construction that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject as against the general provision, although the latter standing alone would be broad enough to include the subject to which the more particular provisions relate. Moreover a provision, although expressed in general and comprehensive language, is construed with reference to the general intent of the act."

It may be conceded that the charter provisions and the Improvement Act of 1911 incorporated therein give to the city council general jurisdiction over the laying out and constructing of roads and highways within the city. Applying the foregoing rule of statutory construction, however, such general authority is limited by the specific provisions relating to public parks set forth in article V, chapter VII, of the city charter providing for the organization of the park board and vesting in them the exclusive control and management of all parks.

[7] In our case the board refused its consent to the constructing of the road on two main grounds: First, because the proposed road would injure the park; and, second, because another route for the highway would solve the traffic problem and not injure the park. These objections to the road were based upon reports of the board's advisory landscape architect, supported by advisory opinions of the consulting park architect of

the California state parks commission, the director of the Sequoia National Park, and the Torrey Pines Park superintendent. The action of the board is thus amply supported, and we are unwilling to question its wisdom.

Appellant cites several cases where a city council was permitted to use portions of parks for purposes such as roads, etc. The cases cited, however, were either where the park board had given its consent to the work, as in Harter v. San Jose and Spires v. Los Angeles, supra, or where no objection to the work was made by the board, as in Humphreys v. San Francisco, 92 Cal. App. 69, 268 P. 388, or where it did not appear that any authority was vested in a park board, as in Pettitt v. Mayor and Council of Macon, 95 Ga. 645, 23 S. E. 198. In all of the cases so cited it also appeared that the contemplated use was not inconsistent with the use of the property as a park. The decisions are obviously not controlling here.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

124 Cal.App. 175

ELLIS et al. v. CLEAR LAKE BEACH CO. et al.

Civ. 4561.

District Court of Appeal, Third District, California.

June 8, 1932.

Vendor and purchaser ⇐334(1).

Where there was never any meeting of minds of purchasers and vendors as to exact terms of contract, and it became impossible for either party to perform, purchasers *held* entitled to recover sum vendors received under contract.

It appeared that real estate brokers desiring to purchase a certain lot from vendor prepared and presented contract on terms favorable to brokers, whereby they were to receive credit forthwith for the face value of commission notes which they had taken from purchasers of other lots, and for commission on lot to be purchased by them; that the vendors refused to accept that proposal, and accepted the contract only with provision that the cash payment was acknowledged as part payment, that the notes were to be held and credits given as payments thereon were made by the makers, that the commission was to be withheld until full payment, that the vendors thereafter without consent or concurrence of purchasing brokers carried on separate negotiations with makers of original commission notes and contract out of which notes arose to end that original contracts were canceled and in some cases new contracts entered into rendering it impossible for either party to perform.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by C. S. Ellis and another against the Clear Lake Beach Company, a copartnership, and others. From judgment for plaintiffs, defendants appeal.

Affirmed.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for appellants.

Leo Freund and David Marcus, both of Los Angeles, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

Plaintiffs recovered judgment against defendants for the sum of $850, with interest and costs. Defendants appeal. The nature of the controversy may be outlined through a synopsis of the pleadings.

The complaint was in three counts. By the first count plaintiffs alleged a written contract for the sale of certain real estate, by the terms of which contract defendants agreed to sell to plaintiffs the property described upon the payment of the sum of $3,000. Payment in full was alleged, with the allegations of demand and refusal to convey, together with other appropriate allegations going to sustain a demand for specific performance. The second count alleged that plaintiffs had earned certain commissions as real estate salesmen, which amounts were due and owing from defendants to plaintiffs, and that plaintiffs had advanced to defendants other sums of money; the grand total alleged due being $3,000. The third count was for work and labor done and performed for the benefit of and at the special instance and request of defendants and for moneys advanced; the demand totaling $3,000.

The separate counts were intended as repetitions of the same claim. The answer admitted the execution of the contract of sale, but alleged that there had been paid thereunder no further sum or sums than would total the amount of $630. The answer further denies any breach on the part of defendants, but avers a willingness on their part to fully perform upon the payment of the full amount of $3,000. The defendants deny specifically the allegations of counts 2 and 3 of the complaint.

The facts developed at the trial may now be considered. The defendants were the owners of a certain tract of land in the county of Lake, state of California, which said tract had

been subdivided into lots of varying sizes and offered for sale to the general public. The plaintiffs were employed by defendants as salesmen, and under the contract of employment the plaintiffs were to receive as remuneration for services all sums collected by them as first payments upon sales of the lots. Under their employment, the plaintiffs sold certain lots, taking from the purchasers the promissory notes of the latter and retaining the same as their compensation. The total of these notes was in the amount of $1,890. There was an accrued indebtedness, from defendants to plaintiffs, in the sum of $100 represented by a credit bonus certificate.

It was the desire of plaintiffs to purchase for themselves a certain lot, the selling price of which was $3,000. It was computed that the commission ordinarily allowed plaintiffs on a sale of a lot at this price would be $580. Lumping the notes and the credit with the commission makes total of $2,570. Plaintiffs prepared a contract of sale between themselves and the defendants in which contract they specified as payments the amount $2,570 made up of the items indicated, and, in addition thereto, they paid in cash the sum of $430, thus making the full price of $3,000. It was the contention of plaintiffs that thereby the lot was paid for in full and they were entitled to the deed for the same. Defendants offered testimony that the understanding was that the notes were not received by them in payment of the lot, but that they were taken for collection only, and that credit was to be given to plaintiffs on the purchase price when, as, and if payments were made on the said notes.

It was evidently the conclusion of the trial court that the defendants were right on this feature of the case, and, inasmuch as but little had been received on the notes, the court below declined to decree a specific performance.

There is no appeal by plaintiffs from the judgment, and, as this implied finding favors defendants and supports their contention, we may, for the purposes hereof, pass the subject of specific performance.

It was, however, shown beyond dispute that plaintiffs had paid to defendants the said sum of $430, receipt of which was admitted; that collections had been made on the notes to the extent of $100; and that there remained due, credited to, and payable to plaintiffs the sum of $326 as commissions arising out of the transactions reflected in the notes received by defendants for collection. It was further shown and admitted that the defendants still retained title to the lot in question and had made no conveyance thereof to the plaintiffs. It was from these facts that the trial court concluded that the plaintiffs were entitled to the return of the sum of $856.

The main ground, and in fact the only ground, urged by appellants in seeking a reversal of the judgment is that the trial court in effect rescinded the contract for the purchase of the lot at a time when defendants were not in default and without any showing, or attempted showing, of fraud, mistake, or duress. We find little merit in the argument.

The evidence clearly developed the fact that there was never any meeting of the minds of the parties as to the exact terms or obligations of the contract of sale. The contract was prepared by the plaintiffs and received by an agent of defendants whose authority to do more than merely receive and file was admittedly lacking.

The plaintiffs had prepared and presented the contract on the terms most agreeable to them; namely, that they were to receive credit forthwith for the face value of the notes and the entire commission. The defendants, on the other hand, refused to accept this proposal and accepted the contract only with the provision that the cash payment of $430 was acknowledged as payment, and that the notes were to be held and credits given as payments thereon were made by the makers and the commission withheld until full payment.

The defendants thereafter, without the consent or concurrence of plaintiffs, carried on separate negotiations with the makers of the notes and the contract out of which the notes arose, to the end that the original contracts were canceled, and, in some cases, new contracts entered into. The net result was that it became impossible for either party to perform under the contract of sale between plaintiffs and defendant. In the final analysis, as the trial court concluded, the defendants retained the sum of $856 for which the consideration had failed, which sum of money in justice and in equity defendants held for the use and benefit of plaintiffs.

Had the plaintiffs prosecuted the appeal, some interesting questions might have been presented, but, under the present state of the record, there being no complaint by plaintiffs, we think the conclusion of the learned trial judge finds ample support both in law and in fact.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 758

BROWN v. BALL et al.

Civ. 8257.

District Court of Appeal, First District, Division 2, California.

May 31, 1932.

s Modified on Denial of Rehearing, June 28, 1932. Hearing Denied by Supreme Court July 29, 1932.

1. Corporations ⇐249(1).

Stockholder could not set off against "stockholder's liability" corporation's indebtedness to him (Civ. Code, § 322).

No set-off is allowable, since such liability to the creditor of the corporation is a personal, direct, primary, and contractual obligation, just as much as if the stockholder had entered into a contract in writing directly with the creditor to pay a proportionate part of the corporation's debt to the creditor; there being no privity between the creditor and the corporation in respect to the stockholder's obligation to pay the creditor which could justify such a set-off.

2. Corporations ⇐264.

Execution of renewal note for stockholder's liability did not toll running of statute of limitations on such liability (Code Civ. Proc. § 359).

3. Evidence ⇐352(3).

Corporation's books *held* admissible against stockholder as prima facie evidence of stockholder's liability (Code Civ. Proc. § 1851).

4. Evidence ⇐352(5).

For corporation's books to be admissible against stockholder as evidence of his liability, they must have been kept in regular course of business.

5. Evidence ⇐352(3).

Items entered in corporation's books after books were turned over to corporation's creditors *held* inadmissible against stockholder to show stockholder's liability.

6. Evidence ⇐237.

Audit and financial statement of insolvent corporation made by public accountant under direction of corporation's officers *held* admissible as prima facie evidence of stockholder's liability (Code Civ. Proc. § 1851).

7. Corporations ⇐240(4).

Corporation's creditors' failure to attach accounts to their assignments of claims against corporation *held* mere irregularity not affecting validity of assignments.

8. Evidence ⇐373(2).

Proof that assignments of corporation's creditors' claims were mailed to assignors with request to sign and return, and that they had been received through mail signed, *held* insufficient foundation for introducing assignments.

Such proof was insufficient as a foundation for introducing the assignments, since it did not show the due execution thereof and the authority of the person purporting to have executed them, and the court could not presume that the pretended agents in executing the assignments were acting within the scope of their authority.

9. Evidence ⇐177.

Testimony that witness examined corporation's books, which were in court, and that they showed all obligations in suit were transacted within three years of commencement of action, *held* admissible (Code Civ. Proc. § 1855).

Such testimony was admissible as falling within the rule laid down by Code Civ. Proc. § 1855 that a witness may testify to the result of his examination of writings when the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time.

10. Depositions ⇐107(3).

Objecting to form of interrogatories in deposition, made for first time on trial came too late (Code Civ. Proc. § 2025).

11. Appeal and error ⇐1171(2).

$3.55 *held* too trifling for appellate court to consider whether trial court allowed such amount to be proved by incompetent evidence.

12. Judgment ⇐253(1).

Recovery in action on stockholder's liability in excess of amount sought *held* unauthorized, although supported by proof.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action by Blanche Brown against W. F. Ball, E. E. Searles, and others. From a judgment for plaintiff, all defendants except E. E. Searles appeal.

Modified with directions.

Lawler & Degnan, of Los Angeles, for appellant.

Hugh M. Foster, of Los Angeles, for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendant W. F. Ball from a judgment against him based upon the stockholder's liability formerly provided for in section 322 of the Civil Code before its amendment in 1931 (repealed by St. 1931, p. 444, and added by St. 1931, p. 1784). The plaintiff sued and recovered judgment as assignee of thirty-two separate creditors of Bartlett Music Company, a California corporation. The court found that at the time the indebtednesses sued upon were created

appellant was the owner of 776 shares of the stock of such corporation out of 1,720 then subscribed and gave judgment against appellant on that basis for $9,269.32.

Appellant attempted to set off against his stockholder's liability a claimed indebtedness by the corporation to himself of over $57,000. The trial court denied any set-off and appellant asserts error on that ground. Appellant cites many statements from text-writers on corporations and many cases from other jurisdictions in support of his contention that the set-off should have been allowed. Without examining these cases and statements in detail in this opinion it will suffice to quote the following from Fletcher's Encyclopedia of Corporations, vol. 7, p. 7456, § 4246, as typical: "According to the weight of authority, when the statute imposes upon stockholders a several liability for corporate debts to the extent unpaid on their stock, or to a certain additional extent, and allows any creditor to sue any stockholder to recover a judgment to the extent of his liability the stockholder is entitled in equity to set off against his liability a bona fide debt due from the corporation, or to set up the debt as a defense, or defense pro tanto, in an action at law." It is to be noted that the author adds: "Some courts, however, have held that no right of set off exists even under such circumstances."

It is rather surprising that the question here involved apparently has never been squarely passed upon by the courts of this state. Our courts have, however, so repeatedly stated the nature of this statutory stockholders' liability that it will be sufficient in that connection to refer to two comparatively recent opinions of our Supreme Court. Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1380, and Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335. Those cases review the previous decisions extensively and make clear the fact that the proportionate liability of a stockholder for the debts of a corporation under Civil Code section 322, as it formerly read, is direct, primary, and personal, contractual in its nature, and entirely distinct from the debt of the corporation. The court said in Ellsworth v. Bradford, supra, at page 318 of 186 Cal., 199 P. 335, 336: "The statutory liability, as has been repeatedly held by this court, is an independent original liability of the stockholder to the creditor which can be enforced directly against the stockholder, quite independently of any judgment against the corporation, and is not dependent upon an adjudication of indebtedness in an action against the corporation, but upon the actual existence of such indebtedness. Under the provisions of the California law stockholders are held to be primarily liable as principal debtors, and not as sureties or guarantors."

In Aronson & Co. v. Pearson, supra, at page 290, of 199 Cal., 249 P. 188, 189, 51 A. L. R. 1380, we find this language: "The constitutional and statutory provisions relating to the liability of stockholders become essential terms of the subscription agreement of a stockholder as fully as if they were set forth at length therein. By accepting ownership of stock in a corporation, the stockholder in effect offers to make payment, to the extent of his stockholder's liability, to any person who may extend credit to the corporation during the period of his ownership. Whenever, during such ownership, any person so extends credit to the corporation, 'the offer and the act (of extending credit) combined make a complete contract' between the stockholder and the creditor. It thus appears that the stockholder's liability to the creditors of the corporation is not based upon the agency, in any general sense, of the corporation to impose such liability upon him but upon his own agreement, implied from his acceptance of the ownership of stock." And again the court says, at page 291 of 199 Cal., 249 P. 188, 190, 51 A. L. R. 1380: "Under the California law the liability is as distinct and separate as it would be if the act had made no provision for any other liability than that of the stockholder for the debts of the corporation, the direct relation of debtor and creditor being established between the stockholder and the creditor by the statute."

[1] With these principles in mind we can see no possible ground for allowing a stockholder to set off against this liability an indebtedness due to him from the corporation. The stockholder's liability to the creditor of the corporation is a personal, direct, primary, and contractual obligation, just as much as if he had entered into a contract in writing directly with the creditor to pay a proportionate part of the corporation's debt to him. There is no privity between the creditor and the corporation in respect to the stockholder's obligation to pay the creditor which could justify the stockholder in offsetting a debt by the corporation to him against his stockholder's liability. This is exactly the conclusion which the Appellate Division of the Supreme Court of New York reached in the case of Pacific G. & F. Co. v. Opolinsky, 135 Misc. Rep. 265, 237 N. Y. S. 682. In that case an action was brought in New York to enforce the liability of a stockholder in a California corporation and there, as here, the stockholder attempted to set off a debt due from the corporation to himself. In holding that such a set-off was not proper under the California law, the New York court said, 135 Misc. Rep. 265, 237 N. Y. S. 682, at page 686: "The liability created by the California statute is a primary one, and the stockholder is liable to the same extent as if he had personally entered into the contract. In such a case the stockholder would have no more right to offset the debt of the corporation than would a partner, if sued, have the right to off-set the

debt of a copartner, or a guarantor to set up a claim against the principal." In this decision, too, will be found a clear statement of the distinction between the cases from other jurisdictions relied upon by appellant and the case of a direct and primary liability such as was created by Civil Code, § 322, before its recent amendment.

The Supreme Court of Washington, in McCann Co. v. Week, 139 Wash. 183, 246 P. 292, and Id., 141 Wash. 702, 251 P 858, took the opposite view; but both to the opinion of the court in department and in bank vigorous dissenting opinions were filed which in our judgment correctly state the law.

We are satisfied that the trial court acted correctly in refusing to allow the set-off claimed.

[2] One of the claims sued upon, and upon which judgment was allowed, was based upon a promissory note given by the corporation to the Whittier National Bank. As to this appellant claims that it is barred by the statute of limitations. Code Civ. Proc. § 359. The note sued upon was executed less than three years before the action was commenced, but it appears clearly from the evidence that it was in fact a renewal note given to evidence an existing and unpaid indebtedness created more than three years before action filed. While the witness Demarask, who was the officer from the bank called to lay the foundation for the introduction of the note, expressed it as his opinion that the note sued upon was not a renewal note, he also testified repeatedly that at the time the note sued upon was executed the Bartlett Music Company received no cash or property of any sort from the bank but a previous note was canceled and surrendered and the note sued upon given in its place. The stockholder's liability was created when the money was originally borrowed and the statute of limitations began to run then. The execution of the renewal note did not create a new stockholder's liability nor toll the running of the statute on the stockholder's liability originally created and this particular obligation was accordingly barred as to appellant. Hyman v. Colman, 82 Cal. 650, 23 P. 62, 16 Am. St. Rep. 178; Bank of San Luis Obispo v. Pacific Coast Steamship Co., 103 Cal. 594, 37 P. 499; Goodall v. Jack, 127 Cal. 258, 59 P. 575; National City Bank v. Chubb, 52 Cal. App. 655, 199 P. 537; Martin v. Howe, 190 Cal. 187, 211 P. 453; Fry v. Baltimore Hotel Co., 80 Cal. App. 415, 252 P. 752.

[3] Appellant complains of the admission into evidence in this action of the account books of Bartlett Music Company. In this behalf appellant claims that the account books of the corporation could not be introduced in evidence against the stockholders. It was so held in Neilson v. Crawford, 52 Cal. 248. The holding in Neilson v. Crawford was at least seriously questioned in McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am. St. Rep. 149, and San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P. 410. We need not stop to discuss these three cases or the possible distinctions which might be made between them for the reason that in our judgment the reasoning of the Supreme Court in Ellsworth v. Bradford, supra, logically compels us to hold that the books of a corporation, if admissible against the corporation, are admissible likewise against the stockholder as prima facie evidence of the stockholder's liability. In Ellsworth v. Bradford, in holding that a judgment against the corporation is prima facie evidence in a suit against the stockholder, the court said (186 Cal. at page 325, 199 P. 335, 339) after discussing other grounds for allowing the judgment against the corporation to be introduced:

"This reasoning may be supplemented by the provision of section 1851 of the Code of Civil Procedure that—'Where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.' This section of the Code apparently both avoids the objection to using the judgment at all as evidence in a suit against the stockholder and limits its conclusiveness.

"It cannot be doubted that in an action on the stockholder's statutory liability the 'obligation or duty of a third person,' the corporation, is in issue, and by virtue of this provision the judgment against the corporation on such obligation becomes prima facie evidence."

By a parity of reasoning in such an action the books of the corporation, if admissible in a suit against it, are admissible as prima facie evidence against the stockholder.

[4, 5] However, it is fundamental that account books to be admissible must be kept in the regular course of business. 10 Cal. Jur. p. 907. It was shown that the books of the Bartlett Music Company had been turned over to a committee of creditors and by them "brought up to date." As to those items that were not shown to have been entered in the books while they were under the control of the corporation we are satisfied that the books were improperly admitted.

[6] There was turned over to the committee of creditors by the officers of the corporation an audit and financial statement of the affairs of the corporation made under their direction by a firm of public accountants, Haskins & Sells. This was admitted in evidence over the objection of appellant and we think properly so. Having been prepared under the direction of Bartlett Music Company and by it delivered to the committee of creditors as a statement of its accounts, it would have been admissible against the corporation

as an admission and hence was prima facie evidence against the stockholders. Ellsworth v. Bradford, supra; Code Civ. Proc. § 1851.

[7, 8] Complaint is made of the admission into evidence of many of the assignments upon several grounds. As to some it is urged that they referred to accounts attached and no accounts were in fact attached to them. We think that it clearly enough appears that the assignors intended to assign their claims against the Bartlett Music Company and its stockholders and the failure to attach the accounts was, at most, a mere irregularity which did not affect the validity of the assignments. As to others the claim is made that the proof of due execution of, and authority to make, the assignments was not sufficient to lay a proper foundation. We have examined the evidence in each of these cases and are satisfied that a sufficient foundation was in fact laid except in a few cases where the only foundation laid for the introduction of the assignments was the proof that they had been mailed to the assignors with a request to sign and return them and had been received back through the mail with signatures affixed. It is claimed by respondent that this was sufficient to raise a presumption of their due execution and the authority of the person purporting to have executed them. No authority directly in point is cited, and we think that it would be a dangerous innovation to hold that on such proof, without more, an assignment purporting to be executed by an agent, as each of these were, could be introduced into evidence. We are asked to presume not only that the persons whose names are subscribed actually executed the assignments, but also that they had authority to do so merely because they were received through the mail in their present form after having been mailed to the alleged assignors with a request that they be executed. We might possibly presume their due execution by the assignor himself upon such a showing, but the execution of assignments is not in the regular and ordinary course of business and there occurs to us no logical basis upon which we could indulge the presumption that the pretended agents in executing the assignments were acting within the scope of their authority. Rigby v. Lowe, 125 Cal. 613, 58 P. 153.

[9] The witness Peterson testified over objection that he had examined the account books of the Bartlett Music Company and that the books showed that all the obligations in suit had been incurred within three years of the date of the commencement of the action. The books were all present in court, and it is not claimed that any of the items added after the books were turned over to the committee of creditors related to any transaction going back as far as three years. A witness may properly testify to the result of his examination of writings "when the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." Code Civ. Proc. § 1855; Globe Mfg. Co. v. Harvey, 185 Cal. 255, 196 P. 261. We are satisfied that the evidence here in question falls well within this rule.

With these general principles disposed of we shall proceed to a consideration of the separate items involved. As to counts 6, 15, 16, 20, and 29, involving a total claim against the corporation of $376.15 and a proportionate liability against appellant of $169.28, there was no foundation laid for the introduction of the assignments except the proof that they had been mailed out and received back in due course of mail. We have held that this was not sufficient.

The witness Salyer, who was an officer of the corporation and familiar with its accounts, identified many ledger sheets as being in the same form as when turned over to the committee. He also testified that entries were regularly made in the purchase journal either the month the purchase was made or at the latest in the succeeding month when a statement was received, thus fixing these entries as having been made under the supervision of the company. In one way or the other, or both, the amounts due on the following numbered counts of the complaint were proved: 1, 2, 5, 7, 10, 11, 12, 14, 17, 18, 19, 23, 27, 28, 30, and 31.

The amounts due under counts 10, 11, 18, 19, 22, 24, 26, 27, 30, and 31 found complete or partial verification in the audit of Haskins & Sells above referred to.

[10] As to counts 3 and 9 the assignors testified personally to the amounts owing. The amount in each case is under $15, and we need devote no more time to them. As to counts 4, 21, and 22 the amounts owing were proved by depositions taken on written interrogatories. In each case the witness was asked by interrogatory to state the balance due his corporation. When the depositions were being read into evidence, objection was made that the question called for the conclusion of the witness. It was not shown that any objection was made to the form of the interrogatory at the time the interrogatories were settled. The objections came too late when made for the first time on the trial. Code Civ. Proc. § 2025; Kyle v. Craig, 125 Cal. 107, 114, 115, 57 P. 791.

The amount due under count 25 was testified to without objection by the witness Peterson. As to counts 24 and 26 it is claimed that witnesses were allowed to testify to the amount owing from an examination of the books of the assignors without producing the books in court. The amounts allowed were supported by the audit sheets

prepared by Haskins & Sells, and while the amounts showed by this audit varied slightly from the amounts allowed the variance is so slight as to justify the application by us of the doctrine de minimis.

[11] On count 13 the judgment against appellant amounted to $3.55. It is claimed that the court erred in allowing this amount to be proved by incompetent evidence. The amount involved is too trifling to take up the time of this court. On count 8 the total amount allowed against appellant was $31.68. About half of this amount was verified by the witness Salyer from the books of the corporation. As to the balance we think that enough appears to support the finding.

Appellant complains that in many instances witnesses were allowed to testify to the amount due at the time of trial. Since the corporation was out of business long before the complaint was filed, and hence incurred no new obligations, we cannot see how appellant could have been injured by this.

[12] As to counts 27 and 30 the judgment was for more than the amount alleged and prayed for. The amounts allowed are supported by the proof, but the complaint was not amended in this particular. Under these circumstances the amount allowed in excess of the allegations and prayer of the complaint must be eliminated. Meisner v. McIntosh, 205 Cal. 11, 269 P. 612.

This case, involving as it does thirty-two separate claims with specifications of error of various sorts directed to each claim, has entailed a vast amount of labor. Manifestly if each specification were discussed in detail this opinion, which is already longer than the court would like, would be expanded to entirely unreasonable proportions. We have, however, examined the evidence in support of each count in the light of the contentions advanced by appellant and the result of our examination has been summarized herein.

The appellants E. J. Salyer and Roy L. Salyer have stipulated that their appeal may be heard on the brief filed by appellant Ball. What has been said herein applies with equal force to these appellants. For the various reasons given, the judgment as to all appellants should be affirmed except as to such portions thereof as are based upon counts Nos. 6, 15, 16, 20, 27, 29, 30, and 32, as to which counts we have held the evidence insufficient, and as to which the judgment should be reversed and a new trial had. However, for the purpose of the record in the court below, a modified judgment covering the portions herein affirmed should be entered showing the proportionate liability of each of these appellants.

It is therefore ordered that the judgment is modified, with directions to the trial court to enter a judgment in favor of respondent and against these appellants in accordance with the views herein expressed and to retry only the issues arising under the counts specified in the preceding paragraph. The appellants will recover their costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 712

RINALDO v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

Civ. 7197.

District Court of Appeal, Second District, Division 1, California.

May 27, 1932.

Rehearing Denied June 25, 1932. Hearing Denied by Supreme Court July 25, 1932.

1. Judgment ⇨524.

Lower court's situation and accompanying circumstances should be considered in construing judgment.

2. Appeal and error ⇨1201(6).

Order which, following decision on appeal, directed medical examiners to cancel order revoking license, with permission to take other proceedings, did not prevent board's filing new complaint.

Superior court's judgment, rendered after reversal of its former judgment on appeal, which directed board of medical examiners to cancel its order revoking license to practice medicine and authorized board to take other proceedings, did not prevent board from filing subsequent complaint against same person previously proceeded against, since the decision of the District Court of Appeal, in conformity with which the superior court's judgment was entered, did not find that the board of medical examiners lacked jurisdiction, but merely that the order made by the board was unsupported because based entirely upon incompetent hearsay evidence.

3. Physicians and surgeons ⇨11(1).

Medical examiners had jurisdiction to revoke license, where complaint charged that respondent in obtaining license falsely represented that facts stated in certificates relative to training were true.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceedings by Eugene J. Rinaldo for writ of prohibition to be directed to the Board of Medical Examiners of the State of California, Percy T. Phillips, and others, members thereof. The superior court rendered judgment in petitioner's favor, and respondents appeal.

Reversed.

See, also, 12 P.(2d) 35.

Otto J. Emme, of Los Angeles, for appellants.

L. E. Dadmun, of Los Angeles, for respondent.

HOUSER, J.

Based upon a complaint filed with the appellant board of medical examiners, and after a hearing had thereon, the said board ordered a revocation of a former license theretofore granted by it to respondent Rinaldo to practice medicine and surgery in the state of California. Thereafter, and following an appeal from an order issued by the superior court by which Rinaldo was denied a writ of certiorari, judgment was rendered by the District Court of Appeal by which the order of the superior court was reversed. 93 Cal. App. 72, 268 P. 1076. Thereupon, by formal order, the superior court vacated its former judgment in the matter and rendered a new judgment thereon by which, among other things, the said board of medical examiners was directed "to cancel its order revoking the license of petitioner, Eugene J. Rinaldo"; and it was further ordered that "the Board of Medical Examiners may take any and such other proceedings as they may see fit in conformity with the judgment and order of court this day herein rendered, and in conformity with the opinion of the District Court of Appeal, Second Appellate District, Division No. One, in the above entitled matter."

Shortly thereafter a new complaint against Rinaldo was filed with the board of medical examiners, following which Rinaldo petitioned the superior court for a writ of prohibition to be directed to said board, by which, if granted, as to any or all of the grievances stated in either or both of the complaints theretofore filed against Rinaldo, the board of medical examiners would be enjoined from revoking Rinaldo's license to practice medicine and surgery within the state of California. A demurrer to such petition was overruled by the trial court. The board of medical examiners filed an answer to the petition, but later withdrew the same. Thereupon a judgment was rendered by said court in accordance with the prayer of said petition, and in substance as hereinbefore indicated. It is from such judgment that the appeal herein is prosecuted.

As between the parties to this appeal, it appears to be conceded that the reason relied upon by the trial court for overruling the demurrer to the petition for the writ of prohibition, together with the rendition of the ensuing judgment thereon, was that the former judgment between the same parties was "res adjudicata," and that, in consequence thereof, as to the allegations of fact contained in the first complaint against Rinaldo, such judgment forbade any subsequent determination of such issues of fact or the rendition of an order thereon by the board of medical examiners.

From a consideration of the language employed by the superior court in the rendition of its final judgment, which followed the decision by this court on its hearing of the appeal to which reference has been had (93 Cal. App. 72, 268 P. 1076), it would appear that the purpose and intent of said final judgment of the superior court was to set aside the first order made by the board of medical examiners, but not to restrict or limit the said board in the matter from taking "any and such other proceedings" as to it might seem fit—all in conformity with "such judgment and order" of the superior court and in conformity with the opinion theretofore rendered by the District Court of Appeal. In effect, the precise point for determination is whether the filing of the new complaint against Rinaldo, together with the allegations therein contained, constituted a breach of the order set forth in said judgment, or was inconsistent with the judgment and opinion theretofore rendered by the District Court of Appeal.

As hereinbefore has been indicated, the procedure thereafter followed by the board of medical examiners was that a new complaint was filed against Rinaldo, which in its substance covered, not only the same cause of action which was set forth in the first complaint, but also included therein other facts which in reality constituted an additional cause of action.

[1, 2] In reaching a conclusion with reference to the question presented, this court is concerned not so much with the general principles which appertain to the doctrine of "res adjudicata" as it is with a determination of what construction should be given to or placed upon the judgment here under consideration. It is at once apparent that the language employed in the judgment must receive its construction from the "intent" with which it was used. In order to discover, if possible, just what meaning should be ascribed to such language, as in the construction of other instruments, it becomes necessary, or at least advisable, as far as legally practicable and admissible for the purpose, that the situation of the lower court and the general circumstances which at that time were present, or which formerly related thereto, should be taken into consideration. Having reference to the record herein, as well as to the full text of the opinion delivered by the District Court of Appeal on the former appeal, it is ascertained that, in substance, the principal question at issue on such appeal, and in fact the turning point in the decision thereof, related solely to a determination as to whether the order by which the board of medical examiners theretofore had revoked the license of Rinaldo to practice medicine

and surgery in this state might legally be based entirely upon hearsay or incompetent evidence. The review by this court of the proceedings had in the matter before the board of medical examiners was identical with a review of the order of any other board, commission, or tribunal, which was before or which might be brought into this court. In the situation there presented, the only power possessed by this court was to determine whether the board of medical examiners had exceeded its jurisdiction solely with reference to the rendition of its order or judgment which had been based entirely upon incompetent evidence. This court having determined that, on the hearing had by the board of medical examiners of the charge against Rinaldo, no competent evidence had been received, the inevitable conclusion that, solely in that particular, the board of medical examiners had exceeded its jurisdiction, necessarily followed. But nowhere in the opinion rendered thereon by the District Court of Appeal is it expressly stated, or even remotely intimated, that the board of medical examiners was acting in excess of its jurisdiction in any other particular. The question whether the complaint against Rinaldo as filed contained such a statement of facts as legally constituted a cause of action against him was neither presented on the appeal, nor discussed, nor attempted to be decided in the opinion rendered by the District Court of Appeal. The foundation for the judgment of this court rested solely and exclusively upon the inadequacy of hearsay evidence to support the order theretofore made by the board of medical examiners. It did not deal nor purport to deal with any other situation; and it therefore becomes apparent that, by the order of the superior court to the effect that the board of medical examiners might "take any and such other proceedings as it might see fit," no limitation whatsoever was placed upon the usual legal procedure which ordinarily would follow or might be pursued in the premises. It therefore follows that the doctrine of "res adjudicata" has no application to the facts herein.

[3] But it is further contended by respondent Rinaldo that, for the asserted reason that the charge or complaint against him failed to state a cause of action or legal reason why his license to practice medicine and surgery within the state of California should be revoked, the board of medical examiners was without jurisdiction to proceed in the matter, and, hence, that the demurrer to the petition for a writ of prohibition filed in the superior court was properly overruled, and, consequently, that the ensuing judgment should be affirmed.

An examination of the complaint in question discloses the fact that the basis of the charge against Rinaldo was that "he is and has been guilty of unprofessional conduct in that the said defendant procured the aforesaid license to practice medicine and surgery in the state of California by fraud and deceit and in particular as follows:" (stating details). It also appears from the allegations of the said complaint that the certificate by which Rinaldo was licensed to practice medicine and surgery within this state "was based and issued by reciprocity" upon certain designated certificates and "upon the assumption that the facts stated therein were true." In substance, the said certificates were:

"(1) A certificate issued by the State of Missouri on July 14, 1920, licensing defendant to practice medicine and surgery in said state which certificate contained a certification that it was based and issued upon a diploma and an M. D. degree issued by the St. Louis College of Physicians and Surgeons, April 17, 1908, and upon a written examination given by the board of medical examiners of the state of Missouri;

"(2) A certificate signed by one Wm. P. Sachs stating of the defendant 'Before beginning the last half of the second year in the study of medicine, he has completed a course which includes at least one year of work of college grade in each of the subjects of physics, chemistry and biology.' "

The complaint contains additional allegations to the effect that Rinaldo "did represent that such certificates were valid and existing and that the facts set forth therein were true"; but that, to the knowledge of Rinaldo, none of them was true; to the contrary, that each was, and all of them were, made by Rinaldo with the intent and purpose on his part to deceive the board of medical examiners and thereby "to cause said Board to issue to said defendant a license and certificate to practice medicine and surgery in the State of California"; and that the existence of said facts was a condition precedent and a necessary requirement to the issuance of said license, etc.

With reference to the sufficiency of the pleading, it is specifically urged by respondent that, since Rinaldo was licensed to practice medicine and surgery within this state "by reciprocity" on a certificate issued by the state of Missouri, which latter certificate purportedly was based upon an alleged degree theretofore conferred upon Rinaldo by the St. Louis College of Physicians and Surgeons, and upon a written examination, the board of medical examiners of this state was bound by the statement of facts contained in the Missouri certificate and was powerless to discover what was the truth in the matter, or to act upon the latter condition should it be shown to be at variance with the facts contained in either certificate. However, it is unnecessary that this court take the time which might be required to reach and render a decision on that particular question. It

will be noted that, although not separately stated, in effect the complaint consists of two charges or specifications of "unprofessional conduct" on the part of Rinaldo; that is to say (1) that he falsely represented to the board of medical examiners "that said certificates were valid and existing"; and (2) that the facts set forth therein were true.

It is apparent that, even though the certificates were genuine, or if, as in effect is contended by respondent, they were unassailable by appellant, nevertheless, if, as an additional and independent element of the alleged unprofessional conduct of Rinaldo, he falsely stated or represented "that the facts set forth therein were true," such an allegation in the complaint (especially in view of the detailed particulars thereof) would constitute such a charge against Rinaldo as would state a cause of action against him, within the jurisdiction of the Board of Medical Examiners. In re Lasley, 61 Cal. App. 59, 214 P. 284; State Bar v. Hull, 103 Cal. App. 302, 284 P. 492; In re Mash, 28 Cal. App. 692, 153 P. 961. Whether on the hearing of the charges preferred against Rinaldo the allegations of the complaint could be sustained was wholly immaterial. Nor is it vital to such question that the allegations of the complaint be perfect either in form or in substance. Clearly a bona fide attempt to state a cause of action against Rinaldo on the ground that he had been guilty of "unprofessional conduct," in that in his application for a license to practice medicine and surgery within this state he had intentionally made misstatements of necessary and elemental facts, by reason of which, and in reliance thereon, the board of medical examiners had been induced to and did issue to him the license or certificate for which he had applied, and which would not have been done had such misrepresentations not been made, constituted such a sufficient foundation for the statement of such a cause of action as is authorized by the statute as to create jurisdiction of the subject-matter in the board of medical examiners.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

123 Cal.App. 719

RINALDO v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

Civ. 7416.

District Court of Appeal, Second District, Division 1, California.

May 27, 1932.

Exceptions, bill of ⇐36(1).

Delay in serving or filing bill of exceptions *held* not default, where party received no prior notice of judgment entry (Code Civ. Proc. § 953d).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Petition by Eugene J. Rinaldo for writ of prohibition to be directed to the Board of Medical Examiners of the State of California, Percy T. Phillips, and others, members thereof. The superior court rendered judgment for petitioner, and, from an order relieving respondents from default in filing bill of exceptions on appeal, petitioner appeals.

Affirmed.

See, also, 12 P.(2d) 32.

L. E. Dadmun, of Los Angeles, for appellant.

Otto J. Emme, of Los Angeles, for respondents.

HOUSER, J.

It appears that the pertinent facts upon which the appeal herein is based are that the respondent gave its notice of appeal from a certain judgment in the court below; that thereupon, by order of the trial court, an extension of time was granted to the respondent within which to file its bill of exceptions in said appeal, which extension was one day in excess of the statutory time limit in such cases made and provided. Following the date of such order of extension, and on the last day thereof, the respondent did serve upon this appellant and file with the clerk of said court its bill of exceptions in said appeal. Thereupon, it appearing that said service and filing were not had within the time permitted by the terms of the statute, the respondent presented its motion to said court that the respondent be relieved from its said default. From the order by which such relief was granted to the respondent, this appeal is taken.

Since from the record herein it also appears that at no time preceding the service and the filing of said bill of exceptions was the respondent given notice in writing by appellant of the entry of the judgment from which the said respondent had attempted to take an appeal, nor that such written notice was waived in writing, or by oral stipulation made in open court and entered in the minutes, it follows that, in accordance with the provisions of section 953d of the Code of Civil Procedure and the construction placed thereon by the appellate tribunals of this state, the respondent could not have been in default in not having served upon appellant and in not having filed with the clerk of the lower court its said bill of exceptions within the time limit prescribed by the statute; and, consequently, that, in its order by which the

default of the respondent was vacated in the premises, no error was committed by the trial court. Attkisson v. Reynolds, 94 Cal. App. 185, 270 P. 686; Griffin v. Kent, 206 Cal. 263, 274 P. 56; Ritter v. Ritter, 208 Cal. 27, 280 P. 112; Sterling Corporation v. Superior Court, 207 Cal. 370, 278 P. 859; Smith v. Wall, 97 Cal. App. 674, 275 P. 983; Shultz v. O'Rourke (Cal. App.) 4 P.(2d) 797; Davilla v. Liberty Life Ins. Co. (Cal. App.) 299 P. 831.

It is ordered that the order in question be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

123 Cal.App. 657

BUSSET v. CALIFORNIA BUILDERS CO. et al.

KENDALL et al. v. BUSSET et al.

Civ. 7084.

District Court of Appeal, First District, Division 1, California.

May 25, 1932.

1. **Appeal and error** ⇐1012(1).

Whether wall discolorations were caused by construction or premature plastering thereof was fact issue, on which trial court's findings, supported by preponderance of evidence, are conclusive.

2. **Mechanics' liens** ⇐281(1).

Evidence in wall contractor's action to foreclose lien *held* to sustain court's findings that wall discolorations were due to premature plastering.

3. **Mechanics' liens** ⇐281(1).

Evidence in wall contractor's suit to foreclose lien *held* not to show breach of warranty that walls could be plastered in regular way.

4. **Mechanics' liens** ⇐260(2).

Subcontractor's action over 40 days after completing walls to foreclose lien for balance payable 40 days after completion of contract *held* not premature.

5. **Parties** ⇐92(1).

Objection of misjoinder of cross-defendant, not demurring to cross-complaint, was too late after judgment.

6. **Parties** ⇐25.

Statutes respecting joinder of defendants should be liberally construed, but not to bring in wholly independent actor on mere conjecture (Code Civ. Proc. §§ 379a, 379b, and 379c, as added by St. 1927, pp. 477, 478, 631).

7. **Parties** ⇐27.

Defendants must be associated in events producing injury under circumstances creating uncertainty as to which is liable to authorize joinder thereof (Code Civ. Proc. § 379c, as added by St. 1927, p. 631).

8. **Parties** ⇐25.

There must be fair doubt as to whom plaintiff should look to for relief to authorize joinder of two or more defendants (Code Civ. Proc. § 379c, as added by St. 1927, p. 631).

9. **Mechanics' liens** ⇐291(5).

Cross-complaint in wall contractor's suit to foreclose lien *held* not to warrant alternative relief against plasterer for cost of painting over discolorations on walls (Code Civ. Proc. § 379c, as added by St. 1927, p. 631).

The cross-complaint alleged that plastering contractor undertook to plaster walls according to building plans and specifications requiring delivery of walls with plaster perfectly white and clean; that walls showed large blotches through plastering; that to make them perfectly white, painting would be necessary at stated cost; that walls contained excessive moisture, which caused coloring matter to ooze out through plaster; that wall contractor claimed that discoloration was caused by plasterer's negligence; and that cross-complainants joined plasterer as defendant because of their doubt as to how discolorations were caused.

Appeals from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by S. W. Busset, doing business under the fictitious name of the Pacific Coast Wall Company against M. G. Kendall, doing business as the California Builders' Company, and another, in which defendants filed a cross-complaint against plaintiff and Frank M. Clausen. From a judgment for plaintiff and an order dismissing the cross-complaint as to cross-defendant Clausen, defendants and cross-complainants appeal.

Affirmed.

Silverstein & Silverstein, of Oakland, for appellants.

James H. Boyer, of Oakland, for respondent S. W. Busset.

John C. Scott, of Oakland, for respondent Frank M. Clausen.

JOHNSON, Justice pro tem.

This action was instituted by plaintiff to foreclose a lien claimed for work done by him under a subcontract made March 2, 1928, with M. G. Kendall, operating under the name of the California Builders' Company, as the general contractor for the erec-

tion of a building for the defendant J. W. Helm, to be used in part for stores and offices, in part for a public garage.

Plaintiff's contract was for the construction of interior walls; and, in connection with their answer, the defendants filed a cross-complaint against the plaintiff and Frank M. Clausen, who did the plastering under a subcontract made also with the general contractor and dated October 27, 1927.

After hearing the evidence, the trial court decided that the plaintiff Busset was entitled to a decree of foreclosure of the lien claimed, and that the defendants were not entitled to judgment under their cross-complaint against either Busset or Clausen. In due time a motion for a new trial was made by defendants and cross-complainants, which was denied so far as the motion related to Busset, but was granted as to the cross-defendant Clausen. Thereupon a motion was made immediately on behalf of Clausen to dismiss the action as to him, upon the ground that he was not a proper party defendant, and that no cause of action was stated against him in the cross-complaint. That motion was forthwith granted. From the judgment in favor of plaintiff and from the order dismissing the action as to Clausen, the defendants and cross-complainants took this appeal.

The building in question is a four-story concrete office building with a public garage, situated in Oakland. The building was constructed for the owner, Helm, under a contract made by him with M. G. Kendall doing business under the name of California Builders' Company, but the contract was not filed with the county recorder. The plans and specifications accompanying that contract called for use of hollow tiles for the interior walls. Instead of using tiles, however, a contract was made through Kendall with Busset to construct a wall according to a process used by Busset, making what he called a Pacific wall, consisting of a composition of gypsum and rice hulls with water added to give fluidity in pouring. In soliciting the contract, Busset submitted a written offer dated February 3, 1928, in which the so-called Pacific wall is described as composed of one part of aerated stucco, two parts of rice hulls, with sufficient water to allow pouring into forms. Detailed specifications for the construction were embodied in the offer, and a price of $5,000, payable in progressive installments, was named. The offer having been accepted, a written contract was entered into on March 2, 1928, in which Busset agreed to install "Pacific wall partitions and fireproofing as per tender of Feb. 3, 1928" for the sum of $5,000, of which $3,400 was to be paid in specified installment payments up to the time of completion of the contract, and a further sum of $1,000 forty days after completion, together with a note for $600, payable in two years with interest at 8 per cent., and secured by deed of trust executed by the owner of the property. The contract provided that the work was to be done "in a first class manner, and in accordance with the plans and specifications for the building, complete in every respect, so as to insure a satisfactory job." Since Busset's work was to conform to the specifications in his tender of February 3d, the reference in the contract to plans and specifications of the building must be deemed to include Busset's specifications as a substitute for those relating to the use of tiles.

The walls were installed by Busset, and the payments falling due up to the time of completion of his contract, and aggregating $3,400, were paid as the work progressed. The residue of the agreed price has not been paid; and a claim of lien having been duly recorded, Busset in this action seeks recovery of the balance of $1,600 with interest and costs, and sale of the property in satisfaction of the lien asserted. Judgment in the amount claimed went in Busset's favor, together with decree for foreclosure of the lien.

The defendants alleged in their pleadings that Busset knew that the walls were to be plastered in the usual way, and, when finished by the plasterer, were to be white and clean and free from defects. It is further averred that Busset represented that walls built by his process were better than walls of tile, and, when finished, produced a smooth surface capable of receiving plaster applied in the regular way. It is pleaded in addition that after Busset finished his work and the plastering had been done, blotches and discoloration appeared, so that painting became necessary in order to make the walls white and clean and free from defects, the cost of painting being $2,000; and claiming also damages in the sum of $1,000 by reason of delay charged in completion of the building, the defendants by their answer and their cross-complaint against Busset prayed that he take nothing by his complaint and that damages be awarded in favor of defendants and cross-complainants.

As has been stated, the cross-complaint brought in the plasterer, Clausen, as a cross-defendant; but attention will be given first to the controversy over the construction of the wall itself by Busset.

[1] The trial court found, among other things, that the blotches and discolorations complained of were caused by plastering the walls before they had become sufficiently dry; that the plastering was thus done prematurely at the instance and under the direction of the general contractor, Kendall, with knowledge on his part of the moist condition of the walls; and that any damage suffered was caused by such premature plaster-

ing done under Kendall's direction. The court further found that there was no negligence on the part of the plasterer; that no delay in completion had been caused by either Busset or Clausen; and that Busset was entitled to the amount of his lien claim. Nothing was allowed to the cross-complainants under the cross-complaint.

The issue as to the construction of the walls and the cause of the blotches and discolorations is one of fact; and since the court found that the defects complained of were due to the circumstance that, under orders of the general contractor or his agents, the walls were plastered while wet, our function is confined to ascertaining whether the record contains evidence sufficient to support such findings. The evidence is not free from conflict; but attention must be centered upon that which, as interpreted by the trial court, sufficed to create a preponderance in favor of Busset.

[2] Complaint about blotches and discolorations appears to be directed mainly to the walls in the stores located on the ground floor. There was testimony of M. L. Garrison, the superintendent, and Harold A. Probst, the foreman, employed by Kendall, and also testimony of Clausen, the plasterer, that the walls of the building appeared to be dry when the plastering began. On the other hand, Busset's superintendent, George Smith, testified that the work on the walls started early in March and was completed about May 2d; and that about three weeks after the work began, there came rainy weather before the roof was on, in consequence of which the building became wet and the drying of the walls was retarded. The work on the interior walls began on the fourth floor and the rain occurred while work was proceeding on the third floor. At that time Smith and Garrison had a discussion concerning the slowness of the drying, and Garrison put some heaters in the upper stories. The walls on the two upper floors were completed before any plastering began. As the plasterer worked upstairs, Busset proceeded to pour his walls on the lower floors; and when he reached the ground floor, which was divided into stores, Smith said that not more than ten days intervened between the completion of any of the walls in the stores and the plastering thereof, and that some of those walls were plastered within two days after being poured. He said also that there was no artificial heating on the ground floor, and that when he himself admonished Garrison that it was wrong to plaster the walls at that time, Garrison replied "We have got to get that building finished. We can't wait for these walls." In the testimony of Kendall's foreman, Probst, it appears that he also told the plasterer "to get his plaster on as soon as he could."

In like manner with Smith, Busset's foreman, Arthur Hargreaves, testified that the plasterers reached the ground floor about three or four days after the walls had begun to be poured there, and followed so closely behind in applying the first coat of plaster that by the time two-thirds of the work in the stores had been done, the plastering was immediately applied to each of the remaining walls as soon as finished.

There is also the testimony of Busset. After saying that the time requisite for the walls to dry varies with weather conditions, and that there was considerable rain during the progress of the work, he stated that from two to four weeks were ordinarily sufficient for drying under good conditions of temperature and circulation if the walls were not sealed with a scratch coat of plaster, but if sealed, the drying process would take much longer. As to the ground floor, Busset testified that there was no artificial heat, and that when the plasterers began on that floor, his men were only two or three days ahead, and the plasterers followed right along. Busset said also that plaster burns and causes discoloration when applied to a wet wall of any kind, and that he cautioned Garrison and Clausen against plastering before the walls were dry. He said further that when he mentioned to Garrison that the walls in the stores were too wet to be plastered, Garrison replied: "Well, we have got to get through, we have got to get through with the building and we can't wait."

It appears also from the evidence that while the walls on the upper floors, where artificial heat was used, were only three inches thick, the stores had five-inch walls; and naturally the time requisite for drying would vary with the thickness of the walls, as well as with weather conditions and the extent to which heat was supplied.

We are of the opinion that the evidence summarized, with the reasonable inferences deducible therefrom, is amply sufficient to sustain the finding that the defects charged were due to the fact that the moisture in the walls was not allowed to evaporate before the plaster was applied.

[3] Defendants contend, however, that there was a breach of warranty of fitness on Busset's part in that one of his circulars advertising his "Pacific Wall" described it as "Better than Tile," and as producing, when finished, "a practically smooth surface which can be plastered in the regular way." In respect of these matters, Busset testified that before his contract was executed, he explained to Kendall that his wall was better than one of tile in that his wall was monolithic and both more soundproof and more fireproof. He said also that plastering in the regular way meant plastering when the walls were dry as in the case of other walls, either

by use of trowels or by spraying. He testified further that he told both Kendall and Garrison that the only difficulty he had had about his wall was its drying quality. Defendants argue that the representation that plastering could be done in the regular way should be interpreted to mean that the walls could be safely plastered like tile walls, as soon as they were in place. Such is not, however, a rational interpretation. Kendall knew that the material for these walls had to be poured into forms, and therefore had to be mixed with about one-fourth part of water. And his own common sense apprized him that walls so constructed, and from three to five inches in thickness, would require time for drying. As the work progressed to completion, certificates for partial payments to Busset were issued at the agreed stages; and not until after the completion payment had been made, was any objection heard. The evidence was not such as to show a breach of warranty, and it supports the finding that the walls could be plastered in the regular way.

[4] Finally, the defendants contend that Busset's action, instituted July 10, 1928, was prematurely begun. His contract provided that the last installment of $1,000 should be paid "40 days after completion together with note for $600." Defendants interpret the word "completion" to mean completion of the entire building, the date of which was June 14. We are satisfied, however, that the time began to run in Busset's favor from the completion of his own contract. His work having been completed on May 4th, the final installment became payable to him June 13th. Accordingly the action was not begun prematurely; and in our opinion judgment was properly awarded in Busset's favor.

[5] In relation to the cross-defendant Clausen, the question presented is addressed more to pleading and procedure than to substantive law. The cross-complainant's motion for a new trial was granted as to Clausen without any specific grounds being stated in the order; and thereupon a motion to dismiss the action as to Clausen was immediately made while all parties were still present, and was forthwith granted. The motion was based on the ground that Clausen was not a proper party defendant, and that no cause of action was stated against him in the cross-complaint. Any objection on the ground of misjoinder should have been raised by demurrer; and as Clausen did not demur at all to the cross-complaint, that particular objection, interposed after entry of judgment, was too late to be tenable.

The determination of the cross-complainants' appeal from the order dismissing the action as to Clausen is therefore dependent on whether the cross-complaint is found to state a cause of action against him. It is accordingly necessary to turn to the cross-complaint in order to ascertain what is charged against Clausen.

After alleging the execution of the contract between Kendall and Busset on March 2, 1928, and the matters incidental thereto, the cross-complaint sets forth that on October 27, 1927, Kendall had entered into a contract with Clausen, whereby Clausen undertook to do the plastering according to the plans and specifications of the building, and that the plastering to be done by him included the plastering of the walls to be constructed by Busset. The cross-complaint then proceeds to state that after Busset's walls were completed, they were plastered by Clausen under his contract; that while the specifications required the walls to be delivered with plaster perfectly white and clean and free from all defects, yet after being plastered the walls showed large blotches through the plastering, and by reason thereof had become discolored; that to make the walls perfectly white and clean and free from defects, painting would be necessary at a cost of $2,000, and that damage had been suffered in the further sum of $1,000 by reason of delay in completion of the building.

It is then alleged on information and belief that the walls as constructed by Busset contained an excessive amount of moisture, which caused coloring matter in the rice hulls to ooze out through the plaster, and that Busset claimed and represented that the discoloration was caused by negligence and carelessness of Clausen in plastering the walls, and not by reason of the construction of the walls. The cross-complainants then close with the statement that they are in doubt whether the blotches and discolorations are caused by reason of the construction of the walls or the plastering or by both, and for that reason join Clausen as a cross-defendant, "with the intent that the question as to which of the cross-defendants is liable or to what extent may be determined between the parties."

Reduced to simple terms, the story told about Clausen is that, though he had made a contract to do the plastering when tile walls were contemplated, he nevertheless proceeded under the same contract when Busset's style of wall was substituted. The walls built by Busset, it is said, contained too much moisture; and when the walls had been completed by Busset, and Clausen had thereafter finished his plastering, coloring matter from one of the ingredients of the walls oozed through the plaster causing blotches and discolorations to appear, which Busset claimed and represented were caused by negligence and carelessness on the part of Clausen, and not by any faulty construction on his own part. Under these circumstances, the cross-complainants were unable to say who was to blame; and therefore they brought both Busset and Clausen into court in order that the doubt created might be put to rest.

There is no allegation that Clausen failed in any way in performance of his contract, or that he was at all negligent or careless in fact, or that any damage or delay was due to any act or omission on his part, operating either alone or in co-operation with any breach of contract by Busset. The only reason shown for bringing Clausen into the case is that Busset was claiming and representing that Clausen, and not himself, was the one to blame. While expressing doubt whether redress should be had from Busset or Clausen or both, the cross-complainants seem studiously to have avoided making any real charge against Clausen.

[6-8] Sections 379a, 379b, and 379c, which were added to the Code of Civil Procedure in 1927 (St. 1927, pp. 477, 478, 631), are based upon like provisions adopted in New York and other states from the English rules of practice, and are designed to give greater freedom and flexibility in procedure, to the end that responsibility for the commission of a grievance or wrong may be fixed in certain classes of cases without circuity of action or multiplicity of suits. The sections should be liberally construed in furtherance of administrative efficiency, but should not be so loosely applied as to bring into court upon bare conjecture a distinct personality, who is pictured not in combination or collaboration with, or as a presumptive agent of, some other party defendant, but as a wholly independent actor. A mere doubt or suspicion is not enough to bring section 379c into play. There must be some nexus associating the defendants in an event or series of events productive of the injury complained of, under such circumstances that, while there is certainty as to the alleged wrong to be righted, there is uncertainty as to which of two or more individuals implicated is legally liable therefor. As is said in Klein v. Betzold, 119 Misc. Rep. 505, 197 N. Y. S. 501, and repeated in Freund Coat Corp. v. Lipschutz, 135 Misc. Rep. 553, 238 N. Y. S. 239, the doubt contemplated in the section must be "a fair doubt as to whom plaintiff should look to right a single wrong, and not a doubt as to whether one or several persons have separately wronged plaintiff."

The rule finds its application, for example, when a contract is made through a person who is dealt with as an agent of a disclosed principal, and both the agency and the contract are afterwards repudiated by the designated principal. In such case both parties may be joined in order to determine whether the principal was acting through an agent duly authorized, or the agent was guilty of a breach of warranty of authority; and redress may be sought in the alternative. Jamison v. Lamborn, 207 App. Div. 375, 202 N. Y. S. 113; Geer v. Blemton Realty Corp., 218 App. Div. 102, 218 N. Y. S. 162; Fox Film Corp. v. Wirth & Hamid R. Corp., 231 App. Div. 37, 246 N. Y. S. 246.

So, also, when there are two allied corporations under one management, with almost identical names, they may be joined in an alternative action brought by a person who rendered services in various transactions, so conducted that he is unable to determine for which of the two companies part of his services was performed. Ellicott v. Archibald McNeil & Sons Co., 206 App. Div. 441, 201 N. Y. S. 500.

Again, when goods are delivered to a carrier for transport by it and connecting carriers, and there is found to be damage or shortage on arrival at destination, a claimant in doubt as to the party responsible may join all parties potentially chargeable. In such a case, the claimant, after establishing shipment in good condition, may rest his case on the presumption arising from proof of damage or short delivery on arrival at destination; and the several carriers participating in the transportation will then be required to show what happened during carriage on their respective lines, so that liability may be fixed where it belongs. Yatter v. Mathies, 139 Misc. Rep. 26, 246 N. Y. S. 548; S. & C. Clothing Co. v. U. S. Trucking Corp., 216 App. Div. 482, 215 N. Y. S. 349.

[9] In the case at bar Busset and Clausen did their work under entirely independent contracts, and Clausen did not begin his plastering until after Busset had finished his walls. There was thus nothing in common between them. A cause of action against Busset was pleaded in the cross-complaint; but the only ground stated for bringing in Clausen was that the cross-complainants had heard it said that he had been negligent, and they were in doubt. Mere doubt cannot, however, fill the place of a fundamental fact. In substance, the cross-complainants said: "We do not know, and we do not assert, that Clausen failed in any way to comply with his plastering contract, but maybe he did."

In that aspect the case resembles Garrett v. McAllister, 137 Misc. Rep. 721, 244 N. Y. S. 283, 285, where upon motion a complaint was dismissed as to a certain defendant on the ground that no cause of action was stated against that party under section 213 of the Civil Practice Act of New York which is identical with section 379c of our Code. The defendant McAllister was an officer of his codefendant the Royal Securities Corporation; and in his individual name McAllister had made a written contract to sell to the plaintiff stock in a certain mining company, agreeing therein to repurchase the stock at the plaintiff's option at a specified price. The action was one for damages for breach of the contract; and the Royal Securities Corporation was joined as a defendant with McAllister in a complaint setting forth McAl-

lister's official relationship with his codefendant, and then adding: "'While said contract was nominally entered into by McAllister in his individual name said contract may have so been entered into by him either for his own account, as agent for defendant Royal Securities Corporation, his undisclosed principal, or as co-adventurer with said defendant in a joint adventure. Plaintiff does not know for whose account and benefit said contract was entered into by defendant McAllister.'"

As to these allegations the court said that to a good cause of action against McAllister, the plaintiff had added a hypothetical cause against the corporation; and that the issue made was not which of the two defendants was liable, but whether the defendants were liable either jointly or severally. The action was pronounced, therefore, to be not in the alternative, but in the conjunctive, and to lack a statement of the essential facts needed for joinder of the corporation.

Speaking at length on the subject of pleading in the alternative, the court said: "Section 213 of the Civil Practice Act does not, in my opinion, apply to such a case. Its language indicates an intention to include only cases where the plaintiff entertains doubt as to 'which' of several persons is liable to him. It does not apply where the plaintiff's only doubt is whether a particular defendant is or is not liable. It does not authorize a plaintiff, who asserts a cause of action against one party concerning which no uncertainty exists, to combine with it a cause of action against others upon allegations that they also 'may' be liable. In this respect the plaintiff is not in any more favorable position here than if the suit were brought against the defendant Royal Securities Corporation alone. Even where the action is properly in the alternative, it must appear that there exists a cause of action in favor of the plaintiff against the defendants collectively considered, although the plaintiff is not able to identify among them the author of the wrong. The exoneration of one defendant will then result in establishing the liability of the other. That situation does not exist where the relief sought is not alternative. Although formal dialectical perfection in pleading is not required (Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281), the complaint here lacks the essential element of a cause of action against the Royal Securities Corporation—an allegation of facts constituting liability made either upon knowledge or upon information and belief. Civil Practice Act, § 276.

"In my opinion it was not the purpose of sections 211 or 213, except in an alternative suit, to alter the rule that a defendant should not be subjected to litigation unless the plaintiff is able to allege facts constituting liability at least upon information and belief. If the Legislature had intended to abrogate a principle so ancient and so basic, it would have done so in unequivocal terms. Instead, by section 211 it has provided that all persons may be joined as defendants 'against whom the right to any relief is alleged to exist,' thereby, as it appears to me, to have excluded the thought that a party might be joined as a defendant upon mere suspicion, except in the case of alternative relief for which provision is expressly made." See, also, Freund Coat Corp. v. Lipschutz, supra.

The views expressed are not to be construed to imply that a cause of action could not have been stated conjunctively against Busset and Clausen. We have been dealing merely with the cross-complaint as it is, and deem the allegations insufficient as to Clausen to afford grounds for relief against him in the alternative.

Inasmuch as no cause of action was stated against Clausen in the cross-complaint, there was no error in dismissing the action as to him.

The judgment in favor of the plaintiff S. H. Busset and the order dismissing the action as to the defendant Frank M. Clausen are each affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 190

BALERO et al. v. LITTELL.

Civ. 8347.

District Court of Appeal, First District, Division 2, California.

June 9, 1932.

Trial ⇐296(1).

Instruction to assess damages for plaintiffs, if nine jurors could not agree decedent was contributorily negligent, required reversal, notwithstanding other instructions.

Such instruction required reversal, notwithstanding further correct instruction to find for defendant if he was negligent and deceased was also negligent in operating car, which negligence proximately contributed to accident, because under former instruction eight jurors could find decedent guilty of contributory negligence and yet give verdict against defendant on finding him negligent, whereas sound verdict required, not only a finding by nine jurors that defendant was negligent, but also a finding that decedent was free from contributory negligence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Catalina Balero and others against Thomas B. Littell. From a judgment for plaintiffs, defendant appeals.

Reversed.

Fry & Jenkins, of San Jose, for appellant.

Maurice J. Rankin and Randall O'Neill, both of San Jose, for respondents.

STURTEVANT, J.

As the surviving widow and minor children of the decedent, John Balero, the plaintiffs commenced an action to recover damages for his death. The defendant answered, and the action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs, and from the judgment entered thereon the defendant has appealed. After the action had been tried, the entire record was burned in the fire that destroyed the courthouse at San Jose. The parties have stipulated to a copy of the judgment roll and have stipulated to the facts constituting a bill of exceptions. On the record so made up, this appeal was taken.

After the evidence was taken, counsel made their arguments, and thereafter the court instructed the jury. It gave numerous instructions tendered by the parties. Thereafter the trial court added some oral instructions. The defendant claims that said oral instructions were prejudicially erroneous. The proceedings were as follows:

"By the Court: * * * If nine of you, when you retire for deliberation, should conclude that this deceased was guilty of contributory negligence in this case which proximately contributed to what happened in this accident, that ends the case, plaintiffs cannot recover and you will decide in favor of the defendant. If, however, nine of you cannot agree, or will not agree, that the decedent was guilty of contributory negligence, then you must proceed to assess pecuniary damages that plaintiffs are entitled to receive along the line I have read to you in these instructions.

"By Mr. Rankin: May I interrupt and ask the Court to explain to the jury that negligence on the part of the defendant must be established by a preponderance of evidence before the plaintiffs can be given a verdict?

"By the Court: Yes. Of course you will not assess any damages against the defendant unless you conclude that the defendant in operating his car in a negligent manner as described to you in these instructions was guilty of negligence which contributed proximately to the accident; that must be established by you. If you think that neither was guilty of negligence and that this happened to be a mere accident that no one could prevent, then plaintiffs cannot recover."

It will be conceded at once that the expression, "If, however, nine of you cannot agree or will not agree * * *" was an unhappy one and that the verb "do" should have been selected instead of the auxiliaries that were used. But the defendant makes a further objection. He contends the instructions were entirely misleading. To weigh the force and effect of the oral instructions let us apply them. We will assume that the instructions were followed just as they were given; that the jury took up first the issue of contributory negligence, and the vote stood as follows: Jurors 1, 2, 3, 4, 5, 6, 7, and 8 voted that contributory negligence was proved, and jurors 9, 10, 11, and 12 voted that contributory negligence was not proved; not being agreed, the jury then took up the issue of the defendant's negligence, and the vote stood as follows: Jurors 1, 2, and 3 voted that the defendant's negligence had not been proved; jurors 4, 5, 6, 7, 8, 9, 10, 11, and 12 voted that the defendant's negligence had been proved; that the jury then took up the issue of damages and assessed the amount; and that the jury thereupon brought in a verdict for the plaintiffs for the amount so assessed. It will thus appear that the verdict, as rendered, did not portray the minds of the jurors because eight found that contributory negligence had been proved, whereas a sound verdict required that nine jurors should have found that contributory negligence had not been proved. Nevertheless, the jurors followed the instruction complained of. In finding for the plaintiff, it was not enough that the jury should find the defendant was negligent. Under the issues, the same jurors were also bound to find that the decedent was not guilty of contributory negligence. The verdict rendered under the assumed facts was sound as to jurors 9, 10, 11, and 12. It was only half sound as to jurors 4, 5, 6, 7, and 8. They found the defendant was negligent, and they also found the deceased was negligent. Under such findings their verdict should have been for the defendant. As to jurors 1, 2, and 3, the verdict was directly opposed to their votes, but their votes were not necessary if the other jurors had all been entirely agreed. It therefore appears that the method of procedure to be followed by the jury in its deliberations was erroneously stated by the trial court.

Acting upon the request of the defendant, the trial court gave an instruction as follows: "In other words, if you shall find from a preponderance of the evidence that the defendant was negligent in the driving of his car, but that the deceased, John Balero, was also negligent and that the negligence of the deceased proximately contributed in the slightest degree with the negligence of the defendant to bring about the accident, then I instruct you that your verdict must be for the defendant and against the plaintiffs." That was a correct instruction but it will be noted

that the oral instruction conflicted therewith in so far as it authorized jurors 4, 5, 6, 7, and 8 to base their verdict on the negligence of the defendant, although they were of the opinion that the deceased was also negligent.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 216

PEOPLE v. CONNORS.

Cr. 229.

District Court of Appeal, Fourth District, California.

June 9, 1932.

1. Homicide ⇐253(3).

Evidence *held* insufficient to show willful, deliberate, and premeditated intent to kill necessary to constitute first degree murder (Pen. Code, § 187).

2. Homicide ⇐21.

Murder perpetrated by poison, lying in wait, torture, or other willful, deliberate, and premeditated killing, or committed in perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is "murder of the first degree," while other kinds constitute "murder of the second degree" (Pen. Code, § 187).

[Ed. Note.—For other definitions of "Murder in First Degree" and "Murder in Second Degree," see Words and Phrases.]

3. Homicide ⇐22(2).

To constitute "murder of the first degree," killing must be premeditated, i. e., accompanied with deliberate and clear intent to take life, unless done in perpetration of certain felonies (Pen. Code, § 187).

4. Criminal law ⇐980(2).

In determining degree of murder after plea of guilty, court may reject any portion of defendant's statement, and is not bound to accept his contention that decedent was aggressor.

5. Homicide ⇐253(3).

Evidence of illicit liaison between defendant and deceased and latter's screams *held* insufficient, without other evidence of premeditation, to establish "murder in the first degree."

6. Homicide ⇐152.

Presumption is that proved killing was malicious and act of murder, where nothing further is shown, but verdict should be murder of second degree.

7. Homicide ⇐151(1).

Burden is on defendant in murder trial to prove circumstances mitigating, justifying, or excusing homicide, unless prosecution's proof tends to show that crime only amounts to manslaughter or was justifiable or excusable (Pen. Code, § 1105).

8. Homicide ⇐241, 250.

Evidence *held* not to show such provocation as excused defendant's killing of his mistress after argument or quarrel commenced by defendant or reduced crime to manslaughter.

9. Homicide ⇐347.

Judgment of conviction of first degree murder on evidence indicating that defendant was guilty of second degree murder at most should be modified accordingly, without granting new trial (Pen. Code, § 1181).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

John R. Connors was found guilty of first degree murder after pleading guilty of murder, and he appeals.

Judgment modified, and cause remanded, with directions.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SCOVEL, Justice pro tem.

The information in this matter charged the defendant with the crime of murder, alleging that on the 23d day of November, 1931, the defendant killed one Betty Stryker. The defendant, at the time of the arraignment, pleaded guilty. At the time for pronouncement of judgment, certain evidence consisting almost wholly of a statement by the defendant was introduced to determine the degree of the crime. The court found the crime to be that of murder in the first degree, and the defendant was sentenced to life imprisonment. From this judgment and sentence the defendant appeals on the ground that the evidence is insufficient to show the crime to have been that of murder in the first degree. We are in accord with defendant's contention.

From defendant's statement given at the time of the pronouncement of judgment it appears that for a period of approximately one and one-half years defendant and decedent had been living together in a state of illicit relationship. Defendant was employed at the race track in Tijuana, living in San Diego with decedent. Prior to September, 1931, the defendant had been employed at the race track at Tanforan. Returning to San Diego in the latter part of this month, he found the decedent and a man by the name

of Tom in his home in a compromising situation. The defendant ordered Tom to leave. On the morning of the murder the defendant returned from Tijuana to his home in San Diego, finding the decedent absent. Defendant walked down to the post office, and upon his return commenced cooking breakfast. Shortly thereafter the decedent returned, and thereupon defendant accused her of having been "out with Tom." From this quite an argument started, and, according to defendant's statement, decedent during the argument stated: "If you mention Tom's name again I will break your head with this hammer." Both started for the hammer which was on the ice box about three feet, away, and during the ensuing scuffle the defendant got the hammer and hit the deceased while she was pulling his hair. The defendant then wrote a note stating that, if anything happened to either of them, Tom was the cause of it. He then cut his own throat. From the blow in the head decedent died. The foregoing constitutes all of the evidence introduced relative to the murder except the testimony of two witnesses who stated that during the altercation they heard the decedent scream.

[1-4] We are of the opinion that the evidence produced fails to show the willful, deliberate, and premeditated intent to kill necessary to constitute the crime that of murder in the first degree. Murder is defined as the unlawful killing of a human being with malice aforethought. Pen. Code, § 187. All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree. All other kinds of murders are of the second degree. "To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with the deliberate and clear intent to take life." People v. Howard, 211 Cal. 322, 295 P. 333, 336, 71 A. L. R. 1385. The facts of the present case are startlingly similar to those of People v. Howard, supra, in which the Supreme Court modified a conviction of murder in the first degree. In the cited case the defendant killed one Cooley with a hammer. The two had occupied the same apartment for some time. The defendant first claimed that the killing had been done by a robber, later admitting that he himself had struck the fatal blow during an argument between the two over a bottle of whisky; that he had then disordered the room in order to give the appearance that the killing had been done in an attempt to burglarize the apartment. He admitted having called on the decedent's estranged wife prior to the homicide, but denied that he had ever proposed marriage to her. She testified, however, that he had proposed marriage to her, and that she had told him that she would never marry any one as long as her husband was alive. From the facts the court determined that there was not sufficient proof of a willful, deliberate, and premeditated attempt to kill, and reduced the conviction to murder in the second degree. As in the Cooley Case, unless credit be given to the statement of the defendant Connors, the record is devoid of any evidence tending to show the circumstances surrounding the commission of the crime. The court in determining the degree had the right, of course, to reject any portion of the statement, and was not bound to accept defendant's contention that the decedent was the aggressor. If the testimony as to this is disregarded, however, there remains nothing from which more than a bare inference could be drawn as to how the affair started. Apparently defendant and decedent engaged in a quarrel before the blow was struck. From the evidence it appears that both parties were of approximately the same height and weight; the decedent, if anything, being the larger. During the scuffle, decedent pulled defendant's hair, and during the fight the blow was struck. There is nothing to show that the killing was either premeditated or that it was accompanied with a deliberate and clear intent to take life. Under the circumstances, we are of the opinion that the record shows at most murder in the second degree.

[5] Counsel for the people suggest that the fact that the deceased had been living together with the defendant without the bonds of matrimony indicates clearly that the defendant was undoubtedly the aggressor. Just how the fact of an illicit liaison indicates that one party thereto is more the aggressor than the other does not appear. It is further contended that the evidence of the two witnesses that they heard the decedent scream also tends to show that the defendant was the aggressor. Some inference to this effect might arise from this fact, but an equal inference might also arise that the scream was caused by the pain from the fatal blow. We do not feel that this fact alone, unsupported by any other evidence of premeditation, is sufficient to constitute the crime that of murder in the first degree.

[6] "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree." People v. Howard, supra.

[7-9] Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circum-

stances of mitigation, or that justify or excuse it, devolves upon him unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable. Pen. Code, § 1105. From the defendant's own statement, it appears that the argument or quarrel from which the killing resulted was commenced by him. Considering, as we may, that no attempt was made on his part to stop the quarrel, and that perhaps to some extent he may have been the aggressor therein, we do not feel that such provocation was shown as would excuse the homicide or reduce it to manslaughter. Since the evidence indicates that the defendant was not guilty of the degree of the crime of which he was convicted, but that he was guilty of a lesser degree thereof, the judgment should be modified accordingly without granting or ordering a new trial. Pen. Code, § 1181.

The judgment of the lower court of murder of the first degree is modified, and the cause is remanded to the trial court, with directions to enter a judgment against the defendant finding him guilty of murder of the second degree and to thereupon pronounce judgment upon him as prescribed by law.

We concur: BARNARD, P. J.; MARKS, J.

124 Cal.App. 159

TYNAN LUMBER CO. v. W. A. HAMMOND CO. et al.

Civ. 8169.

District Court of Appeal, First District, Division 2, California.

June 8, 1932.

Rehearing Denied July 8, 1932. Hearing Denied by Supreme Court Aug. 4, 1932.

1. Principal and agent ⇐41.

Variance between pleading, alleging agreement that seller would pay buyer cost price of stock in his possession if he canceled agency contract, and proof, showing agreement to dispose of stock in buyer's hands, *held* material.

Buyer's pleadings alleged contract purporting to obligate seller to pay buyer cost price of all stock remaining in buyer's possession at time of cancellation of contract in case buyer should decide that agency was not satisfactory, and the evidence disclosed contract between buyer and seller's agent, whereby, if buyer decided agency was not satisfactory, buyer could cancel agreement and seller would see that buyer's stock was disposed of within reasonable length of time.

2. Principal and agent ⇐123(7).

Evidence showed sales agent had neither express nor ostensible authority to agree to rescission of sales contract.

3. Principal and agent ⇐103(5).

Seller's agent could not bind principal by letter giving buyer right to rescind sales contract whenever buyer should feel dissatisfied.

4. Principal and agent ⇐119(2).

Presumption was that sales agent did not have authority to give buyer right to rescind sales contract whenever he should feel dissatisfied.

5. Sales ⇐29.

Buyer was bound by stipulation in sales contract, excluding other agreements, notwithstanding buyer's signature appeared above that portion of contract.

6. Contracts ⇐28(1).

One signing contract must be presumed to have assented to all terms specified therein.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Tynan Lumber Company against W. A. Hammond Company and E. D. Coddington Manufacturing Company and others. From the judgment, defendant E. D. Coddington Manufacturing Company appeals.

Reversed.

J. A. Bardin and J. T. Harrington, both of Salinas, for appellant.

Paul L. Pioda, of Salinas, for respondent.

NOURSE, P. J.

Plaintiff sued for the breach of an oral contract. The cause was tried without a jury, and plaintiff had judgment, from which the defendant Coddington Company has appealed on typewritten transcripts.

The complaint alleged that, on February 5, 1929, plaintiff and defendants made an agreement whereby plaintiff was appointed exclusive sales agent for the sale of "Ecod Fabric" in certain territory in Monterey and San Benito counties; that in accordance with this agreement plaintiff purchased a carload of said fabric, paying defendants $4,000 therefor; that, by the terms of said agreement, plaintiff was given the privilege of canceling the agreement at any time, and that, in such event, "the said defendants would, within a reasonable time from the date of said cancellation, dispose of and pay plaintiff the cost price thereof for any and all of said fabric remaining in plaintiff's possession at the time of the cancellation of said agreement"; that, on September 28, 1929, plaintiff became dissatisfied with said agreement and demanded that defendants remove all the stock then on hand and pay plaintiff

the cost price of said stock, which was alleged to be $2,587.50. The defendants Hammond and Hammond Company defaulted. The defendant Coddington Company filed a general denial. The trial court found all the allegations of the complaint true except that the cost price of the stock in the hands of plaintiff was $1,587.50, and judgment was given in that amount.

The evidence discloses that the Hammond Company was the Pacific Coast representative and sales agent for the Coddington Company, which was a Wisconsin corporation; that a representative of the Hammond Company entered into negotiations with plaintiff for the sale of the Ecod product and agreed to designate plaintiff as sales agent for territory in Monterey and San Benito counties; that, on February 5, 1929, Hammond addressed a letter to plaintiff offering to appoint plaintiff exclusive sales agent for that territory, agreeing to assist plaintiff in making sales, and agreeing "that if you decide that the agency is not satisfactory, you may cancel the agreement and we will see that your stock is disposed of within a reasonable length of time." Plaintiff thereafter placed an order with the Coddington Company through Hammond as salesman which was on a printed form used by that company for the purpose and which was signed by L. H. Tynan on behalf of plaintiff company. This order reads in full as follows:

"05064 E. D. Coddington Mfg. Co. North Milwaukee, Wis. Date S. F. Feb. 11, 1929—Ship to—Tynan Lumber Co. Address Their order #861S—City & State—Salinas, Calif. Ship via S. P. Delivery—Ship When—at once Terms: 2% Cash 10 Days—30 Days Net. F. O. B. Salinas.

Quantity	Description	Price Amt.
16 M yds.	Plain Interior Plaster Fabric	25c per yd.

"To be loaded so one half can be forwarded in car to Monterey—Invoice in Duplicate

8 M yds. to Salinas Yd.
8 " " " Monterey "

"Send Invoices to Salinas.

"L. H. Tynan

Wired Factory 2/12/29—W.A.H.—

"THIS ORDER IS SUBJECT TO ACCEPTANCE BY HOME OFFICE. NO AGREEMENTS, WRITTEN OR VERBAL, WILL BE RECOGNIZED UNLESS ATTACHED AND MADE PART OF THIS ORDER.

Salesman—W. A. Hammond Customer's O. K.—DUPLICATE ENDORSED."

The material was delivered to plaintiff in accordance with this order, and in due time plaintiff paid the Coddington Company the full sum of $4,000 to cover the cost of the invoice. The plaintiff did not meet with success in the disposal of the stock, and, in September, 1929, gave his notice of "cancellation" of the contract. Stated briefly, the case is this: The parties executed a written contract for the sale of goods containing a stipulation that no other agreements were binding upon them. Plaintiff has picked out a portion of the prior negotiations in parol upon which it sues.

[1] The judgment must be reversed because, first, the contract pleaded in the complaint and upon which the judgment was based was never made. The contract with Hammond endeavored to obligate appellant, in the event of cancellation, to see that the balance of the stock was disposed of within a reasonable length of time. The contract upon which the action is founded purported to obligate the appellant to pay respondent "the cost price" of all stock remaining in respondent's possession at the time of cancellation.

The variance between pleading and proof is material. The contract in evidence does not in any sense purport to guarantee respondent a definite return on the sale of the stock. Respondent could have sold all the stock purchased at less than the cost price without any recourse to appellant. Thus the agreement to see that the stock is disposed of presupposes a sale of the remaining stock in the open market. It certainly did not contemplate that respondent could require appellant to reimburse it for the full amount paid and retain the balance of the stock. But such is the judgment appealed from.

[2, 3] Second, the written contract of February 11, 1929, between appellant and respondent, referred to in the record as the "order," contains no ambiguities or uncertainties and requires no evidence to aid its interpretation. It is a simple contract for the sale and delivery of goods at fixed price and place, and, by its express terms, is made complete in itself and not subject to any parol agreements or prior negotiations. This contract was executed by appellants' sales agents who, in that respect, were acting within the scope of their authority.

The prior negotiations of February 5, 1929, between Hammond and respondent have no binding effect upon appellant in respect to the portion sued on, because, as sales agent for appellant, Hammond had express authority to enter into contracts for the sale of appellants' goods, but had neither express nor ostensible authority to agree to the rescission of such contracts. Lindow v. Cohn, 5 Cal. App. 388, 390, 90 P. 485; Thomas v. Anthony, 30 Cal. App. 217, 221, 222, 157 P. 823; Morton v. Albers Bros. Milling Co., 66 Cal. App. 391, 398, 226 P. 809; Burroughs Adding Mach. Co. v. Harris, 99 Cal. App. 604, 606, 279 P. 216. The letter of February 5 purported to give to respondent the right to rescind the contract of sale with appellant whenever respondent should feel dissatisfied. That an agent cannot so bind his principal unless authorized by the latter is the rule of the cases just cited.

[4] There is no presumption of such authority which can be brought to the aid of the judgment: the presumption is to the contrary. Morton v. Albers Bros. Milling Co., supra. There is no reasonable inference which can be drawn to support the judgment

because the express stipulation in appellants' contract that "no agreements, written or verbal, will be recognized unless attached and made part of this order," compels the inference that Hammond was not authorized to bind his principal by any collateral agreement not attached to the contract. There is, of course, no evidence of ostensible authority; the evidence is all to the contrary. There is no room for an inference of ratification, because there is no evidence that appellant had any knowledge of Hammond's agreement.

[5, 6] The point that respondent is not bound by the stipulation in the order contract excluding other agreements because respondent's signature appears above that portion of the contract is not sound. The order was plainly printed on a single sheet of paper; the clause at the end was not hidden or disguised in any manner; it was emphasized by capital letters as in the copy appearing in the fore part of this opinion. It was an essential part of the contract and respondent must be presumed to have assented to all the terms specified. Eldridge v. Mowry, 24 Cal. App. 183, 140 P. 978.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

124 Cal.App. 147

BENNETT et al. v. KINGS COUNTY.

Civ. 753.

District Court of Appeal, Fourth District, California.

June 7, 1932.

Rehearing Denied June 30, 1932. Hearing Denied by Supreme Court Aug. 4, 1932.

1. Death ⇐31(5).

Statute making county liable for "injuries to person" resulting from dangerous condition of highway gives heirs right of action for wrongful death resulting from highway defects (St. 1923, p. 675, § 2).

[Ed. Note.—For other definitions of "Injury to the Person," see Words and Phrases.]

2. Bridges ⇐46(6).

Evidence sustained verdict against county for death when automobile ran off road at dangerous bridge approach (St. 1923, p. 675, § 2).

The evidence disclosed that the road in question led across three main paved highways, and that it was considerably used, that bridge was at sharp angle to the road, approximately on the same level, with no guard rail or fences and no warning signs, and that there had been at least three accidents there before, two of them within a year.

3. Bridges ⇐42.

County may be liable for resulting death where, by reason of long-continued existence of defective condition of highway, supervisors have constructive notice thereof (St. 1923, p. 675, § 2).

4. Bridges ⇐46(6).

Evidence showed county supervisors' constructive knowledge of dangerous condition of bridge and approaches, in action against county for death (St. 1923, p. 675, § 2).

5. Bridges ⇐46(12).

Contributory negligence of deceased who on dark foggy morning drove car off road at sharp turn to bridge *held* question for jury (St. 1923, p. 675, § 2).

The evidence disclosed that, when last seen, the deceased was leaning out of automobile and looking around his windshield, and that lights of his car were burning. At place of accident he had gone only a mile and three-quarters, and there was a possible inference that the accident was caused by sharp turn and conditions at bridge rather than by deceased's relaxation, or excessive speed.

6. Death ⇐58(1).

Deceased is presumed to have exercised ordinary care for his safety.

7. Death ⇐104(2).

Instruction on presumption of deceased's ordinary care was properly given, where contributory negligence was not shown as matter of law.

8. Bridges ⇐46(5).

In action for death resulting from dangerous condition of highway and bridge, evidence that it was not customary for supervisors to erect warning signs at approaches in this district *held* properly refused (St. 1923, p. 675, § 2).

9. New trial ⇐108(2).

New evidence as to number of times deceased had traveled over defective road did not require granting new trial in action against county for death.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Morris John Bennett and others, suing by their guardian ad litem, against Kings County. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Clarence H. Wilson, Dist. Atty., of Hanford, for appellant.

Paul D. Morse and Jesse E. Nichols, both of Oakland, and John F. Pryor, of Hanford, for respondents.

BARNARD, P. J.

This action was brought by the heirs of William J. Bennett to recover for his death, alleged to have been caused by the unsafe, dangerous, and defective condition of a bridge and the approaches thereto. The answer, in addition to a denial of the dangerous and defective condition of the bridge and road, alleged as a separate defense that the accident occurred solely by reason of the negligent manner in which the deceased had driven his automobile. There were no eyewitnesses to the accident, and the evidence is without conflict as to the essential facts.

The accident occurred in Kings county at a point where a public highway crosses a body of water known as Green slough. Across this slough was a bridge about eighteen feet wide and twenty-eight feet long, being approximately on a level with the road. The center line of this bridge is approximately at right angles to the direction of the slough, but this center line makes an angle of about thirty-five degrees with the center line of the traveled portion of the road. In other words, the situation was such that a person traveling down the center of the road would run into the slough, unless he made a sharp turn to enter the bridge. There were no guard rails either upon the bridge or its approaches, and there were no signs warning travelers that they were approaching a bridge. The road itself was an oiled road; the oiled portion thereof being fifteen feet wide, but narrowing to about ten or twelve feet where it crossed the bridge. The bridge had been in that position, and in a similar condition, for more than twenty years.

About 6 o'clock on the morning of December 8, 1930, Bennett left the home of a relative about a mile and three-quarters from the bridge in a light touring car without side curtains, and proceeded in the direction of the bridge. His car had stood out all night, and his windshield was frosted and ice had formed thereon. It was dark, and there was a dense fog; another witness testifying that he could see about thirty feet at the time. When he left the home of his relative, Bennett was looking out on the left-hand side of his windshield, and the lights on his car were burning. A short time later Bennett was found dead in his machine, which was upside down in the slough, the whole body of the car being under water, with its front lights still burning. The tracks of the machine were visible, and showed that it had come along the center of the road, and that, instead of making the sharp turn onto the bridge, it had gone straight ahead into the slough. The wheels of the car nearest the bridge had either just touched or just missed the corner of the bridge. There were skid marks indicating that the brakes were applied just about the time the front of the car was going over the edge. A jury returned a verdict in favor of the plaintiffs, and from the judgment which followed this appeal is taken.

[1] The first point raised is that the demurrer to the complaint should have been sustained. It is contended that the statute upon which this action is based (Stats. 1923, p. 675, § 2) is in derogation of the common law, and must be strictly construed, and that since it does not specifically give a right of action to the heirs of a deceased person, such an action cannot be maintained. It is argued that those cases where such an action has been permitted or which have been treated as if such a right existed are not in point, since this particular question was not therein raised. See Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083; Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540. A part of the act in question reads: "Counties * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways. * * *"

Aside from the consideration of any other statutes, we are unable to see why the "injuries to persons," referred to in this statute, do not include such injuries as may be caused to persons by reason of the death of others as well as injuries to persons directly involved not resulting in death. We think the injury suffered by these plaintiffs is covered by the statute, and that the demurrer was properly overruled.

[2] It is next contended that the evidence does not support the verdict in three respects:

(1) That the evidence is not sufficient to show that the bridge or its approaches were dangerous. It is argued that this was not a main highway, and that no one should expect to find thereon warning signs or danger signals, or such protections as are to be found on main paved highways. Also that the bridge is shown not to have been unsafe by evidence that it had been there for twenty years; that only three or four accidents had happened thereon in previous years; and that no one of the supervisors had heard of an accident thereon. On the other hand, the evidence shows that this road leads across three main paved highways, and that it is considerably used. The bridge was at a sharp angle to the road, approximately on the same level, with no guard rail or fences and no warning signs. There had been at least three accidents there before, two of them within one year, which would tend to show the dangerous character of the bridge. Gorman v. County of Sacramento, supra. In addition to this, the jury was taken to view the bridge and its environments and all reasonable inferences must be indulged in support of the ver-

dict. It cannot be held that the verdict is not without support in this respect.

[3, 4] (2) That the evidence does not show that the board of supervisors had knowledge of the condition of this bridge. The supervisor of the district in which the bridge is located testified that he had been over the bridge a number of times before the date of this accident. He then saw and had actual knowledge of the conditions which the jury has found to be dangerous. Another supervisor testified that he had been over the bridge a good many times. While all of the supervisors testified that they knew of no complaint having been filed with the board as to the condition of this bridge, only one of them testified that he had not heard of previous accidents at that point. One witness testified that several years before he had told a member of the board of supervisors that the bridge was dangerous. The only contention made by the appellant in this regard is that it was necessary for the plaintiff to show actual knowledge on the part of the supervisors. This contention has been settled adversely to the appellant. In Boyce v. San Diego High School District (Cal. Sup.) 10 P.(2d) 62, 63, the court said: "It may also be observed that actual knowledge is not necessary, long-continued neglect being such constructive notice as to fix liability on the district." In Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424, 426, it was said:

"The statute does not provide that actual notice is a prerequisite to recovery in such a case. The long-continued existence of a defective condition may establish constructive notice thereof. Wurzburger v. Nellis, 165 Cal. 48, 53, 130 P. 1052; 43 C. J. 1043 to 1057. It may be inferred from the circumstances in evidence that the principal had constructive notice of the defective condition and he certainly had 'authority to remedy such condition.' To hold that actual notice is required in such a case would be to place a premium on indifference and neglect of duty. 'Neglect of duty cannot be made the basis of exemption from liability.' Kramer v. City of Los Angeles, 147 Cal. 668, 681, 82 P. 334, 339."

[5, 6] In our opinion, knowledge of the condition of the bridge was sufficiently brought home to the board of supervisors.

(3) That the evidence conclusively shows the deceased to have been guilty of contributory negligence, in that he was not looking at the road, that he was looking through the frosted windshield, and could not see, or that he was driving at an excessive rate of speed. It is argued that the probability is that the deceased, during the mile and three-quarters he traveled, got very cold, and that he tired of leaning out to look around the windshield and relaxed his vigilance. While contributory negligence was not pleaded, the case seems to have been tried with that issue in mind. When last seen, the deceased was leaning out and looking around his windshield, and the lights of his car were burning. The tracks showed that his car went down the center of the road and proceeded straight ahead. He had only gone a mile and three-quarters, and the inference is just as possible that the accident was caused by the sharp turn and conditions at the bridge, as that he had relaxed his vigilance or that he was driving too fast. Not only is the inference that the deceased continued to use care, reasonably to be drawn from the evidence, but the plaintiffs are entitled to the presumption that the deceased used ordinary care for his own safety. Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529; Gorman v. County of Sacramento, supra. The appellant argues that this presumption does not apply where the evidence conclusively shows that the contrary is true. Such is not the situation here, and the question of contributory negligence was one of fact for the jury.

[7] The next point raised is that the court erred in instructing the jury to the effect that the deceased is presumed to have used ordinary care for his own safety; it being argued that the evidence conclusively shows contributory negligence on the part of the deceased, thereby dispelling this presumption. Since the facts do not show contributory negligence as a matter of law, the instruction was properly given. Gorman v. County of Sacramento, supra; Brooks v. City of Monterey, supra.

Error is claimed in instructing the jury to the effect that the statute in question (Stats. 1923, p. 675, § 2) does not require that actual notice of the dangerous condition shall have been given to the county, but that notice may be inferred from the circumstances, and also that implied or constructive notice of defective conditions arises from facts from which it may be reasonably inferred or from proof of circumstances from which it appears that the defect ought to have been known and remedied. The instructions complained of correctly stated the law. Boyce v. San Diego High School District, supra; Dawson v. Tulare Union High School, supra.

[8] Error is next claimed in that the court refused to admit evidence to the effect that it was not customary for the supervisors of this county to erect signs warning travelers of their approach to bridges in that particular district in which this bridge was situated. This evidence was properly refused. Gorman v. County of Sacramento, supra.

[9] The last point raised is that the court erred in denying a motion for a new trial. The only point not heretofore covered is that this motion should have been granted upon the ground of newly discovered evidence. The only new evidence relied on was to the effect that the deceased had been over this particu-

lar route either "three or four" times or "four or five" times, according to different witnesses. Evidence was admitted at the trial that the deceased had been over this road "two or three" times or "three or four" times. It was undisputed that he had been over the road several times, and the difference in the number of times is trivial and immaterial, and the court did not abuse its discretion in refusing a new trial upon such a showing. We may add that it fully appears from the record that no satisfactory showing of diligence was made.

No reversible error appearing, the judgment is affirmed.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 131

BOOTH v. PEOPLE'S FINANCE & THRIFT CO. OF MODESTO et al.

Civ. 4515.

District Court of Appeal, Third District, California.

June 7, 1932.

As Modified June 15, 1932. Rehearing Denied July 7, 1932.

1. Corporations ⇐306.

Corporate officer could not escape liability for taking of automobile on ground he was acting as agent for corporation in case taking was tortious.

2. Principal and agent ⇐159(2).

Agent cannot excuse himself for tortious act on plea that he is acting for principal.

3. Replevin ⇐106.

Plaintiff in replevin action, where there is indebtedness or lien on property, and repossession is not obtained, can recover only value of interest therein.

4. Trover and conversion ⇐47.

Liability of corporate officer for tortious taking of automobile was market value thereof without regard to indebtedness on automobile owing to corporation.

5. Trover and conversion ⇐62.

$1,350 damages for detention for nine months of automobile valued at $650 *held* excessive under evidence.

6. Trover and conversion ⇐60.

$1,500 as exemplary damages for tortious taking of automobile of approximately $650 value *held* excessive (Civ. Code, § 3294).

7. Damages ⇐94.

Exemplary damages must bear reasonable proportion to actual damages sustained (Civ. Code, § 3294).

8. Damages ⇐94.

Power of court in relation to allowance of punitive damages is same as may be exercised in any case of excessive damages (Civ. Code, § 3294).

9. Trover and conversion ⇐60.

Refusal, after tortious taking of automobile, to accept payment of remainder of purchase price, furnished some basis for award of punitive damages (Civ. Code, § 3294).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Vida D. Booth against the People's Finance & Thrift Company of Modesto and G. H. Bertram, wherein Palmira Bertram, executrix, was substituted as party defendant in place of defendant last named after his death. Judgment for plaintiff against defendant last named, and the substituted defendant appeals.

Modified, and, as modified, affirmed.

Hawkins & Hawkins and E. A. Lackmann, all of Modesto, for appellant.

F. E. Braucht, V. G. Preston, and Hugh H. Griswold, all of Merced, and Hjelm & Hjelm, of Turlock, for respondent.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of the court.

This action was tried before a jury and the verdict rendered therein is in the following words and figures, to wit (omitting title): "We, the jury in the above entitled cause, find for the plaintiff Vida D. Booth, and against the defendant G. H. Bertram, that the plaintiff is entitled to the possession of the motor vehicle described in the complaint in this action, and if delivery cannot be had, then for the value thereof, and we find the value of said motor vehicle to be $650.00. And we find the plaintiff's damage to be $1,350.00. And we find for the plaintiff in the sum of $1,500.00 as exemplary and punitive damages." Judgment was entered for the plaintiff in accordance with the verdict, and from this judgment this appeal is prosecuted.

The record shows that on and prior to the 19th day of March, 1930, Vida D. Booth was the owner of a certain Ford "Town" sedan, on which date the plaintiff, being desirous of borrowing the sum of $390, executed a bill of sale purporting to convey said automobile to the People's Finance & Thrift Company; the consideration stated therein being the sum of $450. Thereupon the Finance & Thrift Company executed and delivered to the plaintiff a conditional sales contract purporting to sell the Ford sedan to the plaintiff for the sum of $490, receipt of $100 acknowledg-

ed as of the date of the contract, $45 retained as interest. The contract provided for monthly payments in the sum of $32.50 beginning on the 22d day of April, 1930, and payable on the 22d day of each and every month thereafter until full payment had been made; interest on deferred payments from maturity at the rate of 1 per cent. per month, payable monthly.

The "Town" sedan remained in the possession of the plaintiff until on or about the 13th day of October, 1930. At the time of the transactions herein referred to, no delivery was made of the sedan to the People's Finance & Thrift Company, and consequently no redelivery thereof from the People's Finance & Thrift Company to the plaintiff. While couched in the form of a sale by the plaintiff to the defendant People's Finance & Thrift Company, and a resale by the People's Finance & Thrift Company to the plaintiff, the transaction was in fact a loan from the Finance & Thrift Company to the plaintiff, and the execution of the two instruments to secure the repayment thereof.

Without setting forth the dates and items of the different payments, the testimony in the record is sufficient to show payment of the monthly installments, up to and including the 22d day of September, 1930, and that the next payment on the conditional sales contract would not become due until the 22d day of October, 1930, provided two certain instruments, or notes, or evidences of indebtedness signed by third parties were accepted by the People's Finance & Thrift Company as payment on the installments provided for in the contract.

The record shows that the plaintiff owned a certain note for $36.55, and likewise an assignment or mortgage in the sum of $70.08. The testimony on the part of the plaintiff was to the effect that the People's Finance & Thrift Company accepted these two instruments as cash, and there is sufficient testimony in the record to justify this conclusion.

On the 13th day of October, 1930, it appears that the plaintiff made two visits to the office of the People's Finance & Thrift Company, for the purpose of making some arrangement toward paying the balance still owing on the sales contract, leaving the Ford sedan standing upon the street near the office of the Finance & Thrift Company. Some time between the two visits it appears that G. H. Bertram took possession of the automobile under the claim that payment had not been made according to the terms of the contract, and therefore the plaintiff had forfeited her rights thereto. Upon the second visit of the plaintiff to the office of the Finance & Thrift Company, for the purpose of arranging for the payment of whatever remained due upon the sales contract, she was informed by Bertram that she was too late, and, being asked some questions in relation thereto as to why he had taken the automobile without giving any notice, replied: "That's the way I treat people who fight me." (This remark referred to litigation the defendants had had over a certain chattel mortgage executed and delivered by the Booth Motor Company, of which the plaintiff was secretary, and her husband, president, to the People's Finance & Thrift Company.)

[1, 2] Upon this appeal it is insisted that there is no liability on the part of G. H. Bertram, on the theory that he was acting as agent for the People's Finance & Thrift Company, a corporation. This objection, however, is untenable if the taking of the automobile on the 13th day of October, 1930, was tortious. The finding of the jury is to such effect. An agent cannot excuse himself for a tortious act on the plea that he is acting for his principal. Perkins v. Blauth, 163 Cal. 782, 127 P. 50, and the cases there cited.

[3] It is further urged that the verdict is excessive, not only as to the value of the automobile, but also as to the damages awarded, and as to the exemplary or punitive damages. While not so stated in the verdict, for the purposes of this opinion we will assume that the language, "And we find the plaintiff's damage to be $1,350.00," found in the verdict, to refer to damages suffered by the defendant for and on account of being deprived of the use of the automobile.

The record shows that upon the automobile, assuming that the plaintiff's testimony is correct, there had been paid on account of the sums mentioned as the purchase price of the automobile in the sales contract the sum of $223.63, leaving unpaid $166.37. These figures are arrived at by subtracting the amount paid on the contract from the $390, the original amount of the loan, and to secure the payment of which the instruments heretofore referred to were executed. The law is well settled that, in an action of replevin, where there is an indebtedness or lien upon the property, and repossession of the property is not obtained, but only payment made in cash, the plaintiff can recover only the value of his interest therein.

In Bunnell v. Baker, 104 Cal. App. 313, 285 P. 877, 879, 286 P. 1090, 1091, the extent of the recovery under such circumstances is there stated: "The interest of respondent in the trucks was not the entire estate therein, but was special and limited. The value of his interest should have been determined by taking the market value of the trucks and deducting therefrom the amount remaining unpaid under the terms of the conditional sales contract. In case delivery of the trucks could not be made, he was not entitled to a judgment for the full market value of the trucks, but only to the value of his special interest in them. Lindsey v. Butte, 96 Cal. App. 465, 274 P. 428 [275 P. 525]; Connell v. Hogg,

181 Cal. 730, 186 P. 134; Conolley v. Power, 70 Cal. App. 70, 232 P. 744; Griffith v. Reddick, 41 Cal. App. 458, 182 P. 984. As the jury evidently followed the instructions of the court and found the full market value of the trucks at the time of trial, and judgment was entered for this amount in case the trucks were not returned to respondent, we must conclude that the giving of the instructions on the question of value was prejudicial error requiring a reversal of the case."

The instruction of the court relative to ascertaining the value of the automobile reads as follows: "If you find from the evidence in this case that a delivery or return of said motor vehicle cannot be had, then if you find as aforesaid that the plaintiff is entitled to the possession of said motor vehicle, your verdict shall be for the plaintiff and against the defendant, in such amount as you find from the evidence to be the reasonable value of said motor vehicle."

[4] The appellant does not base her contentions upon the instruction but directs her attack to the fact that the verdict following the instruction is excessive, in that it found the value of the automobile and directed recovery of that sum, irrespective of the fact that the plaintiff's interest therein was limited by the indebtedness unpaid thereon in the sum which we have mentioned. In arriving at its verdict, the jury evidently followed the instruction of the court in finding the value of the automobile, and disregarded the fact that the plaintiff had only a qualified interest therein. This objection, however, does not in and of itself necessarily lead to a reversal, for the simple reason that the sales contract set forth in the record shows that the money unpaid for the automobile was owing to the defendant, the People's Finance & Thrift Company of Modesto, a corporation, and not to the defendant G. H. Bertram, and therefore his liability for his tortious act would be the market value of the automobile.

[5] The next objection of the appellant presents a more serious situation. As heretofore stated, the jury allowed $1,350 damages, which we assume to be damages for the usable value of the automobile, suffered by the plaintiff by reason of the detention thereof. In support of this finding plaintiff introduced the following testimony (we set it forth by question and answer):

"Q. How many years have you been in the automobile business? A. Fifteen years.

"Q. During that time did you engage in buying and selling Ford automobiles? A. Yes.

"Q. Did you have occasion to take note of, and hire or rent Ford automobiles during that period of time, to know the reasonable value thereof per day? A. I have rented cars at that price.

"Q. How much per day? A. Well, I would not rent a car, as good in condition as that would be, but I would rent a cheaper car for about $10 per day.

"Q. What would you say would be the reasonable rental value of that automobile, an automobile like that, per day? A. $15.00."

On cross-examination the witness testified as follows:

"Q. Did you ever know, within the last 2 years, of any Ford automobiles being leased? A. They do have rent places where they rent them out.

"Q. Do you know of any particular instance in the last 2 years, of any Ford automobile being leased by the day or by the month or by the week or by the year? A. Yes, sir.

"Q. What instance is that? A. I know of three places where they do such business, and have Ford automobiles.

"Q. Do you know of any instance, any particular person leasing any particular automobile? A. I know their rates.

"Q. Do you know of any one who ever paid their rates? A. Why, I cannot recall.

"Q. Well, just name one of them? A. There are a number of traveling-men who rent, acquaintances and friends of mine, who have at different times, spoken of renting cars."

Upon the part of the defendants, a witness was introduced who testified as follows:

"Q. Are you familiar with the rental value of cars of that type and that condition? A. I took that up with Mr. Paradio this morning, on an open job, to be rented to the Department of California, State of California, obtained $1.75 a day for an open car, with no upkeep. I would say that car would run from $2 to $2.25 a day as a fair daily rental."

This is all the testimony there is in the record upon which to base a verdict for $1,350 for the usable value of the car during the nine months it was held from the possession of the plaintiff.

The testimony further shows that the car was not in fact used. It thus appears that there is absolutely nothing in the record to support the verdict returned by the jury as damages for the detention of the automobile. Had the testimony introduced by the plaintiff, as to the usable value of the car, been accepted by the jury, the damages would have been fixed at the sum of $4,050. On the other hand, if the usable value, as testified to by the only witness introduced on behalf of the defendant, had been accepted as a basis for an allowance, the verdict would have been in the sum of $607.25. Before the statement by a witness can really amount to evidence, it must be made to appear that he has some knowledge of the subject-matter about which he is testifying. Here it is evident that no such knowledge was possessed. Nor is there

anything in the testimony to show net usable value of the car, in excess of the testimony given by the one witness for the defendants.

In the case of Bonestell v. Western Auto-Motive Finance Corp., 69 Cal. App. 719, 232 P. 734, 736, this court had occasion to consider the question of damages for the detention of an automobile, and what is there said applies with equal force to the instant case, save and except that the testimony in the instant case is much weaker than that upon which it was sought to uphold a verdict for damages in the Bonestell Case, as the opinion in the Bonestell Case quotes liberally from the case of Mutch v. Long Beach Imp. Co., 47 Cal. App. 267, 190 P. 638. We set forth the following excerpt from the opinion in the Bonestell Case: "The possession, as nearly as we can determine from the transcript, was withheld for the period of about 48½ days. The plaintiff, in his complaint, alleged that the value of the car was the sum of $2,500, and that the car had at all times and would continue to have a value on account of the use to which it might be put of the sum of $25 per day, and, upon trial of the action, was allowed the sum of $25 per day for the possible use of said car for the period of 40 days, to wit, $1,000. A retrial was granted upon the sole question of damages, and upon a second hearing the plaintiff was allowed compensation for the possible use of the car in the sum of $12.50 per day. It is contended on the part of appellant that there is no testimony supporting the judgment or warranting any finding on the part of the court of such value. Upon the question of value the transcript discloses the following testimony: 'In my opinion, the reasonable rental value, 8 hours, 100 miles a day, would be $20 a day, which would include a driver. The rate would not be less for an extended period of time. In renting this car at $20 a day, I pay for the oil and gas.' The witness Johnson testified as follows: 'A machine in reasonably good condition, of the model described by you, we get with drivers, about $20 a day, not exceeding 100 miles for 8 hours. Most of the drivers work on commission. That $20 includes the expense. Drivers get all the way from two to five dollars a day.' A witness named Cherry testified as follows: 'The kind of car you mention, the reasonable rental value a day, over and above the expense of operating it, would be $25.' And the witness Kemp testified in these words: 'The reasonable rental value of a car in good condition, of the model described by you, would be $20 or $25 a day, without a driver, but if I rented a car for from 30 to 40 days, I would be satisfied with $10 or $12.50 a day.' This is all the testimony to which our attention has been called to support the finding of the court as to the value of the possible use of the car. The testimony shows that, as a matter of fact, the car was not used. Section 3359 of the Civil Code provides that 'damages must, in all cases, be reasonable' and unless the damages allowed are shown to be such as approach actual, usable, or reasonable value of the article to the owner they have no support in this section. In the case of Mutch v. Long Beach Improvement Co., 47 Cal. App. 267, 190 P. 638, the rule for determining damages in such cases as this is very clearly set forth. It is there said: 'It is the net usable value less the expense of keeping up the property which may be recovered. In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself.' In that case the automobile was detained for a period of 86½ weeks. The damages allowed for such detention amounted to the sum of $1,297.50, or $15 per week. In that case the damages were held excessive. In the case at bar the damages allowed for the detention of the car amount to about the sum of $87.50 per week. Thus, if the car had been detained in this case for the same period of time that it was in the Mutch Case, the same calculation and allowance would have fixed the damages at $7,568. We give these figures for the purpose of illustrating the disproportion of the allowance to the real damages suffered. On the part of the defendant one witness testified that if he rented the car for from 30 to 40 days he would 'be tickled to death to get $10 or $12 a day.' Another witness testified that $10 would be the gross value of the car, which would yield 30 per cent. net as profit. It thus appears that there is no testimony showing the net yield or value of the car at any sum approaching 12.50 per day. The testimony on the part of the plaintiff did not show any sum as the net usable value of the car, and that on the part of the defendant was by one witness who stated, as just said, 30 per cent. of the gross value, which would yield about $3 per day. Thus, if applied to the case at bar, the car not being used, and the damages being for 48½ days, would entitle the plaintiff to damages in the sum of $145.50. We do not wish to be understood as fixing this sum as the usable value of the car which the plaintiff in this case is entitled to recover, but simply state that the only testimony in the case bearing upon the question of damages, based upon the rule laid down in Mutch v. Long Beach Improvement Co., supra, which the court was entitled to consider, shows damages only in that sum."

Applying the rule followed in the Mutch and Bonestell Cases, supra, the only testimony showing the net usable value of the car in question fixes the damages at $607.25. The respondent endeavors to distinguish the holding in the Mutch Case, supra, from the facts and circumstances here presented, by calling our attention to the fact that the sum of $203.15 was allowed for depreciation as well as damages for the detention. However, a

careful reading of the opinion in that case discloses that the reversal was not based upon that error alone. The value of the car in the Mutch Case was found by the jury to be the sum of $400. Damages for detention was fixed at the sum of $1,297.50 allowed as rental value. The court in referring to this matter said: "It must be apparent at once that there is something wrong with a scale of damages that allows three times as much for the detention of an article from the possession of the owner for a period of two years as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance." We might quote further, but this language shows that the court had in mind the great disparity between the value of the car and the rental value fixed by the jury. In that case, just as here, no attempt was made to fix the net usable value of the car.

In the case of Tucker v. Hagerty, 37 Cal. App. 789, 174 P. 908, 910, there is language in the opinion to the effect that: "There is nothing so startling in the fact that the rental value allowed by the court amounts to more than the value of the machine as to compel a reversal of the judgment." The record in that case discloses, however, that the defendant admitted the usable value of the particular car involved in that action to be the sum of $4 per day. The trial court allowed the sum of $5 a day, and then cut down the judgment to $4 a day, from which it follows that the question of excessive damages was not presented to the court for consideration. Nor would we be inclined to grant a reversal simply because the rental value, by which we mean the net rental value of the car, was shown to be in excess of the actual value of the car. We are simply calling attention to the fact that there is no testimony supporting the amount of the damages allowed in this case, and also to the fact, which we think to be the law, that there is something wrong, as stated in the Mutch Case, when the rental value of the car is held to be so greatly in excess of its actual value.

In Bunnell v. Baker, supra, the court in its opinion denying a rehearing, in considering the question of excessive damages where the value of the property was fixed at $10,000, and the amount allowed for detention, the sum of $15,000, said: "If this amount is not excessive, it is dangerously near being so. We do not think it necessary to decide this question, but we believe the case should be tried anew." The disproportion between the value of the car in the instant case and the amount of damages allowed for its detention is much greater than the disproportion between the value of the property and the amount allowed for damages in the Bunnell Case, which was held as being "dangerously near" excessive.

In the case of Nelson v. Yonge, 73 Cal. App. 704, 239 P. 67, the question as to the value of the car only was involved. No question was raised as to excessive damages. However, the value of the car being fixed at $1,000, and the damages for its detention at only $600, the case readily becomes distinguishable from the cases which we have cited and the one which we now have under review.

Likewise, in the case of Washington Lumber Co. v. McGuire (Cal. App.) 291 P. 458, no question of excessive damages was involved. It was stipulated in that case that the reasonable value of the use of the truck was the sum of $10. We may add the record shows that the truck was being used in the performance of a contract which doubtless led to the stipulation. At least this court felt bound by the stipulation.

In Stanley W. Smith, Inc., v. Pilgrim (Cal. App.) 3 P.(2d) 573, 574, in considering the question of usable value, the opinion refers to the instruction of the trial court, which was given in substance as follows: "The jury were instructed that if they should find for the defendant he would be entitled during the stipulated time of detention to compensation based upon its reasonable rental value, if any, deemed by the law as the net usable value less the expense of upkeep and maintenance;" and then added the following comment: "If such be the correct rule, the verdict rendered might legally have been approximately double the amount actually allowed and we would not be authorized to say as a matter of law that their estimate upon all the evidence was excessive." No instruction of that kind appears in the present case, nor is there any testimony showing the net usable value, to be at all commensurate with the amount allowed. It may be observed, however, that the court, in the case of Stanley W. Smith, Inc., v. Pilgrim, supra, quoted with approval the cases which we have already cited, and does not hold that damages may be allowed, unless supported by proper testimony.

The rule laid down in the Mutch Case, supra, is taken from the case of Armstrong & Latta v. City of Philadelphia, 249 Pa. 39, 94 A. 455, Ann. Cas. 1917B, 1082, where the authorities are carefully considered, and the damages for detention allowed in double the value of the property, held to be grossly excessive. The instructions in the instant case refer only to the rental value, and not to the net rental value, and should have been made more specific, but it does not appear that the appellant made any request therefor, and the failure of the instructions in this particular, under the circumstances, could not be held reversible error if the verdict found any proper support in the testimony.

[6, 7] It is further objected that the allowance of $1,500 as exemplary or punitive damages is excessive and not supported by the testimony.

The transcript shows that, in support of the claim for punitive damages, the record, in an action prosecuted by the defendant, the People's Finance & Thrift Company of Modesto, a Corporation, v. Booth Motor Co., a corporation, was introduced in testimony. It further shows that, although the Booth Motor Company filed an answer, it did not appear at the trial of the action, and that judgment was taken by default. The record also shows that an attachment suit was instituted by the defendant, the People's Finance & Thrift Company, a corporation, against the Booth Motor Company, in which about $100 of money belonging to the Booth Motor Company was attached, or, rather, garnished. This attachment was later released. There was no objection to the introduction of this testimony, but we do not very well see how this testimony supports any claim for punitive damages. The only testimony in the case relative to punitive damages, and which can bear upon that subject, is the manner in which the defendant Bertram took possession of the automobile involved in this action, and, as found by the jury, took possession prior to any default in the payment of the monthly installments which were held by the jury to have been paid by the two notes which we have heretofore mentioned, and which were claimed by the defendants to have been taken only for collection. The conduct of the defendant Bertram, however, subsequent to the taking of possession of the automobile, and his refusal to redeliver the same, and also his actions when the plaintiff sought to make settlement of the entire balance owing upon the contract of sale, does furnish some basis for holding that the defendant Bertram exhibited a malicious purpose. There does not appear to have been any oppression or outrage in the taking of the automobile, nor does there appear to have been any oppression in the detention of the same, or that any hardship was imposed upon the plaintiff, other than has been, or could be, compensated by the allowance of the net usable value of the automobile during the period of detention. Under such circumstances, the disparity between the actual damages sustained and the punitive damages allowed may be considered in determining whether the latter damages are excessive, and while, as said in the case hereafter cited, "there is no fixed rule as to the proportion between actual and exemplary damages in cases where exemplary damages are recoverable," it is nevertheless held that the exemplary damages must bear a reasonable proportion to the actual damages sustained.

While not commented upon, or made an issue in the case, the amount of punitive damages allowed in Bunnell v. Baker, supra, in the sum of $1,000, where the value of the trucks was found to be the sum of $10,000, is an illustration of some reasonable proportion between punitive and actual damages.

[8] While section 3294, Civil Code, provides for the allowance of punitive damages, the power of the court in relation thereto is the same as may be exercised in any case of excessive damages, even though it is true that a jury has somewhat wider discretion in awarding punitive than in fixing compensatory damages.

In Plotnik v. Rosenberg, 55 Cal. App. 408, 203 P. 438, 439, the District Court of Appeal, speaking through Presiding Justice Langdon, after reviewing a number of cases, uses the following language: "The cases in which courts have set aside such verdicts furnish some guide to the exercise of this power in the present case. A study of these cases reveals the fact that even in cases presenting evidence of extreme malice and aggravation, the verdicts permitted to stand do not represent an award of punitive damages so greatly in excess of the actual damages as in the present case." To be sure, the circumstances presented before the court, where this language is used, shows a much greater disparity of the punitive damages, to the actual damages awarded, than does the record in the instant case. Nevertheless, the disproportion is exceedingly great, and, excluding the testimony as to the litigation between the finance company and the Booth Motor Company, which does not furnish a basis for punitive damages against the defendant Bertram, but which undoubtedly was considered by the jury, there remains nothing showing any extreme malice or aggravation, though it does, to some extent, as we have heretofore stated, exhibit an unfriendly and malicious disposition on the part of Bertram, but nothing oppressive further than we have stated. Under such circumstances, and also in view of the fact that the jury, without any testimony whatever, allowed such extreme compensatory damages, the conclusion is unescapable that the punitive damages are likewise excessive.

[9] If the taking of the automobile, on the 13th of October, 1930, was prior to any default on the part of the plaintiff, and the jury, by its verdict, so held, all questions as to whether the plaintiff did or did not make a valid tender to the defendants of the remainder owing upon the sales contract becomes wholly immaterial, but, the taking being held wrongful, the refusal of the defendants to accept payment of the remainder of the purchase price of the automobile furnishes some basis for supporting the verdict of punitive damages, even though it may be slight.

Following the rule laid down in the case of Wilkinson v. Singh, 93 Cal. App. 337, 269 P. 705, where the punitive damages allowed were held excessive, we have come to the fol-

lowing conclusion: First, that the judgment of the trial court awarding the plaintiff $650 as the value of the automobile, is affirmed; Second, that the judgment awarding the plaintiff punitive damages, and also awarding the plaintiff compensatory damages, is reversed, and the cause remanded for a new trial as to these two issues, unless the respondent shall, within twenty days from the date of filing this opinion, file in this court a remittitur of all compensatory damages in excess of the sum of $607.25, and also for all sums awarded as punitive damages in excess of the sum of $500, and, if such remittitur be filed, the judgment herein shall be ordered modified in accordance herewith, and, as so modified, affirmed. If the remittitur is so filed, respondent will be awarded costs.

And it appearing that respondent has filed in this court, on the 15th day of June, 1932, a remittitur of all compensatory damages in excess of the sum of $607.25, and also of all sums awarded as punitive damages in excess of the sum of $500, the judgment, as modified in accordance therewith, and as so modified, is affirmed. Respondent is awarded costs.

We concur: R. L. THOMPSON, J.; PARKER, Justice pro tem.

124 Cal.App. 128

RASEY v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 4562.

District Court of Appeal, Third District, California.

June 7, 1932.

Mortgages ⇐529(5).

That court allowed commissioner on mortgage foreclosure sale $66.95 costs in excess of amount that should have been allowed *held* not to require vacation of sale of property for $23,578.68.

Allowance of excessive cost to commissioner on foreclosure sale was not ground for setting aside sale, since there was no showing that the mortgagor or her administratrix had been injured, or that the excessive costs could not have been recovered in a law action against the commissioner, or by calling trial court's attention thereto when proceedings were being had.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Laura Violet Rasey, administratrix of the estate of Rose Julia Rasey, deceased, against the Security First National Bank of Los Angeles and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Brooks Gifford and William E. Fox, both of Pasadena, for respondents.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of the court.

Plaintiff instituted this action to vacate and set aside a sale, certificate of sale, and deed made by the commissioner under a decree of foreclosure and sale made of a certain mortgage wherein Rose Julia Rasey, deceased, had mortgaged certain premises to secure the payment of a promissory note in the sum of $18,000, and interest thereon, which, at the time of foreclosure, aggregated a sum between $23,000 and $24,000. To this complaint the respondents interposed a demurrer which was sustained without leave to amend, and, from the judgment entered thereafter, this appeal is prosecuted.

The record shows that the property covered by the mortgage was sold to satisfy a judgment in the sum of $23,572.68. Of this amount it is alleged in the complaint that costs in the sum of $66.95 were allowed that should not have been allowed. It appears that the property in question under the foreclosure was advertised twice, and that one of the advertisements cost the sum of $37.50: that the commissioner, while being allowed only the sum of $10, added the expense of the extra advertising and other items, which amounted to the said sum of $66.95, in excess of the costs that should have been allowed the commissioner for making sale. The sale made by the commissioner took place on the 13th day of November, 1928. The complaint in this action was filed on the 4th day of February, 1930, approximately fifteen months after the date of sale. There is no showing in the complaint that either the plaintiff in this action or the deceased, Rose Julia Rasey, ever sought to redeem the property from the foreclosure sale. No attempt was made to arrest the sale; no attempt to set aside the sale until long after the period of redemption had passed; and not until after the property had been conveyed by the purchaser at the foreclosure sale. No offer was made in this action to pay the amount due, and there is no showing whatever that the plaintiff is able or can pay the amount due on the mortgage.

If it be conceded that the costs and charges allowed the commissioner were in excess in the sum of $66.95 above what should have been allowed, there is no showing that the plaintiff has been injured thereby, or that said sum of money could not have been recovered by a simple action at law against the commissioner. We may further state that the complaint is entirely silent as to whether any offer was ever made to redeem the property from the foreclosure sale by tendering the amount due on the mortgage, less the sum of $66.95, or any other sum.

There is no allegation in the complaint that the foreclosure sale was not legally or fairly conducted. The only complaint is that the court allowed the commissioner costs in the sum which we have stated, in excess of the amount that should have been allowed.

This case is almost identical with the circumstances disclosed in the case of Barry v. Slattery (Cal. App.) 7 P.(2d) 363, where the question of excessive costs allowed a commissioner upon foreclosure sale was presented to this court for consideration. In the Barry Case it was alleged that the commissioner was allowed and collected the sum of $10 in excess of what would have been the legal fees and expenses, and that the property was sold for $34,963.81. Here the property was sold for the sum of $23,578.68. In the Barry Case the property was alleged to have a market value of $70,000. In the instant case the property is alleged to have a market value of $80,000. In this case, just as in the Barry Case, there is no showing of any injury to the plaintiff by reason of any claimed irregularity in the sale, or that the property was not sold in all respects according to law, and to the highest bidder. Nor is there any showing, as we have said, that the small item of excessive costs could not have been recovered by an action against the commissioner, or by calling the trial court's attention thereto when the proceedings were being had. What was said by this court, speaking through Mr. Justice pro tempore Parker in the Barry Case, supra, is applicable here, and, basing our conclusions thereon, and adopting what was said in the opinion in that case as the reasons for our conclusions here, we must hold that this appeal, like the appeal in the Barry Case, is wholly without merit.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PARKER, Justice pro tem.

124 Cal.App. 200

MARTIN v. DIAZ et ux.

Civ. 8396.

District Court of Appeal, First District, Division 2, California.

June 9, 1932.

1. Trusts ⇐96.

Constructive trust may arise out of fraud upon repudiation by trustee of parol trust made when he acquired title (Civ. Code, § 2224).

2. Trusts ⇐110.

Evidence *held* insufficient to establish parol trust at time alleged trustee acquired title, within rule that constructive trust arises out of fraud upon repudiation of parol trust (Civ. Code, § 2224).

Plaintiff and defendant are sister and brother, respectively. Their father, before his death, conveyed certain realty to the defendant, which conveyance, plaintiff contended, was upon the express understanding and agreement that defendant would hold the same in trust for his father during his lifetime, and upon the death of his father, he would hold one-half of the realty as his own absolutely, and would deed the other one-half to the plaintiff.

3. Appeal and error ⇐169.

Generally, issue not presented by pleading cannot be considered upon appeal.

4. Appeal and error ⇐173(2).

In action to establish constructive trust in realty, issue and theory that letter from defendant to plaintiff constituted declaration of trust cannot be presented for first time on appeal (Civ. Code, § 852, subd. 1).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Marianna Martin against Jos T. Diaz and wife. Judgment for the defendants, and the plaintiff appeals.

Affirmed.

H. A. Blanchard and Andrew M. Scorsur, both of San Jose, for appellant.

E. H. Christian and E. S. Leslie, both of Oakland, for respondents.

TUTTLE, Justice pro tem.

This is an action to establish a trust in real property. Judgment went for defendants, and this appeal is taken therefrom.

Some forty years ago F. R. Diaz purchased several acres of land near Hayward, Alameda county. He planted some fruit trees thereon, erected a dwelling, and continued to live there until his death on December 11, 1919. He had two children, Marianna Martin, plaintiff herein, and Jos. T. Diaz, one of the defendants, who survived him and were his sole heirs at law. When the son became twenty years of age, he worked in the nursery owned by his father. The latter took all his wages, and the son took care of him. In 1903 the son married, but continued to live at the family home. The daughter married, and went elsewhere to live. Her relations with her father were always pleasant, and he visited her at San Jose, and she visited him at Hayward.

On October 26, 1912, the father executed a deed to the home place to his son. The consideration was $10. A life estate, together

with all rents and profits, were reserved to the grantor. As related by the son, the circumstances surrounding the delivery of this deed were as follows: "My father gave me this deed about two months after he had it made. I then put it in the trunk. We always keep the same trunk, my wife and I. My wife told me about it, and my father went and got it, and showed it to me. He showed it to me a month or two after it was made. He asked me if I thought it was right. I told him he could do as he pleased about it. I told him he did right. He put the deed back in the trunk. I told him it ought to be away in a safe deposit on account of fire. He said 'You can have it record if you want to.' I kept it in the house a day or two and then I recorded it, through the bank in Hayward, I asked them to record it. At the time father gave me this deed, or, before that, he stated to me what I should give to my sister, Marianna Martin, the plaintiff. He said: 'Give her $500.00, and she to help pay half of the funeral expenses.' That is what he said at that time." The day of the funeral he offered to pay his sister $500, but she refused to accept it. Prior to March, 1914, the sister visited the home of her father and had a conversation with him in relation to this deed which he had made to her brother. She looked for the deed in the trunk, but could not find it. It was recorded on March 30, 1914.

On November 19, 1917, defendant Jos. T. Diaz wrote the following letter to his sister:

"Hayward, Alameda Co., Cal., Nov. 19, 1917.

"Dear Sister:

"Father is getting pretty weak. I know one to call on but you to help him in the last of is days, he has a short time to live in this world and he leaves us enough to pay for is trouble. I should think you and I should look after him, he has been laid up for a week and he is not getting the right treatment he got to wait untill I get home at night to do something for him its rather hard to see the way he is living and I can't be home to take care of him I am working out because we need the money and soon will start on the trees I havent any time to look after him to give him is meals he is getting pritty old and feebel and gets does spells often we got to do something we cant expect the strangers to look after him he as deed the place to me so we wouldent spend any money after he is dead and made a will for your share you needent be afraid you be left with out nothing and he got 200 dollars in the Bank for is funeral I am willing to do whats right We both got to look after him I hope you will take this in consideration and do what you can for him he as done all he could for us when we were small he had done all a father could do he had enough trouble when he was younger and work hard for us both now he needs our help he is over 80 years old and I know he won't live many more and I will try and do all I can for him in is last days he has been always in my company and I always tried to do the best I could for him I hope you will consider and try to do your best a woman can do better than a man he is failing away quick something got to be done I dont expet Louisa to treat him like she would treat her father and I would do the same. I cant explain you unless we see each other. Please try and do something for father.

"Your Brother J. T. Dias."

Turning to the complaint, we find the salient portions thereof to read as follows: "That the said F. R. Diaz, in his lifetime, reposed great faith and confidence in his said son Jos. T. Diaz, the defendant above named, and believing that he would faithfully execute the trust created in him, made, executed and delivered on or about October 26th, 1912, a deed of said property to said defendant Jos. T. Diaz, upon the express understanding and agreement that he would hold the same in trust for said F. R. Diaz during his lifetime, and that upon his death he would hold one-half of said property conveyed by said decedent absolutely as his own property, and would deed the other one-half to Marianna Martin, this plaintiff, a daughter of said decedent; and said defendant Jos. T. Diaz accepted said deed to hold in trust as aforesaid, and without having paid any consideration therefor. That said deed was duly recorded in Book 2239 of Deeds, page 180, in the office of the County Recorder of the County of Alameda, State of California, on March 30th, 1914, the record of which deed is hereby referred to and made a part hereof. That by reason of the confidential relations which said F. R. Diaz had with his said son, said defendant herein, Jos. T. Diaz, and the influence which the said defendant had over him, and by reason of the great faith and confidence reposed in him by said F. R. Diaz, deceased, he made, executed and delivered the deed as aforesaid."

It is further alleged that plaintiff demanded of defendant Jos. T. Diaz that he convey one-half interest in said property to her, but that defendant refused to do so "and persists in his betrayal of the confidence which said F. R. Diaz, deceased, reposed in him in his lifetime, and in violation of said trust, by refusing to make said conveyance."

It is prayed that the court decree that the property was deeded to defendant Jos. T. Diaz under the express understanding and agreement that said defendant was to hold it in trust for said F. R. Diaz while he lived, and after his death that he should hold one-half absolutely, and should convey the other one-half to the plaintiff herein, and that thereby a constructive trust was created. There is also a prayer for general relief.

The trial court found against plaintiff up-

on all the foregoing allegations, and judgment was entered in favor of defendants.

[1, 2] From the allegations of the complaint it is quite clear that plaintiff is seeking to impose upon defendant Jos. T. Diaz a constructive (or, as it is sometimes termed, involuntary) trust, which arises out of the fraud upon the repudiation by the trustee of the parol trust made when he acquired the title. Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Civ. Code, § 2224. The foregoing rule is, of course, only applicable when a parol trust has been established. Here the court found that no trust was proven, and there was sufficient evidence to support the finding. It is unnecessary, therefore, to pursue this question any further.

[3, 4] Having failed at the trial to prove the allegations of her complaint, plaintiff now takes the position that the letter from the son to plaintiff is in itself a declaration of trust, under the provisions of Civ. Code, § 852, subd. 1, and the construction placed thereon by the Supreme Court in the cases of Lynch v. Rooney, 112 Cal. 279, 44 P. 565, and Noble v. Learned, 153 Cal. 251, 94 P. 1047. It is true, as those cases hold, that one who owns real property may, while retaining the legal title, so deal with it as to make himself a trustee for the benefit of another. It nowhere appears in the record, however, that this contention was ever made at the trial. There is no suggestion of it. This theory of recovery was not presented in the pleadings. We assume, therefore, that the letter was introduced to impeach the testimony of defendant Jos. T. Diaz, upon the issue as to whether or not the father intended to create a trust when he executed his deed. As a general rule, an issue not presented by the pleadings cannot be considered upon appeal. Conway v. Citrus Belt Land Co., 94 Cal. App. 533, 271 P. 525. For instance, wherein an action for the specific performance of an alleged oral contract to devise real property, the pleadings and proof are based upon the theory that a contract was made, the theory of a resulting trust in the property cannot be advanced for the first time on appeal. Blanc v. Connor, 167 Cal. 719, 141 P. 217. We might add, however, that in our opinion this letter fails to clearly denote the intention to relinquish the beneficial interest of Jos. T. Diaz in the property in præsenti, and to hold it for the benefit of plaintiff, according to the rule laid down in the case of Noble v. Learned, supra.

Summing up the situation, plaintiff sought to establish a constructive trust arising out of the repudiation of an agreement to hold the real property in trust. Upon sufficient evidence, the trial court found that no such agreement was ever made, and further inquiry upon that issue is foreclosed. Upon appeal, plaintiff seeks for the first time to establish a trust arising out of a letter written by defendant Jos. T. Diaz to her. This issue and theory was not presented in the pleadings or proof. Under such circumstances, it is the rule that an appellant is not entitled to urge the point here.

It is contended that in any event plaintiff is entitled to a judgment for $300. Presumably this is the balance left of the $500 mentioned in the letter, after expenses had been deducted. Defendant Jos. T. Diaz testified that upon the day of the father's funeral, he offered to pay plaintiff $500 if she would pay the funeral expenses, and that she would not listen to him. She stated to him that she did not want the $500, but that she did want the land, as it was worth more. Plaintiff testified that upon the day her father died, her brother stated that the place was deeded to him, and that her share was $500. She replied: "I will not—you won't slip that up on me. He left no money, I know, only $200.00 in the bank for a good many years, and I want the piece of land he left me." At the trial the court stated that permission would be granted to plaintiff to amend her complaint in respect to recovery of this $300, but she refused to do so. No personal property was mentioned in the pleadings. We believe that plaintiff, by her acts and conduct as indicated, has placed herself in a position where she should not now be heard to complain in respect to this matter. We do not feel disposed to disturb the judgment under such circumstances.

Several other points are raised by appellant. We have carefully considered them, but find they are devoid of merit.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

124 Cal.App. 198

KALTENBERGER v. ALEXANDER HOTEL CO. et al. (ASSOCIATED INDEMNITY CORPORATION, Intervener).

Civ. 7103.

District Court of Appeal, Second District, Division 2, California.

June 9, 1932.

1. Appeal and error ⇐756.

Appellate court rule that briefs must present each point separately under appropriate heading, showing nature of question presented, refers to legal questions (District Court of Appeal Rule VIII).

2. Appeal and error ⇐756.

Appellant's brief, stating below heading "Statement of Facts" that appeal was based

on erroneous instructions and setting forth parts of instructions objected to in type of general text below headings from "A" to "P," inclusive, *held* insufficient (District Court of Appeal Rule VIII).

3. Appeal and error ⇐766.

Violation of court rule that briefs must present each point separately under appropriate heading showing nature of question presented *held* to require dismissal of appeal (District Court of Appeal Rule VIII).

4. Appeal and error ⇐756.

Missing headings in brief cannot be supplied or other violations of court rule rectified after case is placed on appellate court calendar (District Court of Appeal Rule VIII).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Frank Kaltenberger against the Alexander Hotel Company and others, in which the Associated Indemnity Corporation intervened. Judgment for defendants, and plaintiff appeals.

Appeal dismissed.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent Alexander Hotel Co.

Syril S. Tipton, of Los Angeles, for intervener.

WORKS, P. J.

[1] One of the provisions of rule VIII of the rules of this court reads: "The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented." We interpret the latter clause of this portion of the rule to refer to legal questions, for our courts of review deal only, on appeal, with questions of that nature.

[2] There is not one heading in the opening brief of appellant in the present case—and there is no reply brief—which states any "question to be presented on the appeal." A small portion of the brief is headed, "Statement of Facts," and below the heading we are informed that the appeal is based upon the ground that the instructions are inconsistent and erroneous. The remainder of the brief is split into parts, each of which is headed merely by a letter of the alphabet, in capitals. These run from "A" to "P," inclusive. The matter following next after "A" is fairly representative of that coming after the other letters. That matter is now set forth: "The first instruction that appellant objects to is that part of the instruction on page 321 of the Reporter's Transcript, beginning at line 20, reading as follows," the "part" referred to then being set forth. This matter below "A" is in the type of the general text of the brief. In appearance it is no part of the heading, and even if, by a stretch of the imagination, it were to be so considered, it fails to state upon what legal ground appellant objects. In short, to repeat, it states no "question to be presented."

[3] Immediately below the language already quoted from rule VIII the following occurs: "For a failure to observe this rule the court may, of its own motion, * * * strike out the brief, or, for the failure of the appellant, dismiss the appeal."

Appellant in the present case shows us a flagrant violation of the rule as to headings, and he must suffer the extreme penalty. The frequency with which this and other parts of rule VIII are infringed still continues tiresome to the court. The rule is a just, although a severe, one, and it is designed, among other attempts which have been made in the last few years, to speed the administration of justice. It became effective in September of 1928, nearly four years ago, but this court, for a considerable portion of the period and because many members of the profession seem to be under a disability to study rules of court, has been lax in the enforcement of it. A year ago, or thereabouts, we rendered several opinions which plainly exhibited an intention to enforce the rule vigorously, for the reason that the profession had been allowed ample time to become familiar with its provisions. The infractions of the rule are even now far too frequent. As these words are being written, another justice of the court is doing the same kind of labor in another case.

It is to be hoped that the members of the profession will understand and pass the word among themselves, that in these matters there is to be no mere swishing of the birch, but a sturdy application of it.

[4] As to briefs now on file in other cases, the court will gladly entertain applications for leave to supply missing headings by interlineation or otherwise, and to rectify violations of other portions of rule VIII, before such cases are placed on calendar. After that event, the day of redemption is past.

Appeal dismissed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

124 Cal.App. 263

TOLLE et al. v. STRUVE et al.

Civ. 8490.

District Court of Appeal, First District, Division 1, California.

June 13, 1932.

1. Action ⇐6.

Action for declaratory relief in respect to validity of lease and sublease was maintainable, though involving and depending on determination of fact question (Code Civ. Proc. § 1060).

2. Action ⇐6.

Action for declaratory relief in respect to validity of lease and sublease was maintainable, regardless of whether attempt to terminate lease gave rise to cause of action for remedial relief (Code Civ. Proc. § 1060).

3. Landlord and tenant ⇐110(1).

Abandonment by sublessee could not terminate lease, unless landlord elected to treat it as terminated.

4. Action ⇐6.

Judgment for accrued rent *held* properly rendered in action for declaratory relief in respect to validity of lease and sublease (Code Civ. Proc. § 1060).

5. Action ⇐6.

Complaint in action for declaratory relief in respect to validity of lease and sublease *held* to state cause of action as alleging existence of actual controversy (Code Civ. Proc. § 1060).

Complaint showed that certain sublessee became obligated to original lessees on sublease, and, having succeeded to interests of other sublessees, undertook to cancel sublease because of alleged deteriorated condition of building and that original lessees refused to acquiesce in cancellation, with further showing that original lessees undertook to cancel basic lease, and that certain other sublessees refused to acquiesce in cancellation, claiming that original lessees had no right to terminate lease, thereby alleging actual controversies of two aspects intimately connected.

6. Action ⇐6.

Statute authorizing declaratory relief should be construed with reasonable liberality (Code Civ. Proc. § 1060).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by F. H. Tolle and others against R. E. Struve, Helen G. Sutton, and others, wherein defendant last named filed a cross-complaint. From the judgment, defendant last named appeals.

Affirmed.

Rush & Beirne, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondents.

DOOLING, Justice pro tem.

This is an appeal upon the judgment roll alone by defendant and cross-complainant Helen G. Sutton from a judgment entered in an action for declaratory relief under section 1060 of the Code of Civil Procedure.

It appears from the findings that defendants R. E. Struve and Autumn Struve, husband and wife, being the owners of certain real property in the town of Carlsbad, San Diego county, entered into a written lease whereby they let to the plaintiffs, twenty-two in number, said real property for a period of ten years at $250 per month and agreed to construct thereon a building for use as a theater and stores. While the building was under construction, the twenty-two plaintiffs sublet the property to defendant Clark at the same rental and for substantially the same term. Defendant Clark, upon completion of the building, entered into possession. Subsequently Clark entered into a partnership in the lease with defendant Atkison, and Atkison transferred his interest to defendant Lewis, who in turn transferred to appellant Helen G. Sutton. In like manner Clark transferred his remaining interest to defendant Sonneman, and Sonneman transferred to appellant. Thus, since on or about April 11, 1928, appellant Helen G. Sutton has been the owner of the furnishings and equipment and the successor to Clark in the sublease from plaintiffs to Clark. The court found that appellant had assumed the obligations of this sublease. In the meantime the defendants Struve, the original owners and lessors, had transferred their interest to the defendants Lavery and Gustin.

In July, 1929, appellant Helen G. Sutton, claiming that by reason of faulty construction and deterioration of the building it was rendered unfit for theater purposes, attempted to terminate her tenancy therein and any liability that she might be under by reason of either the original lease or the sublease. Plaintiffs in turn attempted to terminate their liability under the original lease on the same grounds, but defendants Lavery and Gustin insisted upon their continued performance.

This action was then brought by the twenty-two plaintiffs, the original lessees, against the Struves, Lavery, and Gustin, and the appellant Sutton and all the intermediate sublessees, and in the complaint and an amendment thereto plaintiffs set out the facts substantially as above recited, and asked for declaratory relief against the defendants, determining whether the lease and sublease were valid and subsisting, whether there was

any legal ground for the cancellation of either, and the respective rights, duties, and obligations thereunder of all parties to the action.

Appellant, after a demurrer interposed by her to the complaint had been overruled, answered and filed a cross-complaint. By her cross-complaint she sought declaratory relief decreeing that she had attorned directly to Lavery and Gustin, and that no relation of landlord and tenant had ever existed between her and plaintiffs, that she had never assumed the obligations of either the lease or sublease, but was a tenant of Lavery and Gustin from month to month, alleging certain defects in the construction of the building and deterioration thereof, and asking that it be adjudged that she was under no further obligation to any of the parties.

Defendants Struve, Lavery, and Gustin by cross-complaint sought declaratory relief construing the original lease and the reformation thereof in a certain particular, and asked judgment in favor of Lavery and Gustin for the rental accrued and unpaid thereunder.

The court after a trial made elaborate findings construing both leases, denying the prayed reformation, defining the rights of all parties under both leases, determining that appellant had assumed the obligations of the sublease, and that those obligations were still subsisting and binding upon appellant; that Sonneman and Clark were still bound by the terms of the sublease; and awarding judgment to Gustin against plaintiffs for the past-due rents under the original lease. Appellant Helen G. Sutton was the only one to appeal from the judgment entered pursuant to the findings.

By demurrer to the original complaint and by motion to dismiss at the close of the trial, appellant presented certain objections which she now urges as grounds of reversal.

[1] She first argues that the provisions of section 1060, Code of Civil Procedure, are not broad enough in scope to permit the trial of an issue of fact in an action for declaratory relief, and that, since the rights of the parties are dependent upon a question of fact, the claimed defects in construction of and deterioration in the building, and the extent, character, and effect thereof, the trial court was without jurisdiction. This argument is supported by an elaborate analysis of the terms of section 1060 and the other sections of the Code of Civil Procedure relating to declaratory relief, and extensive citation and discussion of opinions from other states and Great Britain construing the provisions of their various declaratory relief statutes. We do not feel called upon to follow appellant into the field of foreign legislation and decision on this point, nor to engage in an analysis of the provisions of our own declaratory relief statute, for the reason that we consider this question to be definitely foreclosed by the decision of our own Supreme Court in Hess v. Country Club Park, 2 P.(2d) 782. In that case the plaintiff, who held certain real property under a deed containing certain restrictive provisions, sought and secured declaratory relief adjudging that, by reason of the change in condition and character of the neighborhood, it was no longer suitable for residence purposes, and hence the restrictions were no longer binding or enforceable. The sole question involved in that proceeding was dependent upon the determination of a question of fact, the change in character, and use of property in the neighborhood involved. In affirming the judgment, the court said at page 783 of 2 P.(2d):

"The pleadings in this case present a practical situation which calls for declaratory relief. The owner of a lot in a tract of land claims that certain restrictive covenants and conditions are no longer enforceable because of a change in the character of the neighborhood. The original grantor and the owners of other lots in the tract claim, on the contrary, that the covenants and conditions are still enforceable, that they constitute easements upon the lot in question, and that their violation will be ground for injunctive relief and the forfeiture of the lot owner's title. If the lot owner can obtain a declaration in his favor, he may safely proceed to improve his property as he wishes. If such a declaration is refused, he is put in the hazardous position of being obliged to violate the terms of the restrictions before he can know whether or not he must suffer the penalties mentioned. It is inconceivable that he must run the risk of forfeiting any further investment, or even his title to the land, in order to obtain an adjudication of his rights. *It seems clear that the declaratory relief statute was intended to relieve a party from exactly such a dilemma. Unless it can be availed of in a situation such as this, it will lose a large part of the value which, upon its enactment was supposed to attach to it.*" (Italics ours.)

Unless the Supreme Court sees fit to recede from the position taken in this case, which seems entirely improbable, it can be no objection to a proceeding for declaratory relief that it involves and depends upon the determination of a question of fact.

[2] Appellant asserts further that, if her attempt to terminate her obligations under the leases constituted a breach of legal duty, it was one which gave rise to a cause of action for remedial relief against her, and, that being so, there was no longer any room or occasion for the invocation of the statute authorizing declaratory relief. The statute itself seems to afford a complete answer, providing as it does (Code Civ. Proc. § 1060):

"He [the plaintiff] may ask for a declaration of rights or duties, either alone or *with other relief*. * * *" (Italics ours.) We can conceive of no meaning to be attributed to the italicized language unless the statute contemplates the giving of declaratory relief as well after a breach of legal duty as before. This conclusion is strengthened by the additional language of the section that "the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time." The concluding sentence of the section further bears this out: "Such declaration *may* be had before there has been any breach of the obligation in respect to which said declaration is sought." (Italics ours.) The use of the word "may" is permissive, not mandatory. It serves to make clear what the Legislature feared might otherwise be obscure, in view of the fact that historically nearly all relief by way of judgment in common-law courts had been limited to redress for completed wrongs, that this statute contemplated declaratory relief, regardless of whether there had been an actual breach of obligation or not. It does not limit the right to such relief to cases where no breach has in fact occurred.

Appellant assumes the position, as stated in her closing brief: "That the declaratory judgment nowhere empowers a court to pronounce a judgment purporting to revoke the action of the parties in breaching a contract. When by a breach or abandonment or repudiation of an obligation certain legal rights and duties of others have become fixed under the law as it then exists, the court cannot restore the parties to a status quo ante and from that vantage point then proceed to declare their rights."

[3] In this statement appellant mistakes the effect of her repudiation of the lease. No abandonment by her can terminate the lease, unless her landlords elect to treat it as terminated. In spite of the repudiation by the tenant, the landlord may stand upon his lease and sue for each installment of rent as it falls due. Phillips-Hollman, Inc., v. Peerless Stages, 210 Cal. 253, 258, 291 P. 178; Bradbury v. Higginson, 162 Cal. 602, 604, 123 P. 797; Strei v. Brooks, 95 Cal. App. 589, 594. 273 P. 145. It thus becomes apparent that the case was a very proper one for the determination of the rights of the parties by a declaratory judgment. Both leases had several years to run. The right to recover future installments of rent under both leases depended upon the question whether the condition of the building justified appellant in terminating the lease under which she held. So far as those future rights were dependent upon that question, they could be, and were, determined for all parties by the judgment in this action.

[4] Appellant attacks the allowance of a judgment in favor of Gustin against plaintiffs for accrued rent. It falls well within the provision of the section allowing "a declaration of rights or duties, either alone or *with other relief*." (Italics ours.)

[5] Finally appellant claims that the complaint failed to state a cause of action for declaratory relief because it does not contain any allegations showing the existence of an "actual controversy" between the parties. In this connection appellant says in her opening brief:

"Now we assert that the plaintiffs' bill of complaint in this action nowhere states *what their contention is* in the premises, nor does it state what the countercontention of the defendants is. In other words, the bill does not offer an issue, and, of course, where no issue is offered none can be made. And where there is no distinct and definite issue made by the pleadings, how can the court render a judgment that shall be pleadable as res judicata? Yet that characteristic of the judgment in a declaratory suit, the characteristic of its being res judicata, is the one and only reason for the judgment. * * *"

It might be pertinently inquired, if the judgment is not res judicata as to the matters therein determined, why appellant is so anxious to have it reversed. As a matter of fact, the complaint stated so much of "actual controversy" that many of its allegations were denied by the various parties, and the issues tendered by the complaint and the cross-complaints took eight days to try. However, this particular point was so satisfactorily disposed of in the written opinion prepared by the Hon. Chas. C. Haines who tried the case in the court below that we adopt the following portion of that opinion as a part of the opinion of this court:

"In my judgment, therefore, the questions whether declaratory relief can and ought to be awarded in this case depend for their solution on the inquiry whether an actual controversy has been made to appear 'relating,' to use the language of the statute, 'to the legal rights and duties of the respective parties.' It is claimed that the pleadings here fail to disclose such a controversy actually existent, that the plaintiffs 'do not come into court with a claim of rights "manifested by appropriate averments,"' moreover, that they do not allege 'by appropriate averments' a 'contradictory claim of rights in someone else,' and that, in consequence, they have 'tendered no issue of any kind, legal or factual.' I do not believe a pleading fatally defective which states facts from which it is manifest that there is such a controversy, though the pleading does not label it a controversy, or say, in so many words that, as to a given issue of law, one party has thrown

down the gauntlet. But, however that may be, it does appear, from the complaint, that the defendants, Clark, Sonneman, and Sutton became obligated to the plaintiffs upon the sublease; that, having succeeded to the interests of the rest, the Suttons undertook, under claim of right based on the alleged condition of the building, to cancel the sublease, and refuse to pay rentals thereunder and claim no longer to be bound thereby, and that the plaintiffs refuse to acquiesce in such cancellation. This, I think, is tantamount to saying that the plaintiffs dispute the legal right of the Suttons to do what they have undertaken to do. It further appears from the complaint that the plaintiffs, under claim of right based on the alleged condition of the building and the alleged failure of their lessors to properly maintain it, undertook to cancel the basic lease, and that Mrs. Lavery and Gustin refused to acquiesce in that cancellation, and claim that the plaintiffs had no right to terminate the lease. It cannot be gainsaid, therefore, that the complaint shows an actual controversy between the plaintiffs and Mrs. Lavery and Gustin, and that the two controversies are very intimately connected together. The complaint, therefore, does show on its face that there are 'actual controversies relating to the legal rights and duties of the respective parties.'"

[6] We are satisfied that appellant is arguing for too narrow a construction of our declaratory relief statute, and one which, if adopted, would seriously impair a statute which has already proved, and should hereafter increasingly prove, a valuable enlargement of the judicial power of our courts. It was a defect of the judicial procedure which developed under the common law that the doors of the courts were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed upon a party who did not wish to violate the rights of another nor to have his own rights violated, thus compelling him, where a controversy arose with his fellow, to run the risk of a violation of his fellow's rights or to wait until the anticipated wrong had been done to himself before an adjudication of their differences could be obtained. Thus was a penalty placed upon the party who wished to act lawfully and in good faith which the statute providing for declaratory relief has gone far to remove. We feel that the courts should construe the statute with reasonable liberality so that, in the language quoted, supra, from Hess v. Country Club Park, it may not "lose a large part of the value which, upon its enactment was supposed to attach to it."

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 212

PEOPLE v. BONILLA.

Cr. 66.

District Court of Appeal, Fourth District, California.

June 9, 1932.

1. Burglary ⇐41(1).

Evidence *held* to sustain conviction of second degree burglary committed by burglarizing tire shop.

2. Criminal law ⇐1159(2).

Where there is any substantial evidence tending to sustain verdict, verdict is conclusive on appeal.

3. Burglary ⇐16.

One deciding, with others, to burglarize shop and, though not participating in actual burglary, hauling loot away in his truck, *held* liable to prosecution as "principal" (Pen. Code, §§ 31, 971).

[Ed. Note.—For other definitions of "Principal," see Words and Phrases.]

4. Criminal law ⇐517(4).

In burglary prosecution, testimony that service station had been broken into and merchandise stolen established corpus delicti so as to authorize introduction of defendant's admission or confession.

5. Criminal law ⇐563.

"Corpus delicti" embraces certain facts forming basis of offense and existence of criminal agency as cause of them.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words and Phrases.]

6. Criminal law ⇐563.

In establishing corpus delicti, it is unnecessary to prove that crime was committed by person charged therewith.

7. Criminal law ⇐511(2).

In burglary prosecution, testimony of admitted accomplice *held* sufficient to connect defendant with actual commission of the crime.

8. Criminal law ⇐508(9).

Testimony of accomplice is sufficient to prove corpus delicti.

9. Criminal law ⇐511(7).

Testimony of accomplice is sufficient to warrant conviction, where corroborated by admission or confession of defendant.

10. Criminal law ⇐371(6).

In burglary prosecution, admitting evidence as to prior burglary and conversation as to subsequent contemplated burglary, to rebut defendant's showing of lack of intent, *held* proper.

Admitting such evidence was proper, where it appeared that defendant admitted driving truck to scene of service sta-

tion burglary and returning to his home with stolen tires, but claimed that he had been hired by another to haul tires for him, and that he did not know until following day that service station had been entered or that tires were stolen.

11. Criminal law ⇐370, 371(1).

Evidence of other crimes is admissible if tending to establish intent or guilty knowledge, especially where defendant denies such intent or knowledge.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Joe Bonilla was convicted of burglary in the second degree, and he appeals.

Affirmed.

A. Perry Harris, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SCOVEL, Justice pro tem.

The information in this case charged the defendant with burglary, alleging that he willfully and unlawfully entered a shop known as Cornwell's Tire Service, on the Corona-Elsinore road in Riverside county, with intent then and there and therein to commit the crime of larceny. Two other counts set forth in the information were dismissed prior to trial and are not involved in this appeal.

The evidence produced on behalf of the prosecution discloses that Thomas G. Cornwell was the owner of a service station and tire shop near Elsinore in Riverside county. He locked the doors and windows of his place of business about midnight on June 16, 1931. Upon returning the following morning he found a window broken, that the front windows had been unlocked and propped open, and that about $400 worth of tires had been taken.

One Joe Johnson, an admitted accomplice, testified, after the establishing of the foregoing facts, that he had met the defendant in Corona in Riverside county several days prior to the burglary of the service station and that they had talked of "knocking over a job." Present at this conversation, and later an accomplice of Johnson and defendant in the service station burglary, was one Dan Delaney. The defendant agreed to help Delaney and Johnson, and that evening the latter two burglarized a dry goods store in Corona. The defendant was not present, but the stolen goods were taken to his home in five suitcases and were carried by him to Los Angeles in his truck. Of the fruits of this burglary defendant received one suitcase of clothes.

Johnson further testified that approximately two weeks later he and Delaney returned to Corona and in riding around the vicinity they "spotted" the Cornwell service station, and after meeting the defendant the three of them decided to burglarize the place that evening. It was agreed that the defendant should have no part in the actual robbing of the station, but that he would haul the loot away in his truck. Accordingly, later that evening, defendant, together with Johnson and Delaney, rode in the truck to a point approximately a mile from the station. Defendant remained with the truck, the other two going to the station and, after forcing an entrance by breaking a window, took approximately forty tires and a slot machine. The tires and slot machine were piled together near the road, and later defendant drove to the spot and loaded them on his truck. All three then returned to defendant's home in Corona, stored the tires in his garage, and broke open the slot machine; the three dividing the money. The following day the tires were taken to Huntington Beach in Orange county, where they were later identified and recovered.

The witness Johnson further testified as to a conversation had with the defendant subsequent to the service station burglary in which they planned to rob another store in Corona. The defendant refused to use his truck in that robbery because it was known in Corona, but agreed to drive a car owned by Johnson and Delaney for carrying away what might be recovered. Later both Johnson and the defendant were arrested in Orange county. While confined in the Orange county jail a formal statement was made by Johnson to a deputy district attorney and officers from Riverside county and in the presence of the defendant, corresponding in all material details with the foregoing testimony of Johnson given at the trial. While the statement was being taken the defendant was asked at various times whether or not it was true and he stated that it was. The statement was sworn to by both Johnson and the defendant. This statement was introduced in evidence at the trial as an admission or confession on the part of the defendant. The jury found the defendant guilty of burglary in the second degree. Thereafter a motion for new trial was denied and judgment entered. From this verdict, judgment, and order denying his motion for new trial defendant has appealed.

[1, 2] Appellant contends that the evidence is not sufficient to sustain the verdict. It is true that certain testimony was introduced by the defense contradicting certain testimony introduced by the prosecution. Apparently, however, such evidence was disbelieved by the jury, and under the well-established rule that where there is any substantial evi-

dence tending to sustain the verdict, the jury's determination of such conflict is conclusive and cannot be disturbed by us.

[3] Appellant also contends that he could not be convicted of burglary since the uncontradicted evidence shows that he made no entry. The evidence fully establishes, however, that the defendant, as an accessory, aided in the furtherance of the actual commission of the burglary and was therefore liable to prosecution as a principal. Pen. Code, §§ 31 and 971.

[4-9] Appellant contends further that the admission or confession of the defendant was improperly admitted before the corpus delicti had been established. The point is without merit. The first two witnesses called by the prosecution established the fact that the service station had been broken into and merchandise stolen therefrom. The corpus delicti embraces, first, certain facts forming the basis of the offense, and, second, the existence of a criminal agency as the cause of them. In establishing the corpus delicti it is not necessary to prove that the crime was committed by the defendant or person charged therewith. In addition, thereto, however, the testimony of the witness Johnson is amply sufficient to connect the defendant with the actual commission of the crime. The testimony of an accomplice is sufficient to prove the corpus delicti (People v. Frazer, 80 Cal. App. 464, 252 P. 633), and while one charged with crime cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is sufficient to warrant conviction where corroborated by the admission or confession of the defendant. People v. Frazer, supra; People v. Armstrong, 114 Cal. 570, 46 P. 611.

[10, 11] Appellant makes the further contention that the court erred in admitting evidence relating to or tending to prove that the defendant participated in the commission of crimes other than the one charged. Upon the trial the defendant admitted driving the truck to the scene of the service station burglary and returning to his home with the stolen tires. He claimed, however, that he had been hired by Johnson to haul the tires for him and that he did not know that the service station had been entered or that the tires were stolen until the following day. In order to rebut the showing of lack of intent, the district attorney was permitted to introduce evidence as to the burglary of the dry goods store in Corona and the conversation as to the subsequent contemplated burglary in Corona heretofore referred to. We are of the opinion that the evidence was properly admitted. Evidence of other crimes is admissible if it tends to establish intent or guilty knowledge particularly where the defendant claims to have had no guilty intent or knowledge as to the commission of the crime. People v. Hendrix, 192 Cal. 441, 221 P. 349; People v. McGill, 82 Cal. App. 98, 255 P. 261.

Appellant also suggests error by reason of the failure of the court to grant a continuance at the time the case was called for trial and its dismissal of his motion to quash the information. These matters are supported by neither argument nor citation of authorities. We have considered the record relative thereto, however, and can find no error in the rulings of the court.

There being ample evidence to support the verdict and judgment and no substantial error appearing in the record, the verdict, judgment, and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

124 Cal.App. 283

HAYWARD LUMBER & INVESTMENT CO. v. STARLEY et al.

Civ. 935.

District Court of Appeal, Fourth District, California.

June 13, 1932.

Rehearing Denied July 12, 1932. Hearing Denied by Supreme Court Aug. 11, 1932.

1. Vendor and purchaser ⇐191.

Right of possession remained in vendor, where receipts given purchaser for down payment for option showed no intention to give purchaser possession.

2. Mechanics' liens ⇐170.

One furnishing materials at request of purchaser under uncompleted option *held* not, as against fee owner, to acquire lien as of date of furnishing materials (Code Civ. Proc. §§ 1185, 1186, 1192; Civ. Code, § 2897).

3. Mortgages ⇐158.

Mechanic's lien for materials furnished purchaser without vendor's consent *held* inferior to purchase-money trust deed recorded simultaneously with deed to purchaser (Code Civ. Proc. §§ 1185, 1186, 1192; Civ. Code, § 2897).

4. Mechanics' liens ⇐199.

One furnishing materials at request of purchaser, with knowledge that another had title and that price had not been paid, furnished materials subject to rights of vendor (Code Civ. Proc. §§ 1185, 1186; Civ. Code, § 2897).

5. Mechanics' liens ⇐279.

Plaintiff in mechanic's lien foreclosure suit has burden to show facts entitling it to lien.

6. Appeal and error ⇨1071(4).

In mechanic's lien foreclosure suit, it was immaterial on plaintiff's appeal which of co-defendants was payee under note securing purchase-money trust deed.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by the Hayward Lumber & Investment Company against W. S. Starley and others, to foreclose a mechanic's lien. From the portion of the judgment holding the lien subordinate to a trust deed, plaintiff appeals.

Affirmed.

Le Roy B. Lorenz, of Los Angeles, for appellant.

Wright & McKee, C. M. Monroe, and G. C. Thomas, all of San Diego, for respondents.

BARNARD, P. J.

Charles Victor Hall, being the owner of a tract of real property in San Diego county, conveyed it to the Southern Trust & Commerce Bank early in September, 1926, receiving back a declaration of trust providing that the bank should have power to subdivide and sell the property, to execute contracts of sales and conveyances, to receive all payments and to take steps for foreclosures and the like, that the bank was to make certain advances for the improvement of the property, and providing for the payment to Hall of the net proceeds from time to time. Later, the property was conveyed to the Bank of Italy National Trust & Savings Association as successor to all the rights and obligations of the Southern Trust & Commerce Bank. On December 21, 1927, a sales agent received from W. S. Starley and his wife a down payment of $50 in connection with four lots in this tract. A receipt was given reciting: "for an option to purchase" the lots "at the total price of $4,697.00 payable $50 cash herewith and $647.00 cash within 11 days from date hereof," and the balance in installments. The receipt also stated that it was given "preliminary to the execution of a contract of sale." On January 3, 1928, a further payment of $647 was made by Starley to the agent and a similar receipt given, reciting it was for an option to purchase the lots "at a total price of $4,697.00 payable $647.00 cash herewith and $50.00 cash on 12—21—27, balance of $4,000.00 payable as follows: $242.40 on or before July 1, 1928, $3,757.60 on or before 10 years—Trust Deed to be given with interest at seven per cent per annum, payable quarterly on unpaid balances," and that it was preliminary to the execution of a contract of sale. No contract was ever executed, but on April 17, 1928, Starley paid to the agent the sum of $242.40 and at the same time executed a note and trust deed for the balance of the purchase price; the note being payable to Hall and the trust deed being to the Bank of Italy, as trustee for the benefit of Hall, securing this note. The note and trust deed were sent to the Bank of Italy to be placed in escrow pending the completion of the deal. The Bank of Italy ordered a preliminary report on the title from a title company on April 25, 1928, and executed a deed conveying the property to the Starleys on April 30, 1928, but did not record or deliver the same until later.

During April, 1928, Starley approached the plaintiff and arranged to purchase materials with which to erect certain buildings on the property. He testified at the trial that he then informed the plaintiff that the property was subject to this trust deed securing the balance of the purchase price. Starley and his wife then executed and delivered to the plaintiff a trust deed for $6,000 covering this property. On May 2, 1928, the plaintiff sent this trust deed to a title company, asking them for a policy of title insurance when they could show the property vested in Starley or his wife, subject to the trust deed. On May 17th the manager of the plaintiff company telephoned to the title company and was informed that the trust deed had not yet been recorded. On the same day the title company wrote the plaintiff that it might not be able to record the trust deed as directed. On that day the plaintiff furnished Starley with twine and stakes for preliminary work, of the value of $2.39. On May 18th the title company advised the plaintiff that the title to the property in question was in the Bank of Italy National Trust & Savings Association, giving them a formal report to that effect three days later. Small amounts of material were furnished by the plaintiff on May 18th, May 19th and May 22d, and larger quantities thereafter until the buildings were completed in August, 1928. On May 26th the plaintiff wrote the bank, stating: "We are contemplating making a loan to W. S. Starley and wife who we understand are buying this property on contract from your bank, and we would appreciate your advising us the balance still owing on their contract."

The bank replied on June 5th that the unpaid balance was "$3,757.60 with interest from April 18, 1928 at 7%." On June 26, 1928, the deed from the bank to the Starleys and the trust deed back to the bank were both recorded. On August 11, 1928, plaintiff delivered the last of the materials to Starley and thereafter a notice of mechanic's lien was filed, followed by this action to foreclose the same. At the time the plaintiff commenced to furnish the materials, the property in question was unimproved and uninclosed. It is undisputed that both Hall and the bank had no notice or knowledge that Starley had attempted to take possession of the land or commence

improvements on the property or that the plaintiff had furnished any materials therefor until some time after June 26th. At the trial of the action, the court found in favor of the plaintiff in so far as its lien against the Starleys is concerned, but found and held such lien to be subordinate to the trust deed to the bank. From this portion of the judgment the plaintiff has appealed, the only question presented being as to whether or not the lien of the plaintiff has priority over this trust deed.

[1, 2] Appellant's main contention is that its lien accrued on May 17, 1928, while the lien of the trust deed accrued on June 26, 1928, and, therefore, under section 1186 of the Code of Civil Procedure and section 2897 of the Civil Code, its lien must be held superior to that of the trust deed. Appellant assumes that its lien accrued on May 17, 1928, because it began to furnish materials on that date. Under section 1185 of the Code of Civil Procedure such a lien would have arisen at that date if the land in question belonged to the person who caused the building to be erected, but where such a person owned less than a fee simple, the lien would cover only the interest of that person unless, as provided under section 1192 of this Code, the owner of any other interest in the property had knowledge of such construction work and failed within the allotted time to record a notice of nonliability. Neither the evidence nor the findings support the conclusion that the appellant acquired a lien on May 17th. At that time the legal title was in the bank with a beneficial interest in Hall and neither of them consented to or knew of the building operations. The court found that at that time the bank was in possession and entitled to the possession of the property. The appellant attacks this finding on the ground that the only evidence in the record shows that Starley was in possession. The only evidence to this effect is the testimony of one witness that when the materials were first sold to Starley this witness saw Starley on the property with two other men who were working for him. Nothing in the receipts purporting to be options for the purchase of this land gave to Starley any right of possession, and nothing therein indicates an intention on the part of the parties that the vendee was to have possession until legal title passed. Under these conditions the right of possession remained in the vendor. Crane v. Ferrier-Brock Development Co., 164 Cal. 676, 130 P. 429. While of no great importance, the finding that the bank was entitled to possession is sustained by the evidence. Under sections 1185 and 1192 of the Code of Civil Procedure the appellant failed to prove facts showing that its lien attached on May 17, 1928, as against the interest owned by the bank and Hall, since the one ordering the work was not the owner in fee and the owner of the other interest had no knowledge of the building operations. No reason appears why the appellant is in a better position with the Starleys claiming under an uncompleted option or an oral agreement carrying no right of possession, than it would have been in had a written contract, giving a right of possession, been executed, delivered and recorded.

[3] Nor do we think the appellant acquired any lien on June 26th as against the interest of the bank and Hall. At that time the appellant had acquired no lien and the deed to the Starleys and the trust deed back were recorded simultaneously. Then for the first time, the Starleys were given the right of possession of the property, became the owners thereof, and when the first materials were delivered thereafter, the lien of the trust deed had already attached.

[4] It further appears, and the court found, that at the time the appellant began to furnish materials for these buildings, it had knowledge that the title to the property was vested in the respondent bank and that the purchase price agreed upon had not been paid by Starley. Under the existing circumstances, it must be held to have furnished the materials subject to the rights of the bank and Hall in this property. Keeling Collection Agency v. Penziner (Cal. App.) 11 P.(2d) 24.

[5] Some contention is made that respondents Hall and the bank proceeded upon the wrong "theory"; that their pleadings show a claim as incumbrancers and not as owners; and that they cannot be considered as owners during any of the time involved, with their interest protected in the absence of knowledge of the building operations. Their answers denied the allegations of the complaint, and the burden was upon the appellant to show facts entitling it to a lien. In its complaint the appellant alleged that "at all times herein mentioned the defendants W. S. Starley and Emma R. Starley have been and now are the owners" of this property, but this it did not prove. It is true that these respondents also answered that they then claimed under their trust deed. Having conveyed to the Starleys, they could not allege that they were owners at that time. But the issues brought out the evidence, which, with the pleadings and the findings, supports the judgment.

[6] Appellant complains that a finding to the effect that Starley executed a note payable to the Bank of Italy is not supported by the evidence. Admittedly the note was originally made payable to Hall and secured by the trust deed to the bank, with Hall as the beneficiary. Subsequently the note was assigned to the bank in trust. In its judgment the court adjudged as follows: "That the defendant, Bank of Italy National Trust and Savings Association, has a first and prior lien * * * under and by virtue of a trust deed conveying said property, recorded on the 26th day of June, 1928, in Book 1482 at page

314 of Deeds, records of San Diego County, California, said lien being to secure the balance due on a promissory note dated April 18, 1928," describing the note in question. While this court has the power to correct this finding, it is so immaterial that we do not regard it as necessary to do so. Both Hall and the bank were parties to the action, and it can make no difference to the appellant whether the note was originally made payable to the bank or to Hall. It was secured by this trust deed, the effect of which is not dependent upon which of these two respondents happened to have the beneficial interest therein. In its opening brief the appellant sets out certain other findings as being unsupported by the evidence. In its reply brief it abandons these contentions as immaterial. While we do not regard the findings referred to as immaterial, they are all supported by the evidence.

No other points are raised which require discussion. Not only did the appellant fail to establish its lien against the interest of the bank and Hall, but it appears that it had knowledge of the situation existing before it began to deliver the materials. While a most ingenious argument is presented in support of appellant's claims, in our opinion its position is without merit. The portion of the judgment appealed from is affirmed.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 196

CITY OF LOS ANGELES v. STAR SAND & GRAVEL CO. et al.

Civ. 7095.

District Court of Appeal, Second District, Division 2, California.

June 9, 1932.

Rehearing Denied July 9, 1932. Hearing Denied by Supreme Court Aug. 8, 1932.

Landlord and tenant ⇐170(1).

Owner of premises leased for purpose attainable without creating nuisance *held* not liable for creation of nuisance without owner's knowledge or notice.

Facts disclosed that owner of land adjacent to city bridge leased land to sand and gravel company, and that lessees removed sand and gravel, with result that bridge was damaged and destroyed as result of negligent removal of sand and gravel from the wash which removal caused, that court found that it was reasonable and feasible for lessee to perform all conditions of lease without creating nuisance or hazard to bridge or highway, and that lessor had no knowledge that premises would be used to create nuisance or so as to cause probable injury, and had no notice that they were being so used.

Appeal from Superior Court, Los Angeles County, Henry M. Willis, Judge.

Action by the City of Los Angeles against the Star Sand & Gravel Company and Mathilda Haack. From a judgment adverse to plaintiff as against defendant last named, plaintiff appeals.

Affirmed.

Erwin P. Werner and Frederick Von Schrader, both of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appellant brought this action against respondent and the Star Sand & Gravel Company for damages caused its San Fernando Road bridge by flood waters in the Big Tujunga wash crossed by said bridge. It appears that respondent owned lands adjacent to the bridge, and that the Star Sand & Gravel Company was engaged in removing sand, rock, and gravel from the bed of the wash under some arrangement, the nature of which does not appear, with respondent's lessees, whose lease was made for the sole purpose of removing rock, sand, and gravel from the wash. The court found that it was not true that the respondent at the time of the execution of the lease had any knowledge that the premises would be used so as to create a nuisance or cause probable injury to the bridge, that respondent had no knowledge or notice that the premises were being so used, and that the premises could have been used for the purposes of the lease without creating a nuisance or endangering the bridge. It was also found that the bridge was damaged as a result of the negligent removal of sand, rock, and gravel from the wash, which removal caused the volume of water usually and ordinarily flowing in said wash during the seasonal rainfall to undermine and destroy the bridge.

The sole point presented on this appeal, as stated in appellant's brief, is "on the question of the liability of the owner of premises in making a lease agreement of such a character, which lease contemplates the creation and maintenance of a nuisance which ultimately results in damages to an innocent third party." In so stating its contention, appellant entirely overlooks the finding of the trial court "that it was reasonable and feasible for the lessee in said lease named to carry out and perform all of the provisions and conditions of said lease without creating any nuisance or hazard or danger to the bridge or highway referred to in plaintiff's complaint." In view of this finding, and the further find-

ing that it was not true that respondent had knowledge that the premises would be used to create a nuisance or so as to cause probable injury to the bridge, and had no notice that they were being so used, it is apparent that appellant's contention is predicated upon a statement of fact contrary to the findings. In view of the findings, the question of law under the findings really is: Is the owner of premises, leased for a purpose which can be attained without the creation of a nuisance and without endangering the property of any third person, liable for damage resulting from the creation of a nuisance without the knowledge of the lessor and without notice to the lessor that the premises were being so used? Appellant cites no authority which would warrant an answer in the affirmative. The cases cited by respondent conclusively indicate that the question must be answered in the negative. See Rider v. Clark, 132 Cal. 382, 64 P. 564; Kalis v. Shattuck, 69 Cal. 593, 11 P. 346, 58 Am. Rep. 568; Runyon v. Los Angeles, 40 Cal. App. 385, 180 P. 837; Peck v. Peterson, 15 Cal. App. 543, 115 P. 327.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 279

KELSEY v. SAN FERNANDO DEVELOPMENT CO., Inc., et al.

Civ. 4564.

District Court of Appeal, Third District, California.

June 13, 1932.

1. Appeal and error ⇐1010(1).

Trial court's finding, supported by substantial evidence, that vendors did not accept bank stock as payment for purchase price, *held* conclusive.

2. Principal and agent ⇐163(1).

"Ratification" is subsequent adoption or affirmance of act which another, without authority, has assumed to do for ratifier while purporting to act as his agent.

[Ed. Note.—For other definitions of "Ratification," see Words and Phrases.]

3. Specific performance ⇐97(1).

Purchaser *held* not entitled to specific performance of land contracts calling for payments of $8,400, where $5,000 thereof was unpaid (Civ. Code, § 3391).

Specific performance of the contract could not be enforced, since vendors had not received from purchaser adequate consideration for the lots involved, and so came under the operation of Civ. Code, § 3391, which provides that specific performance cannot be enforced against a party to the contract if he has not received an adequate consideration for the contract.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by B. H. Kelsey, as administrator of the estate of David R. Kelsey, deceased, against the San Fernando Development Company, Incorporated, and others, dismissed as to some of defendants. Judgment for defendants, and plaintiff appeals.

Affirmed.

Halverson & Halverson, of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

This is an action for specific performance of certain contracts for the sale of lots, which plaintiff alleges were sold to him by defendant California Trust Company, and the full purchase price paid. These lots were a part of tract No. 9555 situated in Los Angeles county and were owned by defendant Chase.

On October 5, 1926, Chase, by a certain trust agreement, conveyed said tract to the California Trust Company, as trustee, authorizing it to subdivide said tract into lots and to cause same to be sold by the San Fernando Valley Development Company acting as its agent, subject to the terms of the trust agreement and the approval of the trustee. The San Fernando Valley Development Company, as such sales agent, entered into an agreement with F. E. Lynch and Willard J. Lewis to sell the said lots subject to the terms of the trust agreement and the approval of the trustee. Thereafter Lewis and Lynch, through their agent, including one Broadhead, negotiated sales to plaintiff of lots 34, 35, 45, 107, and 108 in said tract of which the sales of lots 34, 107, and 108 were approved by the trustee, the California Trust Company, and contracts were executed by said trustee for the sale of said lots 34, 107, and 108 to plaintiff. Said Lewis and Lynch also negotiated the sales of lots 35 and 45 in said tract to plaintiff, but no contracts for these two lots were executed by the trustee. Upon each of these lots a cash payment was made, the remainder of the purchase price to be paid in installments. This action was dismissed as to defendants Lynch and Broadhead.

Judgment was rendered in favor of defendants. Plaintiff's motion for a new trial having been denied, he prosecutes this appeal. It is the contention of appellant that he has

paid the purchase price of the said lots in full, and that he is therefore entitled to receive from respondents deeds for same. He bases this contention upon the following facts: That he had an arrangement with Broadhead, who was a sales agent for Lewis and Lynch, to pay up in full for all of said lots, which was to be done by the assignment of 50 shares of stock of the Farmers' & Merchants' National Bank of Blythe, Cal., of the par value of $100 per share, the assignment of a note and mortgage of a third party for $2,000 and $70 in cash, and that on the 21st of December, 1926, he met Broadhead and Lynch at their sales office and delivered to them the said stock and the said note and mortgage and paid them $70 in cash in full settlement of the purchase price of all the lots, and that the same was accepted by them in full settlement for same; that they figured up the total purchase price of said sales, deducting therefrom 5 per cent. for cash, as provided for in the contracts, and found that in addition to the cash already paid, the amount of the note and mortgage, and the par value of the bank stock, there was left a balance of $70 for which appellant gave them his check, which was afterwards cashed. Appellant also produced in evidence two receipts signed "San Fernando Valley Development Company, Inc., by J. P. Broadhead," dated December 21, 1926, one of which acknowledged receipt of $1,750 to be applied on the purchase price of lot 45, and the other acknowledged receipt of $1,750 to be applied on the purchase price of lot 35, both receipts stating that they were subject to the approval of the owner.

Both Broadhead and Lynch, testifying on behalf of respondents, denied that the bank stock had been received as a payment on the purchase price of said lots, but, on the contrary, testified that appellant stated to them that this bank stock was selling around par, and that he would not take less than that amount for it; that they stated to him that they would take the stock and endeavor to dispose of it at par, that if they succeeded in doing so they would credit the amount thus received on the purchase price of the lots; if less than par was offered they would refer the matter back to him, and that if appellant did not desire to take less than par the stock would be returned to him; that appellant agreed to this arrangement, and upon this understanding they received the bank stock from him. The bank stock was not sold and was returned to appellant, who refused to receive it and sent it back to respondents.

[1] The court found that respondents did not accept the bank stock as a payment on the amount owing by appellant for the purchase price of the lots. The evidence as to whether or not the bank stock was accepted as a payment is conflicting, but there is substantial evidence to support this finding of the trial court, and such being the case this court cannot disturb it. 2 Cal. Jur. 921, and cases cited.

[2] Appellant has devoted a large portion of his brief to a résumé of authorities bearing upon ratification by the principal of the unauthorized acts of the agent. "Ratification" is defined as being "the subsequent adoption or affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent." Mechem on Agency, vol. 1, p. 260.

The basis of the doctrine of ratification is the doing of an unauthorized act by the purported agent. In the instant case the claim of appellant is that the agents of respondents accepted the bank stock as a payment on the purchase price of the lots, and that there was a subsequent ratification of this act by respondents; but the trial court found, upon sufficient evidence, that the agents did not accept the bank stock as a payment. Therefore, in this case the basic element of ratification is lacking and, consequently, ratification cannot be relied upon by appellant to sustain his action.

[3] Section 3391 of the Civil Code provides that specific performance cannot be enforced against a party to a contract in any of the following cases: "1. If he has not received an adequate consideration for the contract: 2. If it is not, as to him, just and reasonable."

Mention is made in appellant's brief of the fact that after the commencement of this action, the California Trust Company conveyed by deed lot 45 to appellant. The record is silent as to why this was done. In fact, there is nothing in the record concerning this transaction. However, it appears that appellant is asking for specific performance of contracts calling for the payment to respondents of $8,400 upon which there exists an unpaid balance of more than $5,000. Under this condition of the transactions between the parties it cannot be held that respondents have received from appellant adequate consideration for the lots involved in this case. The finding of the trial court that the bank stock was not received and accepted by respondents or their purported agents as a payment on the purchase price of said lots, supported as it was by substantial evidence, is binding upon this court, and renders it powerless to set aside or ignore this finding even though it may feel that a different conclusion should have been reached by the trial court. Clopton v. Clopton, 162 Cal. 27, 121 P. 720; Barry v. Coughlin, 90 Cal. 220, 27 P. 197; Asher v. Martin, 100 Cal. App. 217, 279 P. 810.

We are therefore of the opinion that the judgment must be and it is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, Acting P. J.

124 Cal.App. 259

BOOTH v. LOS ANGELES COUNTY et al.

Civ. 4549.

District Court of Appeal, Third District, California.

June 11, 1932.

1. Contracts ⇐318.

Contract creating forfeiture must be restrained to most technical limits of conditions on which forfeiture is to be exercised.

2. Deeds ⇐162.

Property conveyed for purpose of road, to revert if not so used, could not revert after 32 years' use as road.

3. Estoppel ⇐58.

To entitle one to urge another's act as estoppel against latter's asserting some claim contrary to estopping act, former must show some prejudice to himself.

4. Appeal and error ⇐931(1).

Unchallenged finding is presumptively supported by sufficient facts.

5. Estoppel ⇐62(1).

Mere denial of, or waiver of, public right, does not estop state or any of its branches.

6. Estoppel ⇐62(7).

County which, in previous action against it to quiet title, disclaimed all interest in property in controversy, *held* not estopped to deny interest therein of successor of plaintiff in that case, and not a party thereto in successor's action against county to quiet title.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action to quiet title by Cyrus E. Booth against Los Angeles County and others. From the judgment for defendants, plaintiff appeals.

Affirmed.

John C. Miles, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, and A. C. Cooney, of Compton, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

This is an appeal by plaintiff from a judgment declaring title to certain property to be vested in defendant county of Los Angeles subject to an easement for street purposes in favor of the city of Compton and refusing to quiet the title of plaintiff as prayed.

There is little dispute of fact, and a general statement of the conditions existing, with reference to the title to the property involved, will suffice.

On June 27, 1884, one Harshman was the owner of the property. On said date Harshman made, executed, and delivered to respondent county of Los Angeles his deed conveying to said county the property. The said deed, after describing the property, contained the following clause: "This conveyance is made for the purpose of a road or highway, to revert to said J. J. Harshman, his heirs and assigns if not so used."

Immediately subsequent to the execution and delivery of said deed, the county of Los Angeles used the premises as a road, and continued said use until 1888, at which time the city of Compton was incorporated. It might here be noted that the lands here involved were at all times within the territory embraced by the city of Compton, though said city was not incorporated until the time mentioned. The land being within the corporate limits of the city, it was used thereafter as a street, and was continuously so used until about 1916, at which time "Alameda" street, as it was called, was straightened out and paved, so that it was moved some sixty feet to the west. Since that time the property has not been used as a street or road. The street has not been vacated by any official action. Since 1916 the county of Los Angeles has been in possession of the premises, using the same continuously as a stock pile upon which to store decomposed granite and rock for the county road department.

It is further stipulated and agreed that any and all reversionary rights are in plaintiff.

We are of the opinion that the judgment must be affirmed. The law of the case may be taken from the opinion in the case of Hasman v. Union High School, 76 Cal. App. 629, 245 P. 464, 465. In that case the land was conveyed to a school district, with the following clause inserted: "To have and to hold all and singular the said premises * * * provided the same shall be used for the purpose of maintaining thereon a high school; otherwise the above described property shall revert to and become the property of the party of the first part, his heirs, or assigns."

It was held that the condition of the deed was satisfied when the school district, in good faith, and without any intention at the time of changing the location of the school, erects buildings on the property and conducts a high school thereon for twenty-nine years and until the interests of the school demand a change of location.

The language of the deed in the cited case seems much stronger than the language of the deed here under consideration, in that the deed to the school district contained therein some notion of a school being maintained.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Disregarding the factual similarity, certain well-established principles of law are affirmed in the Hasman Case, which apply with equal force to the case before us.

[1] The established rule is that, where the right to a forfeiture is created by contract or by law, it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Downing v. Packing Co., 183 Cal. 91, 190 P. 455.

Without further citation, reference may be had to the authorities cited in the Hasman Case, all going to support the rule.

[2] Paraphrasing a portion of the opinion in the main case cited, had it been the intention of the grantor herein that the property should revert upon the discontinuance of its use for road purposes, it would have been so easy to have so stated in plain and simple language that it must be inferred from the terms actually employed that such was not the intention of the grantor. There appears nothing harsh or inequitable in upholding the rule. It may be assumed, from a general experience, that the entire object of the condition was accomplished when a road or public highway was established and accepted by the public. Cases holding to a seemingly contrary view as cited by appellant are distinguished in the cases cited herein.

The road was maintained upon the property for a period of thirty-two years, and, according to the finding of the court below, is still being used for road purposes, to wit, as a storage site for gravel used in adjacent highway work.

[3-6] Appellant urges a claim of estoppel against the county of Los Angeles. This claim is based upon the record in a certain case or proceeding wherein a predecessor in interest of plaintiff's reversion sought to quiet his title against the city of Compton and the county of Los Angeles. The defendant county of Los Angeles filed its answer wherein it was alleged that the property lay wholly within the city of Compton, and that the said county claimed no right, title or interest therein. The present plaintiff was not a party to that action, and the action never reached a judgment, being subsequently dismissed.

Estoppel rarely, if ever, works automatically, without regard to person. It is elementary that, to entitle one to urge the act of another as an estoppel against the latter's asserting some right or claim at variance with the estopping act, there must be shown some prejudice to the one urging the estoppel.

Without going into nicety of detail, we may turn to the unassailed finding of the court below, which is as follows: That the plaintiff herein did not acquire any interest in said premises in reliance upon said disclaimer. Said finding standing unchallenged, it is presumed that there were sufficient facts in support thereof. In any event, a mere denial or waiver of public rights does not estop the state or any of its branches.

It may be conceded, as stated in Johnston v. City of Los Angeles, 176 Cal. 480, 168 P. 1047, that such a disclaimer, taken with all of the other testimony upon this subject, has certain evidentiary value which must be regarded. We assume, to repeat, that, whatever evidentiary value this fact may have had, due weight was given thereto in reaching the finding noted.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

124 Cal.App. 193

DARLING et al. v. DEVERE.

Civ. 7088.

District Court of Appeal, Second District, Division 2, California.

June 9, 1932.

1. Joint adventures ⇐5(2).

In action to recover profits from sale of realty, finding that parties were not agents of owner, and hence not precluded from purchasing property for resale, *held* not against evidence.

2. Joint adventures ⇐1.

Agreement by which parties were to divide profits from sale of property *held* not unlawful, though owner was not advised of prospective sale at profit.

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action by Ingaborg Darling and another against Felix Devere. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Redwine & Redwine, of Hollywood, for appellant.

Benjamin Lewis and Fairfax Cosby, both of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This is an appeal by the defendant from a judgment rendered in favor of the plaintiffs.

The testimony adduced by the respondents establishes the following situation: One Mahan owned a parcel of real property which he had listed for sale with a broker named Ross.

Lawson, who will be mentioned, was sales manager for Ross. The respondents and appellant were associated together in the real estate business with the Aron Hover organization. One of the respondents heard that a publishing company had under consideration the purchase of the Mahan property. She immediately and on October 16, 1928, interviewed and secured from Mahan's broker, Ross, a refusal of the property until the following noon. That evening both of the respondents talked to the appellant and asked him to join with them for the purpose of purchasing the property; the title to be taken in his name, one of the respondents to advance the necessary money and the profits to be divided equally between them, i. e., into three parts. Appellant agreed and the next morning they called upon Ross—rather they talked to and concluded their agreement with Lawson, his sales manager—and after some negotiation appellant executed an agreement by which he was to purchase the property for the sum of $27,000. Lawson appended and signed at the end of the agreement the following: "I hereby accept the above proposition and agree to comply with the same. I also agree to pay the Aron Hover Orgn. the sum of $1,000.00 commission when deal is closed. Howard B. Lawson, Agent." The purchase was completed, the sale to the publishing company was perfected, and a profit realized. The judgment was for two-thirds of the profit after giving the appellant credit for one-third of the $1,000 which was paid to the Hover organization as commission.

[1] The appellant asserts that several of the findings are not supported by the evidence, and also that the agreement by which the parties were to divide profits was unlawful and against public policy because the respondents were guilty of fraudulent concealment of facts from their principal, Mahan. It would serve no useful purpose to set forth in detail the findings thus attacked, or to detail the support which they have in the evidence. Perhaps, however, it is advisable to discuss one proposition which constitutes the kernel of the problem. The court found that the appellant and respondents, through the Aron Hover organization, did not agree to act and did not act as brokers or agents for Mahan, the owner of the property. The only bit of evidence which might be construed as being opposed to the finding is that which is contained in the undertaking on the part of Lawson to pay the "Aron Hover Orgn." the sum of $1,000 as commission and the subsequent payment of the sum. On the other hand, Ross represented Mahan and Lawson as his sales manager represented Mahan. It is not unusual for one broker to give to another a substantial part of a commission earned. Furthermore, the conversation was to the effect that respondents were representing the buyer, the respondent. We cannot say, nor do we believe that the trial court erroneously found, that appellant and respondents were not the agents of Mahan.

[2] This finding also concludes the argument that the agreement was unlawful and contrary to public policy. If the respondents were not together with appellant under any obligation to Mahan, they had the right, as would any one else, to purchase the property. The entire argument of appellant is built upon the assumption that they were such agents.

Judgment affirmed.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

124 Cal.App. 126

MODERN IRON WORKS, Limited, et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY.

Civ. 8319.

District Court of Appeal, Second District, Division 2, California.

June 7, 1932.

1. Prohibition ⇐10(1).

Showing of petitioners *held* not to entitle them to writ of prohibition restraining trial court from proceeding with trial on ground that it lacked jurisdiction of subject-matter because issue had not been joined.

When the case was called for trial, objection to introduction of evidence upon the ground that the complaint did not state sufficient facts was sustained, and an order was entered that plaintiffs file their amendment at the opening of court on the following day, "having it conform to the ruling made," and that petitioners be permitted to deem the amendment denied, to demur thereto, or to file an answer in writing, and on the next day petitioners' counsel declined to receive an offered copy of the amendment when filed, or to answer the same, and objected to further proceedings upon the ground that the issues presented had not been joined by them, but petitioners failed to reveal any discrepancy between the agreed amendment permitted and that tendered under directions of the trial court.

. Prohibition ⇐27.

All intendments must be resolved in favor f regularity.

Petition for writ of prohibition by Modern Iron Works, Limited, and others, prayed to be

directed to the Superior Court of the State of California in and for the County of Los Angeles to restrain the court from proceeding with a trial wherein petitioners were defendants.

Writ denied.

Lasher B. Gallagher, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, J.

The petitioners, defendants in a civil action in the superior court of Los Angeles county, prayed in this court a writ of prohibition restraining the said court from proceeding with the trial, upon the ground that it had not jurisdiction of the subject-matter for the reason that issue had not been joined.

When the case was called for trial, objection to the introduction of evidence, upon the ground that the complaint did not state sufficient facts, was sustained. A motion by the plaintiffs to interline in one of the paragraphs certain allegations conforming to facts stated by counsel and dictated into the record was granted, as modified by the trial court, upon condition that the same be deemed denied for the time being, that part of the evidence be adduced for the purpose of ascertaining as to whether or not the interests of the defendants might render a continuance necessary or desirable, and that the plaintiffs furnish formal amendments on the day following. At the request of the defendants' counsel, certain witnesses were excluded from the courtroom, a witness for the plaintiffs testified, and was cross-examined on behalf of the defendants. A colloquy between the respective counsel arose as to the subject-matter of the amendment to the complaint which should be filed on the following day, the defendants' counsel strenuously insisting that, if the same were not to be exactly as agreed upon and approved by the court, they were unable to anticipate the nature of their defense. It was thereupon again ordered that the plaintiffs file their amendment at the opening of court on the following day "having it conform to the ruling made," and that the defendants be permitted to deem the same denied, to demur thereto, or to file an answer in writing. On the next day the defendants' counsel declined to receive an offered copy of the amendment when filed, or to answer the same, and objected to further proceedings upon the ground that the issues presented had not been joined by them. A considerable portion of the facts thus stated was made to appear from the transcript furnished at the hearing held pursuant to the issuance of the alternative writ, and this was not alleged in the petition.

[1, 2] It results, from a failure of the petitioners to reveal any discrepancy between the agreed amendment permitted and that tendered under directions of the trial court, that the plaintiffs may have complied wholly with the requirements of the stipulation and order for aught that is made to appear. All intendments must be resolved in favor of regularity, and, in the absence of an affirmative showing to the contrary, it will be presumed that the court below would, if permitted to do so, have acted within its jurisdiction.

The alternative writ of prohibition is discharged, and the peremptory writ is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 179

WILLIAMS v. LOWENTHAL.

Civ. 727.

District Court of Appeal, Fourth District, California.

June 8, 1932.

1. Fraud ⇐9.

Representations relied upon as being fraudulent must contain recognized essential elements of fraud (Civ. Code, § 1567).

2. Sales ⇐38(3).

Representations in respect to future profits *held* insufficient to support charge of fraud in respect to sale of musical instrument operating on deposit of coin (Civ. Code, § 1567).

Statement in respect to machine producing certain revenue sufficient to take care of payments due under sale contract, and in addition yield a profit to buyer, clearly was a representation of character known as "seller's talk" and constituted mere expression of opinion, rather than material representations as to existing facts where parties dealt at arm's length.

3. Sales ⇐52(7).

Seller's representation that musical instrument was in good order *held* not under evidence to furnish sufficient support for defense of fraud (Civ. Code, § 1567).

Evidence was to effect that seller stated machine operating on deposit of coin was a good machine and would probably not get out of order, and if it did he would repair it, other testimony showing that seller made repairs to machine as requested by purchaser, thereby establishing that seller performed agreement to repair machine.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Sales ⊂261(5).

Seller's declaration at time of sale of musical instrument that it was good machine *held* not express warranty of fitness (Civ. Code, § 1732).

5. Sales ⊂273(1).

Generally, although there is no express warranty of fitness, law will imply warranty that article sold is reasonably adapted to purpose (Civ. Code, § 1735, subd. 1).

6. Sales ⊂284(4).

Defects in coin boxes used in operating musical instruments purchased under separate contract would not support claim of purchaser that machine was unfit for purpose for which sold (Civ. Code, § 1735, subd. 1).

7. Sales ⊂288(2).

Buyer's failure to return or offer to return article is sufficient to defeat claim of breach of implied warranty of fitness.

8. Sales ⊂124.

Buyer in default on conditional sale contract, having neither restored nor offered to restore property, could not rely on equitable defense of failure of consideration.

9. Sales ⊂127.

Buyer, failing to give notice of rescission or offer to restore machine, could not interpose defense of rescission.

10. Sales ⊂437(3).

Buyer to recover for breach of warranty under statute was required to plead necessary facts as basis for measuring damages and present proof of damages suffered (Civ. Code, §§ 3313, 3314).

11. Sales ⊂439.

Verdict for seller of musical instrument showing deduction for damages on account of breach of warranty *held* erroneous, in absence of evidence respecting damages resulting from breach (Civ. Code, §§ 3313, 3314).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Whitney C. Williams against Jake Lowenthal. From the judgment, plaintiff appeals.

Reversed.

Ernest Klette, of Fresno, for appellant.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for respondent.

JENNINGS, J.

This action was instituted by plaintiff to recover the balance alleged to be due from defendant on account of the sale by plaintiff's assignor to defendant of a musical instrument known as an orchestrope. Defendant was the proprietor of a restaurant in the city of Fresno. The orchestrope was an electrically operated phonograph equipped with 56 phonograph records. It was so arranged that it would operate upon the deposit of 5-cent coins in a receptacle provided for them. The instrument was sold under a conditional sales contract whereby defendant agreed to pay therefor the sum of $1,438, of which $100 was paid at the time the written agreement was executed and the balance was to be paid at the rate of $55.77 per month. The sales contract provided that until the total purchase price was paid, title should remain in the seller. In case of default in the payment of any monthly installment due from the buyer the entire purchase price was to become immediately due and payable. It was further provided that no warranty or guaranty was given unless specified in the written agreement, which was declared to constitute the entire contract between the parties. Plaintiff's complaint alleged the execution of the contract, the delivery of the instrument, default in the payment of three successive monthly payments, by reason of which default plaintiff elected to declare the entire balance of the purchase price due and payable and prayed judgment for such balance, being the sum of $1,226.86. The record shows that at plaintiff's request a writ of attachment was issued and levied upon the orchestrope. From the allegations of the complaint, it is evident that plaintiff elected to treat the transaction as a completed sale and to recover the balance due on the purchase price. Defendant's answer set up the following defenses: (1) Fraud; (2) breach of an express warranty of fitness; (3) total failure of consideration; and (4) rescission. The fraud was alleged to consist of false representations by plaintiff's assignor, the seller, to defendant that the instrument would yield to defendant a revenue which would exceed the amount due monthly on the purchase price and that the instrument was in good order and would remain so for a long period of time and, if at any time it should be in need of repair, the seller would promptly repair it. The action was tried before a jury, which returned a verdict in plaintiff's favor in the sum of $250. From the judgment for such amount rendered in conformity with the verdict, plaintiff prosecutes this appeal.

[1-3] The record indicates that the action was tried by defendant on the theory that fraud entered into the execution of the contract relied upon by plaintiff and the case was submitted to the jury under appropriate instructions relative to the defense of fraud. Defendant testified that he could neither read nor write, that the seller, prior to the execution of the written agreement, told him that the machine would produce a monthly revenue of $85, which would amount to approximately $30 per month in excess of the

monthly installment of $55.77, that the machine was a good machine and would probably not require repair, but that if repairs should be necessary he would furnish them, that the above representations were contained in the written contract, and that the absence of such representations in the written agreement was not discovered by him until after the action was instituted. It requires the citation of no authority to sustain the familiar rule that the apparent consent of a party to a contract is not real when obtained through fraud. It is so declared in section 1567 of the Civil Code. But it is also elementary that representations relied upon as being fraudulent must contain the recognized essential elements of fraud. When, therefore, the defendant maintained that he was told that certain representations which were made to him were contained in a written agreement and that relying upon their presence in the agreement he executed it, the defense of fraud is available to him only if the representations of whose absence he complains were in fact fraudulent. This must be true, for if such representations were not in fact frauduient their presence in the written agreement would obviously not give rise to a cause of action nor support a defense based upon fraud. The absence of nonfraudulent representations from the written agreement could have no different effect. The statement that the machine would produce a revenue sufficient to take care of the payments due under the contract and in addition yield a profit of $30 per month to the buyer is clearly a representation of the character denominated by the decisions as "seller's talk." The law long since recognized that sellers of property in their zeal to consummate sales were prone to "puff their wares" and exaggerated statements as to the value of property offered for sale were held to be mere expressions of opinion rather than material representations as to existing facts where the parties dealt at arm's length. In this category are representations respecting future profits to be derived by the buyer from property offered for sale. Lee v. McClelland, 120 Cal. 147, 52 P. 300; Gleason v. McPherson, 175 Cal. 594, 166 P. 332; Wegerer v. Jordan, 10 Cal. App. 362, 101 P. 1066. The evidence fails to show that there was any relationship of trust and confidence between plaintiff's assignor and defendant and there is an absence of any showing that the representation as to future profits was not honestly made or that it was made in bad faith. Such representation therefore could not support a charge of fraud. The representation that the machine was in good order at the time the sale was made was obviously a representation as to an existing fact and if false might, under proper circumstances, furnish sufficient support to the defense of fraud assuming that the defects could not, by the exercise of ordinary diligence, have been discovered. But the evidence produced by defendant relative to this representation was not sufficient to support the claim that it was false. Defendant testified that the seller stated that it was a good machine and would probably not get out of order and that if it did he would repair it. He also testified that in the evening of the day on which the machine was installed difficulty was encountered in that the coins which caused the machine to operate did not reach the receptacle provided for them and that he summoned the seller, who repaired the defect. He further testified that during the whole period when the machine was in his possession it was out of order most of the time by reason of the failure of coins deposited by patrons of defendant's restaurant to reach the coin receptacle. However, it appears from the record that the seller did make repairs to the machine when he was notified by defendant that it was out of order. The evidence therefore was sufficient to show that the seller performed his agreement to repair the machine when it was out of order and defendant's claim that it was not in order when installed is not supported by a fair consideration of the evidence produced at the trial.

[4, 5] The defense of breach of warranty of fitness was pleaded in defendant's answer. It was alleged that, at the time the written agreement was entered into between the parties, the seller, plaintiff's assignor, stated and represented to defendant that the musical instrument was in good workable condition and was suitable for the use to which defendant intended to put it and that the seller would keep the instrument in good repair and in first-class condition and in such condition that it would always operate upon the deposit of 5-cent coins. It was then further alleged that the instrument was not at the time the representations were made or at any time in first-class workable condition nor in such condition that it would operate upon the deposit of coins and that the seller refused and neglected to repair the machine although he was requested so to do by defendant. The evidence which, it is claimed, supports the allegation of an express warranty of fitness rests in the testimony of the defendant, to the effect that the seller stated to him that the orchestrope was a good machine and would probably not get out of order and that if it did he would repair it. An analysis of the testimony thus presented reveals that the claim that there was an express warranty of fitness is not sustained. Manifestly, the only part of the representation which in any respect approaches a warranty of fitness or quality is the declaration that it was a good machine. The remainder of the statement relates entirely to the future and does not purport to describe the condition of the machine at the time the sale agreement was executed. As heretofore suggested, the evi-

dence presented by the record indicates that repairs were made by the seller whenever he was notified of the necessity therefor. The use of the word "probably," in the phrase "It would probably not get out of order," effectually negatives the idea of a warranty that the instrument would not get out of order. It remains then to consider whether the statement that the instrument was a good machine constituted a warranty of quality or fitness. It is clear that the statement relied upon as amounting to a warranty, which we must assume was believed by the jury to have been made by the seller, could not constitute an express warranty. It was no more than the expression of an opinion which did not import a warranty. Brackett v. Martens, 4 Cal. App. 249, 87 P. 410; Alexander v. Stone, 29 Cal. App. 488, 156 P. 998; Civ. Code, § 1732. It is, however, generally recognized that although there is no express warranty of fitness, nevertheless the law will imply a warranty that the article sold is reasonably adapted to the purpose for which it is purchased. 35 Cyc. 408; Lamb v. Otto, 51 Cal. App. 433, 197 P. 147. Section 1735 of the Civil Code, added by the Legislature of 1931 (page 2239, § 1), declares that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale except under certain conditions therein specified. Subdivision 1 of the section sets out the only conditions which are here applicable. This subdivision is in the following language: "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

[6, 7] It may be conceded that, notwithstanding the absence of an express warranty of fitness, nevertheless the circumstances presented by the evidence were such that a warranty that the instrument was fit for the purpose for which it was sold was raised by implication of law. The difficulty which then presents itself is to discover from the evidence that there was a breach of such implied warranty. Defendant's testimony was to the effect that the machine failed to operate on deposit of coins on the same day that it was installed; that during the time it remained in the restaurant it failed to operate on deposit of coins more than half the time. But the evidence also shows that the machine when delivered had merely a slot for coin deposits and that a few days after it was installed, defendant purchased from plaintiff's assignor under separate contract coin boxes which were installed in various places in defendant's restaurant. Defendant testified that the same difficulty was encountered with the boxes as with the machine. No evidence was offered which tended to show how much of the time the failure of the machine to operate was due to some defect in the coin boxes. For all that appears the failure of the machine to operate on deposit of coins may have been due entirely to some defect in the boxes after they were installed. But defectiveness in the coin boxes purchased under separate contract would not support the claim of defendant that the machine itself was defective and unfit for the purpose for which it was sold. Furthermore, it is significant that although defendant testified that he continually had trouble with the machine during all of the time it was in his possession and that it was out of order most of the time, nevertheless the record shows that he made three successive monthly payments in accordance with the terms of his contract. Moreover, the evidence shows that there was neither a return of the instrument by the defendant nor an offer to return it. Such conduct on the part of the buyer is sufficient to defeat his claim of breach of an implied warranty of fitness. 22 Cal. Jur. 983, § 60; Union Oil Co. v. Purissima Hills Oil Co., 181 Cal. 479, 185 P. 381; Streff v. Gold Medal Creamery Co., 96 Cal. App. 18, 273 P. 831.

[8] Nor is the defense of failure of consideration available to defendant. As hereinabove noted, defendant had entered into a written agreement for the purchase of certain personal property. He had paid a small portion of the purchase price and agreed to pay the balance in monthly installments. After paying three such installments, he refused to make any further payments on the ground that the machine which he had agreed to purchase was useless to him because, as he said, "it wouldn't work." But the record contains no evidence that defendant ever offered to restore the machine to the seller or to plaintiff to whom the contract had been assigned by the seller. When the action was instituted defendant was in default and had neither restored nor offered to restore the property. He was, therefore, in no position to rely upon the equitable defense of failure of consideration. Gamble v. Tripp, 99 Cal. 223, 33 P. 851; Garvey v. Lashells, 151 Cal. 526, 91 P. 498; Hincksman v. Delacour, 47 Cal. App. 416, 190 P. 832.

[9] With respect to the defense of rescission it is sufficient to say that the record contains no evidence that there was any effort to rescind the agreement. No notice of rescission was given nor was there any offer to restore the machine.

[10] Finally, it may be remarked that an anomalous result was achieved by the verdict of the jury in conformity with which the judgment appealed from was rendered. By their verdict in plaintiff's favor the jury found that the orchestrope was sold for the sum

specified in the written agreement, to wit, the sum of $1,438. As heretofore noted, the evidence produced at the trial showed that the defendant made an initial payment of $100 when the contract was executed and thereafter paid three monthly installments of $55.77 each, making a total of such monthly payments of $167.31. The sum total of the payments made by the defendant under the terms of his contract was therefore $267.31. It is obvious that plaintiff elected to treat the transaction as a completed sale and by their verdict in plaintiff's favor the jury must have proceeded upon this theory. The effect produced by the verdict and the judgment rendered in conformity with it is that the defendant in return for the sum of $517.31 is given title to property for which he agreed to pay more than 2½ times this sum. The defendant contends that the jury rejected the written contract and substituted in its place an oral agreement in accordance with the testimony produced by the defendant and then found that certain covenants of warranty had been breached by plaintiff's assignor and that the detriment suffered by defendant amounted to the sum of $709.55, which was subtracted from the balance of $1,266.86 claimed by plaintiff, leaving the sum of $517.31 which represented the jury's estimate of the actual reasonable value of the orchestrope, and that from this figure there was then subtracted the sum of $267.31 representing the total payments made by defendant, thus leaving the sum of $250 for which amount the verdict was returned. Assuming the correctness of defendant's contention with respect to covenants of warranty and the breach of them by plaintiff's assignor, there is a difficulty with the contention of defendant which is immediately apparent. The action was brought to recover the balance claimed to be due on account of the purchase price. In arriving at this balance the sum total of payments made by the defendant was subtracted from the contract price. The defendant had thus been credited with the amount of the payments made by him and manifestly was not entitled to a further credit of the same amount. The suggested explanation cannot therefore be correct. A further difficulty in sustaining the judgment arises when the verdict is examined with reference to the allegations of defendant's answer and the evidence submitted by him. One of the special defenses set up by the answer was that the plaintiff warranted that the instrumen was in good workable condition, and suitable for the uses to which defendant intended to put it. Assuming that there was an implied warranty of either quality or fitness, the measure of damages for the breach of such warranty was established by certain statutes which were in effect at the time the action was instituted and tried. These statutes are sections 3313 and 3314 of the Civil Code.

The former section is in the following language: "Breach of warranty of quality of personal property. The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time."

Section 3314 reads as follows: "Breach of warranty of quality for special purpose. The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

[11] It was therefore incumbent upon the defendant first to plead the facts which the above-cited sections prescribe as the basis for measuring the damages, and, second, to present proof of the damages suffered by him by reason of the breach of warranty. Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 498, 88 P. 512; Starr Piano Co. v. Martin (Cal. App.) 7 P.(2d) 383. The defendant did neither of these things. His answer contains no allegations of facts which are sufficient to support a verdict for damages in any amount. Nor was any effort made by him to present proof of any damages sustained by him. The record contains not a scintilla of evidence respecting the "excess in value" which the property would have had. The only evidence as to value which was placed before the jury was the contract price of the instrument. This was some evidence of what the value would have been if, under defendant's theory, there had been no breach of an implied warranty of quality. But, in order that the jury might intelligently apply the correct measure of damages, it was necessary that some evidence indicative of the actual value of the instrument at the time of its delivery should be presented to them. Nor was any evidence submitted to the jury tending to show the "loss incurred" by defendant in his effort to use the orchestrope. As heretofore noted, the statute prescribing the measure of damages for breach of warranty of fitness for a particular purpose makes this an element necessary to be shown for a discovery of the detriment caused by a breach of warranty of fitness. In the absence of evidence relative to these necessary elements, the verdict cannot therefore be correct.

For the reasons stated, the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

124 Cal.App. 245

BEST v. MARTIN.

Civ. 7167.

District Court of Appeal, Second District, Division 2, California.

June 10, 1932.

Rehearing Denied July 8, 1932.

Appeal and error ⇐766.

Substantial failure to comply with rule respecting presenting points separately in brief required dismissal of appeal (Supreme Court and District Court of Appeal Rule VIII).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by William Best against John Martin. From the judgment, defendant appeals.

Appeal dismissed.

H. M. Mayes, of North Hollywood, for appellant.

Gilbert J. Heyfron and Harry Tullar, both of Hollywood, for respondent.

FRICKE, Justice pro tem.

Appellant's opening brief wholly fails to comply with that portion of rule VIII of the Supreme Court and District Courts of Appeal which requires that "the briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented." This court has repeatedly called attention to the provisions of this rule and the penalties involved for its violation. See Barnes v. Cocke, 99 Cal. App. 700, 279 P. 190, wherein appellant's brief was stricken from the files; Withers v. Southern Pacific Co., 101 Cal. App. 373, 281 P. 518, wherein the judgment was affirmed because of appellant's failure to comply with the rule; People v. Yaroslawsky, 110 Cal. App. 175, 293 P. 815, wherein the court calls attention to the propriety of dismissing an appeal for the same violation of the rule as is presented in the case at bar; Hawkins v. Doolittle, 113 Cal. App. 619, 298 P. 862; Haverty Co. v. Pacific Indemnity Co. (Cal. App.) 4 P.(2d) 214, 215; and Culver City Lime Co. v. Orlopp (Cal. App.) 11 P.(2d) 635, wherein the appeals were dismissed for the same cause; and Burns v. Renaker Company (Cal. App.) 2 P.(2d) 408, 410, wherein respondent's brief was stricken from the files for violation of the rule.

In Hawkins v. Doolittle, supra, this court called attention to the fact that noncompliance with the rule would compel the dismissal of the appeal regardless of its merits. In Haverty Co. v. Pacific Indemnity Co., supra, this court said: "But, in view of repeated cautionary expressions of this and other courts, we are compelled to instill respect for the rules of court and previous rulings, and to require their observance by those who must be presumed to be familiar with them." The warning was again sounded in Burns v. Renaker Co., supra, wherein the court, after calling attention to the violation of its rules, said: "We have formerly been lenient as to these matters, but the evil seems to grow under this benevolent lack of regimen. We have lately, therefore, enforced the penalties incurred by a violation of the rules except in particular cases in which there has seemed to be some excuse for the dereliction, and the other courts of review of the state, apparently, have also become more severe in such cases. It seems that, in the matter of obedience to the rules of court, we should make strenuous endeavor to see to it that many of the members of the bar who are not now doing so shall resume the practice of the law, for rules of court, generally speaking, have the force of law, and a knowledge of their purport is as necessary to the practitioner at the bar as is his knowledge of the law itself, properly so called."

In view of the fact that rule VIII is not of recent adoption and the repeated attention which has, by judicial opinion, been called to its violation and the penalties attendant thereto, a substantial failure to comply with its provisions is inexcusable, and cannot be condoned by the court.

The appeal is dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

123 Cal.App. 726

PEOPLE v. THOMPSON.

Cr. 1203.

District Court of Appeal, Third District, California.

May 27, 1932.

Rehearing Denied June 11, 1932.

Hearing Denied by Supreme Court June 24, 1932.

1. Automobiles ⇨355(8).

Evidence sustained conviction of driving automobile involved in accident resulting in child's death and failing to stop and render aid following accident (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

Facts disclosed that 6 year old girl while crossing street was struck down by "dark blue touring car," and that witnesses' description of automobile and driver tallied with defendant's automobile and clothing worn by him; that defendant after accident continued on course some distance and turned around, came back, and passed scene of accident without stopping; and that examination of defendant's automobile after being arrested a few minutes after the accident disclosed broken headlight, and dented fender, and there were found on automobile blood stains, and human hair of same color as that of injured child.

2. Automobiles ⇨355(6).

Evidence sustained conviction of driving automobile while in intoxicated condition (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537).

3. Criminal law ⇨1186(4).

Instructions relating to not stopping and rendering aid following automobile accident, not mentioning whether defendant had knowledge of accident, *held* not prejudicial error, where defendant had knowledge of striking person (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62; Const. art. 6, § 4½).

Such instructions were to effect that duty was imposed by law upon driver of automobile which strikes person to stop and render assistance in all cases, whether accident was caused by carelessness of driver or person struck, and to effect that, if defendant drove certain automobile which became involved in accident resulting in death, and if defendant failed to stop and render assistance, to convict defendant of failing to stop and render aid following automobile accident.

4. Criminal law ⇨798½.

Court must instruct jury as to verdict to be rendered, where defendant is charged with driving automobile while under influence of intoxicating liquor (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537).

5. Automobiles ⇨358.

Verdict that defendant was guilty of driving automobile while under influence of intoxicating liquor, as charged *held* insufficient to support judgment of conviction (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537).

6. Criminal law ⇨939(2).

Denying new trial for newly discovered evidence *held* no abuse of discretion; diligence in endeavoring to obtain testimony, or impossibility of obtaining testimony by reasonable diligence, not being shown.

7. Criminal law ⇨939(2).

As regards granting new trial, party cannot wait until after trial to locate witnesses.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Matt Thompson was convicted of failing to stop and render aid following an automobile accident and of driving an automobile while intoxicated, and he appeals.

Affirmed in part, and reversed in part.

Blaine McGowan and L. F. Puter, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 8th day of December, 1931, an information was filed in the superior court of Humboldt county, containing three counts, upon which the defendant was tried and found guilty on counts 2 and 3, and, from the order denying his motion for new trial and judgment based upon said counts, this appeal is prosecuted. The counts upon which the defendant was convicted read as follows:

"Count Two. And complainant further complains of said defendant, Matt Thompson, and says: That said defendant, on the 8th day of November, 1931, at Eureka, in the County of Humboldt, State of California, did violate section 141 of the California Vehicle Act, in the manner following: That said defendant, while then and there the driver of a vehicle, to-wit, an automobile, which said automobile was then and there involved in an accident resulting in the death of a person, to-wit, one Helen Edna Sepic, did fail to immediately stop said vehicle at the scene of the accident.

"Count Three. And complainant still further complains of said defendant, Matt Thompson, and says: That said defendant, on the 8th day of November, 1931, at Eureka, in the County of Humboldt, State of California, did then and there wilfully and unlawfully operate and drive a motor vehicle, to-wit, an au-

tomobile, on the public highways of the State of California, to-wit, on Harrison Avenue, in the city of Eureka, while in a drunk and intoxicated condition, contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

The verdict finding the defendant guilty on count 3 is in the following language: "We, the jury in the above entitled action, find the defendant guilty of the crime of driving an automobile while under the influence of intoxicating liquor, as charged in count 3 of the information."

Upon this appeal the appellant contends that the testimony is insufficient to support the verdict of the jury as to count 2, that the court failed to instruct the jury as required by the law, and that the verdict as to count 3 is insufficient to support the judgment. A new trial was also asked on the ground of newly discovered evidence, supported by affidavits.

[1, 2] Without setting forth the testimony of the various witnesses, it is sufficient to state that the record discloses the following facts relative to the offense charged in count 2, to wit:

On November 8, 1931, Helen Edna Sepic, aged about 6 years, was playing near her home alongside a public street in the city of Eureka. At about 5 o'clock p. m. she attempted to cross the street, and was struck down and fatally injured by an automobile described as a "dark blue touring car," moving at the rate of about 25 or 30 miles an hour. The description of the automobile, and of the person therein, by those who witnessed the accident, tallied exactly with the description of the automobile driven by the defendant, and the clothing worn by him.

The record further discloses that, a few minutes after the accident, the defendant was arrested by a police officer while in an automobile described as above, and an examination of the automobile disclosed a broken headlight and a dented front fender. In answer as to how this condition came about, the defendant stated that he had no knowledge of how the headlight was broken or the fender dented. There were some blood stains found on the automobile and also human hair of the same color as that on the head of Helen Edna Sepic. It also appears in the record that metal bolts and several pieces of broken glass were picked up at the scene of the accident. It further appears from the testimony that the driver of the automobile, after striking Helen Edna Sepic, continued on his course for some distance, turned around, and came back and passed the scene of the accident without stopping. The defendant was seen in the automobile, in which he was subsequently arrested, a short time before the accident occurred. At the time of the arrest of the defendant, the testimony amply supports the finding of the jury that the defendant was intoxicated. There is also testimony in the record as to the defendant and other parties indulging in intoxicating liquors on the afternoon of the day of the accident. These circumstances set forth in detail by the various witnesses furnished an ample basis for finding the defendant guilty on both counts 2 and 3.

At the conclusion of the trial the court read to the jury section 141 of the California Vehicle Act (St. 1923, p. 562, as amended by St. 1929, p. 544, § 62), and then gave to the jury the following instructions, to-wit:

"2. I instruct you that the duty imposed upon a driver of an automobile which strikes a person, to stop, render assistance, and furnish the information required by law, is a duty which he must perform in all cases, and it is immaterial whether such accident was caused by the carelessness of such driver, the carelessness of the person struck, or of both, or was an unavoidable accident. Such duty arises whenever a collision occurs.

"3. If, then, you believe from the evidence in this case, to a moral certainty and beyond a reasonable doubt, that the defendant Matt Thompson, at the time alleged in the information, drove an automobile, and that said automobile became involved in an accident resulting in the injury and death of Helen Edna Sepic, and that the said Matt Thompson neglected and failed to stop his automobile and neglected and failed to render to the said Helen Edna Sepic reasonable assistance, including the carrying of the said Helen Edna Sepic to a physician, surgeon or hospital if it was apparent that such treatment was required, it is your duty to bring in a verdict of guilty to count two of the information, irrespective of how you may find upon count one and count three of said information.

"4. Section 112 of the Motor Vehicle Act provides: 'It shall be unlawful for any person who is an habitual user of narcotic drugs or who is under the influence of intoxicating liquor or narcotic drugs to drive a vehicle on any public highway within this state.'

"5. If the defendant, Matt Thompson, operated a vehicle upon the highways of this state while under the influence of intoxicating liquor, he would be guilty of violating section 112 of the Motor Vehicle Act, and under those circumstances it would be your duty to render a verdict of guilty on the count charging the operation of an automobile on the highways while intoxicated, which is count three of the information."

[3] These instructions, so far as they relate to not stopping and rendering assistance, are alleged to be prejudicially erroneous in that no mention is made as to whether the defendant did or did not have knowledge of the collision of the automobile which he was driving, with the person of Helen Edna Sepic, and in support of this contention appellant relies

upon the cases of People v. Graves, 74 Cal. App. 415, 240 P. 1019, 1020; People v. Rallo (Cal. App.) 6 P.(2d) 516, and People v. Scofield, 203 Cal. 703, 265 P. 914. These cases, however, in their facts, are readily distinguishable from those shown by the record in the instant case.

In the case of People v. Graves, supra, an almost identical instruction was given, and was conceded to be erroneous, in that it did not mention the subject of whether the defendant did or did not have knowledge of the collision. The court there, nevertheless, used the following language, which is pertinent here: "While the instruction is no broader than the section itself, it is inconceivable to us that the Legislature ever intended to make the provisions of this section applicable to a person who was ignorant of the fact that the automobile which he was driving had struck another person. And it is with equal difficulty that we can bring our minds to believe that any jury would convict an accused of the violation of the provisions of said section without being assured, to a certainty, that he had actual knowledge that his machine had struck a person, or had collided with another automobile, even under an instruction of the court as broad as that given in this case." Here we have facts and circumstances which show that the defendant had knowledge of the collision. The driver of the automobile, after the collision and after driving some distance farther on, turned about, retraced his course, passed the scene of the collision, and did not stop.

In the case of People v. Rallo, supra, this court had occasion to pass upon a somewhat similar instruction, but the circumstances showed that the person who was found guilty was lying asleep in the rear of the automobile; the person found guilty was not driving the machine; the driver in that case was found not guilty. There is no evidence to show that Rallo had any connection with the actual driving of the machine, or had any knowledge of the collision until he was told by the driver that something had been hit, and then they retraced their steps, and, according to the testimony, failed to find any injured person.

In People v. Scofield, supra, the circumstances show that the defendant returned to the scene of the accident, and was relieved from offering aid, etc., by the fact that other persons had taken charge of the person who was injured, and were engaged in removing him to a hospital. The defendant in that case stopped and did everything which the law required him to do, save and except rendering aid, which was rendered by other persons.

Section 4½ of article 6 of the Constitution is applicable to this case, and, notwithstanding the fact that the word "knowledge" does not appear in any of the instructions relating to the striking of the person of Helen Edna Sepic by the automobile then and there being driven by the defendant, estops us from holding such failure prejudicial error.

Section 112 of the California Vehicle Act, after specifying that it shall be unlawful for any person under the influence of intoxicating liquor to drive a vehicle on any public highway, contains, among others, the following specifications: "Upon every verdict of 'guilty' under this section, the jury shall recommend the punishment and the court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury."

The respondent calls our attention to section 112 of the act of the Legislature in 1923 (St. 1923, p. 553), which contains no such provision. However, this prosecution is not under the section as it then read, but is under the section as amended in 1929 (St. 1929, p. 537), which reads as above stated. This section has been construed in the following cases: People v. Ray, 92 Cal. App. 417, 268 P. 382; People v. Beck, 95 Cal. 257, 272 P. 797; and sections 261 and 264 of the Penal Code containing similar provisions to the cases of People v. Beck, supra; People v. Currie, 93 Cal. App. 544, 269 P. 770; People v. Sachau, 78 Cal. App. 702, 248 P. 960, and People v. Rambaud, 78 Cal. App. 685, 248 P. 954.

[4] In the cases of People v. Sachau and People v. Rambaud, supra, this court had occasion to examine the question of the recommendation of a jury as to the punishment to be inflicted, and it is unnecessary to set forth at length the reasons therein stated, but it is sufficient to say that it conclusively appears from those cases and the other cases cited that it is incumbent upon the court to instruct the jury as to the verdict to be rendered when one is charged with driving an automobile while under the influence of intoxicating liquor.

[5] In addition to what was said relative to section 264 of the Penal Code as to the recommendation of the jury being binding upon the court, we find that the language contained in section 112 of the California Vehicle Act is more mandatory in form. The concluding words of the paragraph in which the recommendation is found reads, as we have stated: "The court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury." It thus appears that the Legislature, following the interpretation given by the courts to section 264 of the Penal Code, concluded to use language conforming to the interpretation of the courts, and therefore expressly prohibited the imposition of any sentence greater than that contained in the recommendation of the jury.

[6, 7] It follows from what we have said, and the reasoning of the cases which we have cited, that the verdict as to count 3 is not sufficient to support a judgment. There is no

showing in the affidavits upon which the appellant based, in part, his motion for a new trial, of any diligence in endeavoring to obtain the testimony, or any showing that such testimony could not have been obtained by reasonable diligence preceding the trial of the cause. The affidavits are really cumulative in so far as any facts therein stated are concerned, and, without setting them forth in detail, it is sufficient to say that we have examined them, and no basis is presented therein for the granting of a new trial. There is no showing whatever that either the defendant or his counsel exercised any reasonable effort to obtain the presence of the four witnesses at the trial whose affidavits were presented in support of the motion. It is sufficient to say that no abuse of discretion is shown on the part of the trial court, for the reason that, before such affidavits can be considered as laying the foundation for a new trial, it must appear that the testimony set forth in the affidavits could not have been obtained and presented upon the trial of the action by the exercise of reasonable diligence. It has been decided many times that a party cannot wait until after the trial of an action and then proceed to locate witnesses who would testify to a contrary state of facts. It must appear that such testimony could not have been presented upon the trial by the exercise of reasonable diligence.

In view of the foregoing facts it follows that the order of the court denying the defendant's motion for a new trial, as to count 2, and the judgment of the court based thereon, must be affirmed, and that the order of the court denying a new trial as to count number 3, and the judgment based thereon, must be reversed. And it is so ordered.

I concur: R. L. THOMPSON, J.

123 Cal.App. 684

BRADNER et al. v. NOESEN et al.

Civ. 4560.

District Court of Appeal, Third District, California.

May 25, 1932.

Rehearing Denied June 24, 1932.

1. Landlord and tenant ⇐190(1).

Appointment of receiver on application of sublessee *held* not eviction of lessees as respected liability for rent during period receiver was in possession.

2. Landlord and tenant ⇐184(1).

Note executed at same time as lease providing that on breach lessor might declare note due became due and payable on default in payment of rent (Civ. Code, § 1642).

Lease, note, and mortgage were executed at the same time, and each formed a part of same transaction. The lease provided that lessees concurrently with its execution should make and execute a promissory note secured by a chattel mortgage on furnishings and fixtures in premises as surety for fulfillment of all terms of lease, and that on breach thereof lessor should have right to declare the note due and payable and foreclose chattel mortgage.

3. Landlord and tenant ⇐182.

Illegal provision of lease for recovery of liquidated damages does not prevent recovery of rent due at date of surrender of leased premises (Civ. Code, § 1670).

4. Landlord and tenant ⇐184(1).

Note executed as surety for fulfillment of terms of lease *held* supported by sufficient consideration.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by M. L. Bradner and another against J. W. Noesen, Madeline Noesen, Edith W. Gay, Willis Lenore Hallam, and others, wherein defendant last named filed a cross-complaint. Judgment for plaintiffs, and the first three named defendants appeal.

Modified, and, as modified, affirmed.

W. W. Wallace, of Los Angeles, for appellants.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, Denio, Hart, Taubman & Simpson, of Long Beach, Jerold E. Weil, of Los Angeles, and R. A. Newell, of Long Beach, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

This action was brought by plaintiffs to recover judgment for rent, to foreclose a chattel mortgage, and to recover damages.

The facts upon which this action is founded are as follows: Plaintiff M. L. Bradner leased an unfurnished apartment house, containing 60 rooms, in Long Beach to defendants J. W. Noesen and Madeline Noesen, his wife, for a period of five years, beginning December 1, 1924, at a rental of $36,000, payable monthly in advance in installments of $600 per month. At the date of the execution of said lease, the said Noesens also executed a note for the sum of $5,000, due on or before five years after date, secured by a chattel mortgage on certain personal property. This note and mortgage was given as security for the fulfillment of the terms and conditions of the lease on the part of the lessees.

On September 17, 1925, the said Noesen and wife assigned said lease to defendant Gay, who assumed said note and mortgage, plaintiffs assenting to said assignment without releasing the assignor. Under the same conditions, said lease was successively assigned to defendant Hallam and to defendants Hall and Oster, and upon each of said assignments the property covered by the said mortgage was sold and assigned to the assignee, and possession of said leased premises delivered.

Prior to the commencement of this action plaintiffs had filed three actions against defendants, two of which were for unpaid rent and the other an action in unlawful detainer. All of these actions were dismissed by plaintiffs before trial.

In the second action for rent defendant Hallam filed an answer and applied for the appointment of a receiver. One of the grounds for such appointment was that the defendants Hall and Oster, who were then in possession of said leased premises as assignees of the lease, were insolvent and were collecting the rents of same, and instead of applying said rents to the payment of the rent accruing to the landlord were converting same to their own use, and that said Hallam was liable to the landlord for the rent called for by the lease.

No objections being made to this application, the court appointed one Anna Slevelan as such receiver. Said receiver took possession of the apartment house on August 11, 1927, and thereafter continued in possession until July 1, 1928.

The action of unlawful detainer was filed June 14, 1928, but as plaintiffs were given possession of said apartment house on July 1, 1928, the said action was dismissed.

The present action was commenced on August 28, 1928, and judgment was rendered for plaintiffs and against defendants for the unpaid rent owing on said lease up to July 1, 1928, amounting to the sum of $4,960.32, decreeing the foreclosure of the mortgage, and for $2,460 damages for the remainder of the term of the lease. From this judgment defendants J. W. Noesen and wife and Edith W. Gay have appealed.

Respondents admit, in their brief, that the portion of the judgment awarding them $2,460 as damages, for the remainder of the term of the lease after July 1, 1928, is erroneous. It is therefore unnecessary to consider the matters involved in this part of the judgment.

[1] Appellants contend that the appointment of the receiver, who took possession of the apartment house, was an eviction of the lessees, and that, during the time such receiver remained in possession, appellants were not liable for the rent of the apartment house, and in support of this contention they cite Telegraph Avenue Corp. v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A. L. R. 366. The court held in that case that the appointment of a receiver upon the application of the landlord, who took full control and possession of the premises, amounted to an eviction of the tenant, and relieved him from payment of rent during the period of the receiver's occupancy.

In the case now under consideration the appointment of the receiver was made on the application of a third party and not by the landlord.

Appellants seek to connect respondents with the appointment of such receiver by the testimony of defendant Hallam, who testified that respondent M. L. Bradner first made the suggestion to her to have a receiver appointed, stating to her that he was getting no rents and implored her to have the appointment made. Bradner testified that in a conversation with defendant Hallam's attorney he stated to him that he thought it advisable for Mrs. Hallam to have a receiver in order to protect her interests and the interests of the other assignees.

It appears from the affidavit of Hallam that she asked for the appointment of a receiver solely for her own protection. The court found that respondents did not take possession of said leased premises until July 1, 1928, and this finding is supported by evidence.

Why the receiver was not discharged when the case was dismissed on October 21, 1927, is not disclosed by the record. There is no evidence that the receivership was continued at the instance of respondents or that they were in any way responsible for its continuance.

[2] Appellants' next contention is that the $5,000 note was not due at the commencement of the action.

The lease, the note, and the mortgage were executed at the same time; each formed a part of the same transaction. The lease provides that the lessees concurrently with its execution shall make and execute the promissory note secured by a chattel mortgage on the furnishings and furniture then in said premises as surety for the fulfillment of all terms of the lease, and that upon breach thereof the lessor should have the right to declare the note due and payable and foreclose the chattel mortgage.

Section 1642 of the Civil Code provides that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

Construing these three instruments together, it is apparent that one of the conditions under which the note and mortgage were given was to secure the payment of the rent, and that, upon the default in the payment of the rent, the lessor had the right to

proceed to foreclose the mortgage for the rent then due.

[3] Respondent has conceded that the clause in the lease providing for the recovery of liquidated damages is illegal, under the provisions of section 1670 of the Civil Code; but this provision in the lease does not prevent the recovery of the rent due respondents at the date of surrender of the leased premises. Green v. Frahm, 176 Cal. 259, 168 P. 114; Rez v. Summers, 34 Cal. App. 527, 168 P. 156.

None of the cases cited by appellants, in which the lease provided for liquidated damages, hold that the lessor, by reason of such provision was not entitled to recover the actual rent due and owing from the tenant at the time the action was commenced, where the complaint sets forth the amount of the unpaid rents, and asks judgment therefor, as was done in this case.

[4] There is no merit in appellants' contention that the note was executed without consideration.

The judgment is modified by striking therefrom that part awarding to respondents the sum of $2,460, and, as so modified, is affirmed, appellants to recover costs on appeal.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 733

In re ESTATE OF Manuel Silva GEORGE also known as Manuel S. George, also known as Manuel George.

GEORGE et al. v. CAMP et al.

Civ. 8445.

District Court of Appeal, First District, Division 1, California.

May 28, 1932.

1. Executors and administrators ⇐137.

Executor has exclusive power and discretion to sell real estate of decedent, but must show, on hearing on return, facts warranting sale (Code Civ. Proc. §§ 1536, 1552).

2. Executors and administrators ⇐137.

Executor may in return of sale of real estate, allege necessity in exact language of statute (Code Civ. Proc. §§ 1536, 1552).

3. Executors and administrators ⇐137.

Executor, in return of sale of real estate, need not detail outstanding debts and assets of estate (Code Civ. Proc. §§ 1536, 1552).

4. Executors and administrators ⇐137.

Executor's return of sale of real estate must show on face compliance with requirements as to notice, posting, and advertising, and fairness of proceedings (Code Civ. Proc. §§ 1536, 1552).

5. Appeal and error ⇐1010(1).

Trial court's finding that places of posting on executor's sale of real estate complied with statutory requirements cannot be disturbed, in absence of evidence to contrary (Code Civ. Proc. §§ 1536, 1552).

6. Executors and administrators ⇐137.

Executor's return of sale of real estate was not insufficient because not showing property was sold at 90 per cent. of appraised value or that appraisement had been made within year (Code Civ. Proc. §§ 1536, 1550, 1552).

7. Executors and administrators ⇐137.

Requirement that appraisement be made within year does not limit powers or duties of executor selling real estate, but is direct limitation on court's power (Code Civ. Proc. § 1550).

8. Executors and administrators ⇐141.

In construing notice of statutory sale of real estate, court will indulge presumption that law was complied with (Code Civ. Proc. § 1552).

9. Executors and administrators ⇐141.

Executor's notice of sale of real estate *held* to sufficiently specify time when property was sold (Code Civ. Proc. § 1552).

Notice read that executor would sell at private sale to highest bidder and "subject to confirmation by this Court on or after Monday the 23d day of March, 1931," all right, title and interest of estate, etc.

10. Appeal and error ⇐232(1).

Complaint regarding sufficiency of return of executor's sale, not urged in lower court, would not be considered on appeal (Code Civ. Proc. § 1552).

11. Executors and administrators ⇐141.

Court did not abuse discretion in refusing to grant continuance of sale by executor of real estate to permit heirs to advance money or secure additional bidders.

Refusal to grant continuance was not error, because there was no definite offer before court to raise money necessary to pay off indebtedness, and it was shown that suit had been commenced by mortgagee to foreclose on claim against the real property which, if allowed to proceed, would entail costs and additional burdens and possibly drive away all bidders.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Wilbur L. Camp, executor of the estate of Manuel Silva George, also known as Manuel S. George, also known as Manuel George, deceased, filed a return of sale of real estate of decedent, opposed by Isabel Carmo Soares George and another. From an order confirming the sale, contestants appeal.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellants.

J. M. Atkinson, of Los Angeles, for respondents.

Owen D. Richardson and Donald B. Richardson, both of San Jose, amici curiæ.

PARKER, Justice pro tem.

This is an appeal from an order confirming sale of real estate in the matter of the estate of Manuel Silva George, deceased. As noted in the caption, the said decedent was also known by other names.

Preliminary to a discussion of the points involved, we note the claim of respondent Camp that appellants are not parties aggrieved by the order and not proper parties to prosecute this proceeding. This contention is based upon the claim that the last will and testament of said decedent excludes contestants and appellants from sharing in the distribution, and that there is no proof before the court below as to appellants' interest in the estate. An analysis of the conflicting claims and the authorities presented in support thereof would extend this opinion to exhaustive lengths, and, inasmuch as the attack upon the order may be fully considered and disposed of without such detail, we expressly refrain from a determination of this question.

At all of the times covered by the present controversy, the respondent Wilbur L. Camp was the duly appointed, qualified, and acting executor of the last will and testament of the said decedent. No question is presented as to the regularity of the proceedings leading up to the appointment of said Camp or of his subsequent qualification. On March 23, 1931, the said executor filed in the Superior Court a return of sale of the real estate of the said decedent, together with a petition for an order of said court confirming the sale. On the hearing of the said return of sale, the contestants herein appeared and objected to the confirmation; and it might be here noted that not one of the grounds now urged by appellants was urged in the court below. However, as it is contended that the defects were and are jurisdictional and would for all time stand as clouding the validity of the sale, we ignore the proffered question of appellants' estoppel to urge these claims here.

[1] It is appellants' first contention that the return of sale of real estate of a decedent as the practice now requires is in lieu of and a substitute for the former requirement of a petition for order of sale of real property. Therefore, argue appellants, the same strictness of construction and the same completeness of detail is necessary in the present return of sale as was formerly required in a petition for order to sell real estate. No authority is cited in support of this contention, nor is there any persuasive argument presented from principle.

Section 1536 of the Code of Civil Procedure gave to the executor the power to sell any of the real estate of the decedent's estate when it appeared to him that it was for the advantage, benefit, and best interests of the estate and those interested therein.

The sections following 1536 provide the manner in which such sales must be conducted and the kind and character of notice required. Section 1552 provides that, after making a sale of real estate, the executor must make a return of his proceedings to the court, and provides further for the hearing of said return by the court and the manner and form of notice thereof. Section 1552 then reads: "Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale, and if good reason does not exist for such sale, or if the proceedings for the sale were unfair or the sum bid disproportionate to the value and it appears that a sum exceeding such bid at least ten per cent exclusive of the expenses of a new sale may be obtained, the court may vacate the sale," etc. Under the former reading of section 1536, no discretion was vested in the executor, the section reading that a sale of real estate could be made only upon the order of the court, and such order was provided for only when it appeared to the satisfaction of the court that certain specified conditions existed which would necessitate the sale. Under the reading of the section as amended, the sole and exclusive power and discretion rests with the executor, subject, of course, to the necessity of showing upon a hearing on the return that the facts support the exercise of the discretion given. Obviously the only test of the reasonable exercise of this discretion rests in the probate record, including the inventory and appraisement, claims presented, and anticipated costs of administration. This record is a part of the court's files, and it would seem a forced construction to require that, when an executor returns to the court his proceedings on sale, he reincorporate therein what is already before the court.

[2] The executor derives his power from the Code section 1536. When a sale of real property is necessary to pay the debts outstanding against the estate, or when a sale of real estate is deemed for the advantage, benefit, and best interests of the estate, the executor is authorized to sell, and there is no

provision in the law requiring preliminary proof on these facts. Whether an act is necessary or advantageous is always a matter of conclusion, and, in the matter of the sale of real estate of a decedent, the conclusion is to be drawn, in the first instance, by the executor. Lest the discretion vested in the executor be arbitrarily exercised, section 1552 provides, upon the return of sale, that the court must examine into the necessity of the sale or the advantage, benefit, and interest of the estate in having the sale made. Thus ample protection is given to the estate and those interested in the administration thereof. All that it is necessary for the executor to allege in his return of sale is that the sale was necessary to pay the debts outstanding or the costs of administration, or that such sale was for the advantage, benefit, and best interests of the estate and those interested therein. This allegation may be in the exact language of section 1536, without alleging the facts upon which such conclusion is based.

[3] Under section 1552 there are two distinct matters before the court: First, the necessity of the sale; and, second, the manner of conducting the same and the price received for the property sold. This section provides that the executor, after making any sale of real estate, must make a return of his proceedings to the court. The return of proceedings embraces all acts in the conduct of the sale as distinguished from the executor's determination that a sale was necessary or advantageous. We hold that, where an executor sets forth in his return of sale of real estate that it is necessary that said property be sold in order to obtain money to pay the debts of the estate and the expenses of administration, it is unnecessary to detail outstanding debts and the assets of the estate, though we may readily concede that it might be a better practice to do so. Mindful of the importance of the question, in so far as many prior probate sales might be disputed and vast interests unsettled and vexatious litigation ensue, it would merely encourage strife to hold that a sale of real estate under probate, in all other respects valid, should be held at naught, for the sole reason that an allegation of this nature in a return was not supported by the computations which showed its exactness, where the entire record was already before the court and the allegation supported and found to be true. However, we are not regarding the required return of proceedings lightly. While there is, as indicated, a discretion vested as to the necessity for sale, yet, when a sale is determined as necessary, the manner of sale is outlined by the statute, and the doctrine that the mode is the measure of the power comes into its fullest play.

The language of section 1552 is that the court upon the hearing must examine the return, obviously indicating that such return itself upon examination would disclose the proceedings. The section further provides that the court must examine witnesses in relation to the sale, expressly omitting the necessity of testimony on the proceedings leading up to the sale.

[4] It is conceded that the powers of any executor are almost entirely statutory and the power of sale is exclusively so. Section 1552, in providing for the notice of the hearing on return of sale of real property, sets forth the manner of notice and directs that, after describing in the notice the lands sold, reference must be made to the return for further particulars. This, too, indicates clearly that it was the legislative intent that any person interested might learn from the return itself the steps taken leading up to the sale. We hold, therefore, that a fair construction of the statute requires that the return show on its face a compliance with the requirements as to notice, posting, and advertising, where necessary, and the fairness of proceedings. We may then test the return in the instant case. This return shows on its face a full compliance with the statute and the code sections governing. Rather than detail further the return itself, we may review the particulars wherein appellants claim the same insufficient.

[5] First, appellants contend that the return shows that notice of sale was not posted in three public places. The return specifies with particularity the places where the notices were posted, but the appellants insist that the places set forth in the return in fact were less than three. This contention deserves little comment. The court below found that the posting was sufficient. We are cited to the case of Standley v. Knapp, 113 Cal. App. 91, 298 P. 109, as controlling the instant case. Once and for all, let it be repeated that the cited case determined nothing other than the principle that a reviewing court would not take judicial knowledge of places and localities not generally known or subject to the rule of judicial notice. In the cited case, the trial court had found that the posting was insufficient by reason of the fact that the places of posting were not separate and distinct; in other words, that what was claimed to be a posting in different places was in reality different postings in the same place. In the instant case, the trial court's finding and order was that the places of posting complied with the requirements, and, in the absence of any evidence to the contrary, this finding cannot be disturbed. The contention of appellants here is that, because the trial court in Standley v. Knapp found that the courthouse and hall of records in Los Angeles were one and the same place, we must necessarily hold that the courthouse and the hall of records in San Jose must be the same place. A sufficient answer would

be an expression of appreciation of the leavening humor interjected into a procedural discussion.

[6, 7] Next, appellants contend that the return is insufficient, for the reason that it nowhere appears therein that the property was sold at 90 per cent. of its appraised value or that any appraisement had been made within one year. This requirement is no part of the return, inasmuch as section 1550 provides that a new appraisement may be made at any time before confirmation. Further, this requirement does not limit the powers or duties of the executor, but is a direct limitation upon the power of the court. In the instant case, the record before the court showed that only four months or thereabouts had elapsed from the return of the original inventory and appraisement and the return of sale. Such appraisement showed the property to have been appraised at a valuation of $18,000, and the return of sale showed the property to have been sold at a gross price of $18,500, from which was to be paid a commission of $500. Likewise affirmative testimony before the court showed the appraised value to be a fair valuation and not disproportionate to the true value of the said real estate.

[8, 9] The next point urged is that the notice of sale at private sale did not show or specify the time within which or when the property would be sold. This contention is based upon the wording of the notice. The notice reads that the executor will sell at private sale to the highest bidder and "subject to confirmation by this Court on or after Monday the 23rd day of March, 1931," all the right, title, and interest of the estate, etc. Appellants argue that this notice simply notifies all persons that the sale is subject to the confirmation of the court on or after March 23d, and gives no notice of when the sale itself will be made. It is readily apparent that a court could not confirm the sale until after it was made. Appellants insist that every person reading the notice would know that it took ten days' notice before confirmation, and that therefore the last day upon which a sale could be made under the notice was March 13, 1931. It is conceded that a sale on March 13th would have been invalid under the notice. However, we do not accept appellants' views on this. The entire attack rests upon the mechanical construction of the words. The lack of a comma following the word "Court" is all that supports appellants' argument. If we adopt the hypercritical attitude of appellants and scrutinize the notice, we can infer that any one reading this notice must know that no legal sale could take place on March 13th, and, indulging the presumption that the law is being complied with, we would construe the notice as being that the sale itself would take place on or after March 23d.

[10] The final point urged against the sufficiency of the return is that the said return on its face indicates that no sufficient notice was given. The contention is based upon the fact that the return is dated March 19, 1931, and the certificate of the notary attached to the return shows that said return was verified by the executor as of March 19, 1931. The return shows the sale to have been made on March 23d, and the notices given were to the effect that a sale would not be made prior to that date. It is not disputed that a sale cannot be made on the 23d and a return thereunder filed on the 19th of the same month. Yet the return itself was not filed until the 23d day of March. The only explanation made by respondent executor is that the dating of the return and the jurat thereon as of the 19th was an act of inadvertence. Inasmuch as the point was not urged at all in the court below where correction, if inadvertent, could have been made, we deem it worthy of scant consideration here. Had the return been filed on the 19th, the situation would be different. Much may be said on this particular phase of the case, but we decline further discussion, and refuse to interfere with the order appealed from, in so far as this ground is urged, solely on the ground that no claim was made thereon in the court below.

This concludes the review of appellants' argument on the procedure up to the date of confirmation. We deem it necessary to state here that the entire matter is with reference to the state of the law prior to the Statutes of 1931 and the present Probate Code.

[11] It is next claimed by appellants that the court below abused its discretion in refusing to grant a continuance to permit the heirs to make arrangements to advance the money necessary to pay the indebtedness or to secure additional bidders. We will not detail all of the facts presented in the record. There seemed to be some discord and disagreement as to who represented the heirs; this from the fact that the question of heirship was still undetermined. Appellant Isabel George claims to be the widow of decedent. Appearance was made by another person also claiming to be the widow and the mother of the legatees mentioned in the will. Counsel for appellants did make some sort of an equivocal offer to raise the money necessary to pay off the indebtedness, but there was nothing positive or definite before the court. Said counsel wanted only the opportunity to go out and seek new bidders with no assurance that any could be found. It was also shown that a suit had been commenced by a mortgagee to foreclose on a claim against the real property, which, if allowed to proceed, would entail costs and additional burdens and possibly drive away all bidders. Under these conditions, we can

see no abuse of discretion in the refusal of a continuance.

The order appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 23

BERT E. ANDERSON CO. v. HASHA et al.

Civ. 8279.

District Court of Appeal, First District, Division 1, California.

June 1, 1932.

1. Assignments ⇐58.

In absence of statute, mere retention of orders by drawee, unaccompanied by circumstances evidencing intention to accept, is insufficient to establish acceptance thereof.

2. Assignments ⇐137.

Evidence *held* to sufficiently disclose circumstances from which intention to accept orders for payment could be implied (Civ. Code, § 3218).

3. Assignments ⇐137.

Receiving and filing orders drawn on fund to drawer's credit without objection was sufficient to show acceptance by drawee.

4. Assignments ⇐137.

Drawee's statement that orders drawn on fund to drawer's credit would be paid evidenced an acceptance.

5. Assignments ⇐58.

Drawee, by acceptance of orders against fund to drawer's credit, assumed obligation to pay orders.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action by Bert E. Anderson Company against M. E. Hasha, Morthland Mortgage Company, and others. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

Williams & Parks and Eugene D. Williams, all of Los Angeles, for appellant.

Charles M. Easton, of Los Angeles, for respondent.

GRAY, Justice pro tem.

Appellant does not question the findings that defendant Hasha, in payment for materials furnished him by respondent in the construction of two houses, drew two orders, dated respectively July 26, 1926, and August 5, 1926, against funds to his credit in appellant's possession; that, immediately after their dates, respondent presented the orders to appellant, who then gave its written receipt therefor; and that appellant, after retaining the orders until December 20, 1926, returned them to respondent, with a refusal to pay. Appellant, however, disputes the evidence's support of the further finding that appellant promised and agreed to pay the orders.

[1, 2] In absence of statute, the mere retention of the orders, unaccompanied by circumstances from which an intention to accept may be implied, was insufficient to establish acceptance of the orders. Notes 8 Ann. Cas. 612; 17 L. R. A. (N. S.) 1266. Appellant argues that, since the orders are not payable to order or to bearer, they are not bills of exchange as defined by section 3207 of the Civil Code, and that, therefore, their retention cannot be deemed an acceptance under section 3218 of the same Code. Conceding for present purposes the correctness of this argument, and, further, that there is no statutory rule as to the effect of such detention, yet the judgment must be affirmed if the evidence discloses circumstances from which an intention to accept may be implied.

The president of respondent testified as follows: "* * * I took the order dated July 26, 1926 * * * to Mr. Daniels. * * * When I gave him this paper as is customary he checked up on his ledger and presented me with a receipt and told me that we could expect our money not later than the next afternoon. In August when I took the second order down we had approximately the same conversation. I at that time asked him about the first one but he would give me no answer. The check was not ready. He just said, 'Well, the check is not here. Mr. Morthland is not here to sign it.' When I called for my check on these orders he said that the check was not here but it would be all right. He showed me both of them were O.K.'d. * * * I must have made half a dozen or more calls asking for the check. * * * At their request I gave them a statement to accompany each order. * * * On December 20th Mr. Corral of the Morthland Mortgage Company returned Mr. Hasha's orders on the Morthland Mortgage Company, together with a statement attached thereto, and said, 'We can't do anything for you.'"

[3-5] This evidence is uncontroverted. Receiving and filing the orders without objection was sufficient to show acceptance. Montgomery Door, etc., Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 N. E. 71; Hackett v. Campell, 10 App. Div. 523, 42 N. Y. S. 47. The statement that the orders would be paid also evidences an acceptance. McPherson v. Walton, 42 N. J. Eq. 282, 11 A. 21; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Southern Creosoting Co. v. Chicago & A. R. Co. (Mo.

Sup.) 205 S. W. 716. Other testimony that appellant had always paid similar orders received from respondent tended to show a custom from which an intention to accept might be inferred. Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572. By its acceptance, appellant assumed the obligation to pay the orders. Barlow v. Lande, 26 Cal. App. 424, 147 P. 231.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 96

MITCHELL v. J. H. ROTH & CO. et al.

Civ. 8494.

District Court of Appeal, First District, Division 1, California.

June 6, 1932.

1. Gaming ⇐12.

Contract to purchase stock stating delivery was contemplated *held* not within constitutional prohibition against futures, notwithstanding oral agreement no delivery would be made and stock would be sold at profit by certain date (Const. art. 4, § 26).

2. Corporations ⇐121(3).

Delay in action to rescind contract for purchase of stock *held* no defense, where induced by defendants' own representation that they would make voluntary adjustment (Civ. Code, § 1691).

3. Corporations ⇐422(1).

Representations of corporation's agent to sell stock were representations of corporation's principal.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Mary Maher Mitchell against J. H. Roth & Co., J. H. Roth, an individual, and others. From a judgment for plaintiff, defendants J. H. Roth & Co., and J. H. Roth appeal.

Affirmed.

David H. Cannon, of Los Angeles, for appellants.

Willard G. Cram, of Los Angeles, for respondent.

DOOLING, Justice pro tem.

The plaintiff in this action and her assignor, Mrs. Riley, who is plaintiff's sister, were each induced to purchase shares of the capital stock of Trancontinental Petroleum Corporation by certain representations of defendant Lowery, which representations the trial court found were false and fraudulent. Pursuant to her agreement with Lowery, plaintiff delivered to Lowery sixty-seven shares of the capital stock of Shell Union Oil Company, which Lowery represented to her would be hypothecated with a bank as security for a loan to cover one-half the purchase price of the Transcontinental Petroleum Corporation stock which she was buying, with the assurance that the Shell Union stock would remain the property of plaintiff and in no event would be sold. In like manner Mrs. Riley paid to Lowery $750, which was received as payment of one-half the purchase price of the stock which Mrs. Riley agreed to buy. Among the false representations made by Lowery was a representation that the stock had a present value of $25 per share, and that on April 1, 1929, it would be placed on the stock market at $35, and that he could dispose of the stock purchased by plaintiff and her assignor for them at that time for $35 per share, thus netting them each a profit of $10 per share on the transaction. On June 18, 1929, plaintiff and her assignor, having learned in the meantime that the stock which they had thus agreed to purchase was practically worthless, served notice of rescission on the defendants, and this action followed. The court found that throughout the transactions defendant Lowery was acting as agent for defendants J. H. Roth and J. H. Roth & Co., and gave judgment against all three for $1,905, the value of the Shell Union stock which had in the meantime been sold, and $750, the amount paid by Mrs. Riley.

From this judgment defendants Roth and J. H. Roth & Co. prosecute this appeal. Appellants make three points on appeal: (1) That the contracts for the purchase of the Transcontinental stock were illegal because in violation of section 26, article 4, of the California Constitution; (2) that plaintiff and her assignor did not rescind promptly as required by section 1691, Civil Code; (3) that the finding that defendant Lowery was the agent of J. H. Roth finds no support in the evidence.

[1] Taking these propositions in the order stated, the portion of section 26, article 4, of the Constitution, relied upon by appellants, reads: "All contracts for the purchase or sale of shares of the capital stock of any corporation or association without any intention on the part of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market prices on divers days, shall be void, and neither party to any such contract shall be entitled to recover any damages for failure to perform the same, or any money paid thereon, in any court of this State."

In the case before us both plaintiff and her

assignor signed contracts in writing in which they agreed to buy the stock, each containing the following language: "It is understood and agreed * * * that actual delivery is contemplated." Thus on their face the contracts were not violative of the constitutional provision. It is appellants' contention, however, that the testimony shows that both plaintiff and her assignor had the oral understanding with Lowery that they were not to receive the shares of stock or pay the balance due on them, but that Lowery agreed to sell the stock on April 1, 1929, for $35 per share, and to pay them the difference between that sum and $25 per share, the price at which they had agreed to buy. Even thus nakedly stated, we are satisfied that the transaction is not in violation of the constitutional provision. The agreement was not the ordinary short-selling agreement in which the parties gamble upon the price of the stock at a fixed future date, the buyer to win if the stock goes up and the seller to win if it goes down. Here was no gamble at all. In consideration of their agreement to buy the stock and the payment of one-half of its purchase price, Lowery promised absolutely that on April 1st he would sell the stock for a definite price, $35 per share. If he could not sell it for $35 on April 1st, he was not to sell it at all, nor did he make any effort to sell it at that date at a lower price. The plaintiff testified that she understood that, if the stock did not sell for $35 on April 1st, "then I was to get my certificates"; and plaintiff's assignor, Mrs. Riley, testified that she thought she owned the stock.

We are satisfied that the constitutional provision in question is designed merely to prohibit dealing in futures with no intention to purchase or sell actual shares of stock, but merely to "pay off" upon the rise or fall of the market between fixed days. Willcox v. Edwards, 162 Cal. 455, 459, 460, 123 P. 276, Ann. Cas. 1913C, 1392. This was not such a transaction.

[2] The contention that plaintiff and her assignor did not rescind promptly is based upon the claim that plaintiff became suspicious of the transaction some time in February, and her assignor learned that the representations were false not later than the middle of May, and the notices of rescission were not served until June 18th. However, the evidence shows that plaintiff saw defendant Roth early in April and at that time Roth promised to give back her securities to her; that some time later in April she saw defendant Lowery, and Lowery said: "Well, I got you into this and I am going to get you out"; and that on May 1st Roth induced plaintiff and her assignor to give him orders to sell their Transcontinental stock, saying that he would sell the stock and then he would straighten everything up. On May 20th plaintiff and her assignor each sent a letter to Roth demanding that he keep his promises to them, and on June 18th, the notices of rescission were served. It will thus be seen that the delay about which appellants now complain was induced by defendants' own representations that they would make a voluntary adjustment with plaintiff and her assignor. Where the delay in rescinding is induced by the conduct of the offending party, it cannot be availed of by him as a defense. Promis v. Duke, 208 Cal. 420, 426, 281 P. 613; Hunt v. L. M. Field, Inc., 202 Cal. 701, 704, 262 P. 730; Davis v. Butler, 154 Cal. 623, 628, 98 P. 1047; Eade v. Reich (Cal. App.) 7 P.(2d) 1043, 1045; Noll v. Baida, 202 Cal. 98, 259 P. 433.

[3] It is admitted that Lowery, in selling the stock, was acting as agent for appellant J. H. Roth & Co. Appellant J. H. Roth testified that he had authorized J. H. Roth & Co. to sell Transcontinental stock belonging to him, and that the Transcontinental stock sold to plaintiff and her assignor was a part of this stock. The thinness of Roth's contention that Lowery did not represent him in selling the stock is thus made obvious. J. H. Roth & Co. was Roth's agent to sell the stock. The representations of Roth & Co.'s agent Lowery were the representations of Roth & Co.; and the representations of Roth's agent, Roth & Co., were the representations of Roth. A corporation can only act through its agents, and, if Roth's position was correct, an individual could always relieve himself from liability for the fraud of his agent by choosing as his agent a corporation.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 678

PEOPLE v. EMMETT.

Cr. 2170.

District Court of Appeal, Second District, Division 2, California.

May 25, 1932.

1. Criminal law ⇐655(4, 5).

In burglary prosecution, judge's remarks during examination of prospective juror and upon defense counsel's refusal to waive reading of information *held* not prejudicial error under circumstances.

Circumstances were that during her examination by court a juror stated that she had been the victim of a burglary, but that this experience would not prejudice her; that defendant's counsel challenged

juror for cause and court disallowed the challenge, whereupon counsel stated that there was no question but that there probably was prejudice, and court inquired whether counsel was accusing juror of perjury; that the defense then excused juror by a peremptory challenge, following which the court apologized to the juror for the ungentlemanly insinuations of counsel, and counsel assigned this as error, and court responded that counsel's standing before court was not such as to entitle him to any great consideration; that following acceptance of jury court asked both counsel whether they would waive formal reading of information since court had already stated its contents to jury during voir dire examination, and defendant's counsel declined so to do, whereupon court said that this was the first case in about 12 years' occupancy of the bench where counsel demanded that clerk perform the arduous duty of reading a long information, contents of which court had already stated, but that such was counsel's privilege; that court of its own motion instructed jury that reprimand of any counsel by court or conduct which occasioned it should not in slightest degree prejudice jury.

2. Judges ⇐49(1).

That judge remarked during impaneling of jury that defendant's counsel was not in good standing before court *held* not to disqualify judge because biased (Code Civ. Proc. § 170).

3. Criminal law ⇐826.

That defendant's instructions were submitted to court during prosecutor's opening argument would not justify their refusal (Code Civ. Proc. § 607a).

That instructions were not submitted within time required by Code Civ. Proc. § 607a, requiring counsel before first witness is sworn to deliver to presiding judge all proposed instructions, would not justify their refusal, since such section has no application to criminal trials.

4. Criminal law ⇐778(4), 789(2).

Instruction on presumption of innocence and reasonable doubt in language of statute was sufficient (Pen. Code, §§ 1096, 1096a).

5. Burglary ⇐46(6).

Instruction that proof of corpus delicti, supplemented by confession and possession of stolen property shortly after it was taken, would not be sufficient to convict accused of burglary, *held* properly refused.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Robert R. Emmett was convicted of burglary of the second degree and grand theft, and he appeals.

Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank W. Richards, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appellant was found guilty of burglary of the second degree and grand theft, the jury also finding that he had suffered three prior convictions of felony. The evidence conclusively established that during the night of the 13th and 14th of July, 1931, the barn of the Fox Hills Riding Academy was burglariously entered and saddles and bridles of a value of $300 or more stolen therefrom, and that appellant sold several of the stolen saddles and bridles to secondhand dealers under various fictitious names. Appellant made confession of his guilt of the crimes charged to the owner of the riding academy in the office of the sheriff in the presence of a number of witnesses. Appellant was not represented at the trial by counsel who now appears for him.

[1] Appellant assigns as error the alleged misconduct of the trial judge during the examination of a prospective juror. During her examination by the court a juror stated that she had been the victim of a burglary, but that this experience would not tend in any way to prejudice her and that she would be able to give the defendant the same fair trial as if she had not had such an experience. Appellant's counsel challenged the juror for cause and the court disallowed the challenge. In the face of this ruling counsel stated, "There is no question but what there can be and probably is prejudice—" at which point the court interrupted with an inquiry as to whether counsel was accusing the juror of perjury. The defense then excused the juror by a peremptory challenge, following which the court said: "I desire, on behalf of this defendant, to apologize to you Mrs. Ellingwood, for the very ungentlemanly insinuations of this man." Counsel assigned this as error and the court responded: "Your standing before these courts Mr. ——— is not such to entitle you to any great consideration," which remark was also assigned as error. Following the acceptance of the jury the court asked both counsel whether they would waive the formal reading of the information in view of the fact that the court had already stated its contents to the jury during the voir dire examination. This appellant's counsel declined to do, whereupon the court said: "I will say this. This is the first case I have ever had in about 12 years occupancy of the bench where counsel has demanded that the clerk perform the rather arduous and lengthy duty of reading a long information, the contents

of which the court has already stated. If you desire to impose that additional work on the clerk, of course it is your privilege to do that, and the clerk will read the information, the amended information." Appellant contends that the foregoing remarks of the trial court constituted prejudicial error. Counsel should not have made the insinuations that the juror was prejudiced after the court had ruled and disallowed his challenge for cause, and the refusal to waive the reading of the information, while within his rights, appears not to have been prompted by a desire to serve his client, but rather evidenced an unwillingness to comply with a reasonable request of the court. Even so, the remarks of the trial judge did not add to the dignity of the court and had better been omitted. We cannot, however, see how the defendant could have been prejudiced by these incidents, especially since, though no request was made therefor, the court, of its own motion in its final instructions to the jury, instructed the jury that the reprimand of any counsel by the court or the conduct which occasioned it should not in the slightest degree prejudice the jury and that the verdict should be based solely on the evidence and the court's instructions as to the law. This appears to have been given not only because of the incidents above referred to but because of instances during the trial, not mentioned in the briefs, when the court found it necessary to admonish counsel and on at least one occasion to warn him that his conduct would lead to his punishment for a contempt of court unless he desisted, and which tend to show that the conduct of counsel at the beginning of the trial was more aggravating in character than the cold record would indicate. The incidents assigned do not warrant a reversal. See People v. George, 72 Cal. App. 124, 236 P. 934; People v. Costa, 24 Cal. App. 739, 142 P. 508; People v. MacDonald, 167 Cal. 549, 140 P. 256; People v. Cramley, 23 Cal. App. 340, 138 P. 123; People v. Watson, 57 Cal. App. 85, 206 P. 648.

After the recess following the reading of the information, appellant filed an affidavit designed to disqualify the trial judge upon the ground of bias and prejudice against the defendant and his attorney. The only fact set forth in the affidavit is that the court made the remark during the impaneling of the jury that defendant's counsel "is not in good standing before this court." While there is an allegation that "other statements" were made by the court and that the court refused to permit certain questions to the jury, the affidavit fails to point out any specific instances, and there is an entire absence of any allegation of fact which will justify an inference that the court was biased or prejudiced in the slightest degree against appellant.

[2] It is a basic and initial requirement of a proceeding under section 170 of the Code of Civil Procedure to disqualify a judge who is claimed to be biased or prejudiced that the party asserting such disqualification shall file with the clerk a written statement "setting forth the fact or facts constituting the ground of the disqualification of such judge." There having been a total failure on the part of appellant to set forth facts which, if true, would show bias or prejudice of the trial judge, the proceeding contemplated by section 170 was never begun and the trial court was, therefore, not called upon to take any proceedings provided for by that section. People v. Berman (Cal. App.) 4 P.(2d) 226.

[3] Appellant finally assigns as error the refusal of the trial court to give the instructions requested by the defense and refused upon the ground that they were not submitted to the court until after the close of the evidence and during the prosecutor's opening argument and were, therefore, not submitted within the time required by section 607a of the Code of Civil Procedure and for the further reason that they were covered by the instructions given to the jury. As this court has previously held that section 607a of the Code of Civil Procedure has no application to criminal trials [People v. Fink, 68 (Cal. App.) 8 P.(2d) 493], a mere noncompliance with that section would not justify the refusal of the instructions.

[4] The trial court gave the instruction on the subject of presumption of innocence and the doctrine of reasonable doubt, as declared in section 1096 of the Penal Code, and the law is now settled that, where this is done, "no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." Pen. Code, § 1096a; People v. Bettencourt (Cal. App.) 1 P.(2d) 494; People v. Annunzio (Cal. App.) 7 P.(2d) 739; People v. Barnes, 111 Cal. App. 605, 295 P. 1045; People v. Dykes, 107 Cal. App. 107, 290 P. 102. The instructions numbered 1, 2, 8, 9, and 10 were properly refused under the rule just stated, they being but variations of the rule declared in the instruction given.

The instruction numbered 3 was covered by the instruction on reasonable doubt and was properly refused upon the further ground that it improperly assumed that the case of the prosecution rested wholly upon circumstantial evidence and was furthermore inapplicable to a case in which there was but one defendant.

[5] The instruction numbered 4 in effect declared that proof of the corpus delicti supplemented by a confession and possession of the stolen property shortly after it was taken would not be sufficient and was properly refused as being contrary to the law. People v. Russell (Cal. App.) 8 P.(2d) 209, and cases

cited; People v. Ross, 61 Cal. App. 61, 214 P. 267; People v. Eldridge, 72 Cal. App. 386, 237 P. 770.

Instruction numbered 6 was properly refused as being specially directed to a consideration of the testimony of the defendant (People v. Barnett, 99 Cal. App. 409, 278 P. 885; People v. Khan, 92 Cal. App. 534, 268 P. 701; People v. Heath, 79 Cal. App. 20, 248 P. 1027; People v. Adams, 199 Cal. 361, 249 P. 186), and also as being covered by the court's instructions upon the credibility and weight to be given the testimony of witnesses generally.

Two of the instructions given by the trial court, assigned as error, are so obviously in accord with the settled law that the points are wholly without merit.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

124 Cal.App. 7

In re WIRT'S ESTATE.

HIRAM LODGE NO. 18, FREE AND ACCEPTED MASONS OF DELAWARE, OHIO, et al. v. COX et al.

Civ. 8153.

District Court of Appeal, Second District, Division 1, California.

May 31, 1932.

1. Depositions ⇨104.

Only proponents could object that answers to interrogatories in depositions were not responsive (Code Civ. Proc. § 2025).

2. Trial ⇨89.

Trial court's refusal to strike out voluntary answers given to interrogatories in depositions *held* not error, where evidence would have been otherwise admissible (Code Civ. Proc. § 2025).

3. Perpetuities ⇨8(4).

Evidence supported finding that main purpose of Masonic lodges, beneficiaries of bequest, was "eleemosynary," within constitutional provision forbidding perpetuities unless for "eleemosynary" purposes (Const. art. 20, § 9).

Evidence disclosing that lodges were not established or maintained for profit, that their purposes were of a moral and charitable nature, and that their charitable activities, though mainly confined to members and their families, were, in times of stress or great public need, extended to include relief to those not affiliated with the order, was sufficient to support a finding that the main purpose of the lodges was "eleemosynary"; "eleemosynary" being synonymous with "charitable" as the latter word is used and understood in treatises and decisions upon the subject of trusts.

[Ed. Note.—For other definitions of "Charitable" and "Eleemosynary," see Words and Phrases.]

4. Charities ⇨10.

That bequest provided that only income of charitable fund be used for current expenses *held* not to change charitable character of fund (Const. art. 20, § 9).

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Gary Wirt, deceased. Contest by Charles H. Cox and others, opposed by the Hiram Lodge No. 18, Free and Accepted Masons of Delaware, Ohio, and another. From a judgment directing distribution, contestants appeal.

Affirmed.

Ford & Johnson, of San Francisco, for appellants.

Harry K. Sargent, of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

At the time this matter was first presented to the superior court, upon the petition of Hiram and Jackson lodges, praying distribution to them of the residue of the estate of Gary Wirt, the heirs at law of said deceased appeared and filed their contest and objection to such distribution, alleging, as the sole ground of such contest, "that the bequest in the will of said deceased was and is void under the provisions of article 20, § 9, of the Constitution of the state of California." The trial court heard the contest and decided that the bequest to the petitioning lodges was void under the provisions of the article of the State Constitution just cited, and thereupon made its order and decree for the distribution of the residue of the estate to the heirs at law. From this decree of distribution the lodges appealed. Upon the final presentation of this matter upon that appeal to the Supreme Court, counsel for the appellants presented an application purporting to be made under section 956a of the Code of Civil Procedure for leave to produce evidence before the Supreme Court that said lodges were, in fact, charitable or eleemosynary institutions within the intent and meaning of the exception contained in the foregoing cited section of the State Constitution. The Supreme Court in its decision of this matter (Estate of Wirt, 207 Cal. 106, 111, 277 P. 118, 120) said: "Applying this prin-

ciple to the facts as presented upon this appeal, we have become satisfied that the question as to whether or not certain lodges which are independent as to the detail of their local organization, but which in a general way belong to one branch of a widespread order of Masonry, are or are not charitable as to the main objects and purposes of their organization and conduct, but which exist at places remote from the area over which this court exercises jurisdiction, is a question as to which this court cannot, as matter of law, assume to take judicial notice, but which are essentially matters of fact to be made the subject of judicial inquiry and of the proffer of appropriate proofs before the trial court."

The court then, after reversing the lower court, as to the decree of distribution, made the following order: "And that the cause should be remanded to the trial court, with instructions to reopen the same and to take such further proceedings therein as are in conformity with the views expressed in this opinion." In accordance with this order of the Supreme Court, the superior court regularly heard this matter. At this hearing the petitioners, who are respondents upon this appeal, introduced in evidence certain depositions of witnesses, residents of the states of Indiana and Ohio, the situs of the petitioner lodges, named in the will of the said deceased. The contestants, the appellants here, offered no evidence at this hearing. The matter was submitted to the court, and the court made and filed written findings of fact in which it found that petitioners "are eleemosynary and charitable institutions, and that the constitutional inhibition against perpetuities, does not affect the bequest to said lodges as contained in the will of Gary Wirt, deceased." Contestants' motion for a new trial was denied by the trial court. Judgment was duly entered in accordance with the court's findings of fact and conclusions of law, and, from this judgment, contestants appeal.

[1, 2] The contention of appellants is that the evidence is insufficient to justify or support the findings made by the court herein. The only evidence offered at the hearing had in this matter was that contained in certain depositions of witnesses taken on behalf of the petitioner lodges. These witnesses resided within the jurisdictions within which the lodges were located, and gave testimony as to the aims and purposes for which they were established and maintained, and as to their management, administration, and control. At the opening of the hearing, counsel for the contestants made a general objection to the answers as contained in the depositions, that the answers were incompetent, irrelevant, and immaterial and further moved to strike out each answer as hearsay, voluntary, not responsive, and a conclusion. The objections and motions were taken under advisement by the court, and later overruled and denied. The interrogatories, the answers to which appellants directed these objections and motions, were very broad in their statement, though couched in language calculated to elicit evidence responsive to the question submitted to the trial court for inquiry. The form of the interrogatory was not the subject of attack. Section 2025, Code Civ. Proc. The objection that the answers were not responsive could only be properly made by the proponent of the interrogatory. It was not error for the trial court to refuse to strike out voluntary evidence if it would have been otherwise admissible. Davis v. Parsons, 165 Cal. 70, 80, 130 P. 1055. The interrogatories were very broad in their scope, and comprehensive and intelligible answers of necessity, must have been prolix and voluminous. From an examination of the questioned answers, it appears that a very large part of the matter they contain was not subject to objection or motion to strike, and, as to the remainder, if it can be deemed questionable under any theory whatsoever, the circumstances under which it was received would not justify a reversal here.

[3] The evidence produced by the petitioner lodges at the hearing was, in the case of each lodge, of a very similar character. They were not established or maintained for profit or gain. They were part of a state-wide organization. Their purposes were of a moral and charitable nature. The charitable activities, though in the main confined to members and their families, were, in times of stress or great public need, extended to include relief to those not affiliated with the order. The moneys collected by them were used in maintaining their organization, both local and state, and in carrying on their charitable work. Appellants contend that the evidence is insufficient to support the finding that the lodges were mainly organized or existed for eleemosynary purposes, as that expression is used in the Constitution. In commenting upon a situation very similar to that presented here, and involving a lodge of the same general character as petitioners', the court in Kauffman v. Foster, 3 Cal. App. 741, 744, 86 P. 1108, 1110, used the following language which is appropriate to the instant case: "The sufficiency of the evidence to support the findings of the court as to the charitable character of the association is next challenged. Competent evidence appears in the record to show that the association was formed for certain purposes of charity and society and holds its funds in trust for these purposes, and none other; that the lodge funds are sacred to the purposes of charity and shall not be used for any other purpose. This evidence is sufficient to support the finding last referred to." The term "eleemosynary" as made use of in connection with the constitutional exception referred to is synonymous with "charitable" as

the latter word is used and understood in treatises and decisions upon the subject of trusts. Estate of Sutro, 155 Cal. 727, 734, 102 P. 920, 923. The fact that the institution is one which is not operated for gain or profit is strongly indicative of its charitable character. People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L. R. A. 269. The fact that some of the activities of the lodges may not be classified as charitable does not deprive the institution of its eleemosynary character if the main purpose be charitable. Estate of Dol, 186 Cal. 64, 198 P. 1039. In Estate of Sutro, 155 Cal. 727, at page 736, 102 P. 920, 923, the court quotes with approval the general definition of "charitable" found in Jackson v. Phillips, 14 Allen (Mass.) 556, as follows: "A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, *or otherwise lessening the burdens of government.*" (Italics ours.)

The evidence presented in the instant case conclusively shows that the works as carried on by the petitioner lodges was of such a nature, though in part limited to members of the lodges and their families, that it directly lessened the burden that otherwise would have rested upon the public. Read as a whole, the evidence presented here is sufficient to support the court in its finding that the main purpose of the petitioner lodges was eleemosynary within the meaning of our State Constitution. In the great number of authorities which have been cited to this court from other jurisdictions, it should be noted that in many of the instances the statutes involved were of a much more restricted nature and involved questions arising under laws limited to "public charities," "pure charities," "purely public charities." Our Constitution makes no such limitation; neither is such limited construction to be found in our reported cases.

Appellants' contention that the questioned bequest was for a particular purpose only and that there was no general charitable intention cannot be sustained. Our courts have, in the construction of such bequests, uniformly upheld them where it could be fairly said that an intention to create a charitable donation appeared. "But in this country courts have been extremely liberal in construing charities, and under principles analogous to the doctrine of cy-pres have enforced trusts far more indefinite and inexact than the one here involved." Estate of Upham, 127 Cal. 90, 94, 59 P. 315, 317.

[4] Appellants' last contention is founded, it would appear, upon the question presented at the hearing before the Supreme Court, "as to whether the matter of the application of the income to be derived from the residue of said estate to 'current expenses' was incidental to the main object of these organizations, and hence was in the nature of a charitable bequest." Estate of Wirt, supra, at page 109 of 207 Cal., 277 P. 118, 119. The will of the deceased provided that "only the income of said funds shall be used for current expenses." It would be an exceptional institution in which the administration of a fund of the character that is here involved would not incur some expense, either directly or indirectly. The fact that the deceased in his will has provided for a limitation upon the amount of such expense that may be charged as against the fund which he provides to be established of itself would not change the character of the fund. The trial court very properly found that the main purpose of the lodges was charitable, and, if in the effectuation of this charity funds are incidentally used in a manner which, if considered as isolated examples rather than as a part of the general plan of the deceased, would be other than charitable, this fact, under the circumstances present here, does not change the eleemosynary character of the bequest. Limitations of somewhat similar nature have been upheld by our courts in a number of cases. Estate of Peabody, 154 Cal. 173, 97 P. 184; Estate of Royer, 123 Cal. 614, 56 P. 461, 44 L. R. A. 364; Estate of Coleman, 167 Cal. 212, 138 P. 992, Ann. Cas. 1915C, 682; People v. Cogswell, supra. In City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n, 78 Va. 431, 436, the court said: "Its revenues * * * are wholly applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances. These are charitable purposes." The evidence before this court in the instant case supports the conclusion reached by the court in the above-quoted case.

The judgment appealed from is affirmed.

I concur: YORK, J.

CONREY, P. J. (concurring).

I concur in the judgment. Section 9 of article 20 of the Constitution, on which this appeal rests, reads as follows: "No perpetuities shall be allowed except for eleemosynary purposes." The will provides that the residue of the estate shall be equally divided between the two lodges, and that "said lodges shall place said fund in a special funds to be known as the Gary Wirt fund, and only the income of said funds shall be used for current expenses."

There is not to be found, in these terms of the will, any attempted creation of a perpetuity. The title of the legatees vests immediately. "The rule against perpetuities, in-

grafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time." Estate of McCray, 204 Cal. 399, 406, 268 P. 647, 650. For the foregoing reasons, and entirely apart from the charitable or other characteristics of the respondent legatees, I think that the appeal is without merit.

HALL v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.*

Civ. 786.

District Court of Appeal, Fourth District, California.

June 4, 1932.

Rehearing Granted June 29, 1932.

1. Witnesses ⇐8.

Court issuing subpœna has authority to order resident witness to appear anywhere in county, though place of appearance is more than fifty miles from witness' residence (Code Civ. Proc. § 1989).

2. Domicile ⇐4(2).

Person's residence is question of intent to be determined from all evidence.

3. Depositions ⇐71.

Evidence that one subpœnaed as witness for taking of deposition had place of business in county and had lived there for three years sustained conclusion in contempt proceedings that her residence was in county (Code Civ. Proc. § 1989).

4. Certiorari ⇐68.

Finding of trial court upon conflicting evidence could not be disturbed on writ of review.

5. Contempt ⇐63(1).

In case of constructive contempt, judgment is sufficient if, from entire record, it appears contempt was committed.

6. Depositions ⇐36.

In affidavit for issuance of subpœna to take defendant's deposition, allegation that defendant had appeared *held* sufficient as stating ultimate fact and not mere conclusion (Code Civ. Proc. §§ 1014, 2021).

Proceedings by Lillian Earle Hall for writ of review to annul the judgment of the Superior Court of Riverside County, Hon. George R. Freeman, Judge.

Judgment affirmed.

A. Brigham Rose, of Los Angeles, for petitioner.

Neil S. McCarthy, Earl L. Banta, Howard P. Hall, and Saul Ruskin, all of Los Angeles, for respondents.

SCOVEL, Justice pro tem.

Prior to the institution of the proceedings herein sought to be reviewed, Thomas H. Lipps et al. filed an action in the superior court of Los Angeles county against petitioner herein, Lillian Earle Hall et al. Thereafter Thomas H. Lipps, desiring to take the deposition of petitioner, filed in the superior court of Riverside county an application for subpœna to take deposition, reciting the pendency of the foregoing action, alleging that Lillian Earle Hall resided in Palm Springs in Riverside county and requesting that a subpœna issue commanding her to appear before L. B. Caldwell, a notary public in the city of Riverside, on January 18, 1932. The application was supported by an affidavit reciting "that Lillian Earle Hall has appeared in said action and said action is at issue as to her." Thereupon a subpœna was issued by the Honorable George R. Freeman, judge of the superior court of Riverside county, ordering that Lillian Earle Hall appear before such notary in the city of Riverside on January 18, 1932. The subpœna was duly served on petitioner at Palm Springs and proper notice of the taking of the deposition served upon her attorneys. On January 18, 1932, Lillian Earle Hall failed to appear before the notary for the taking of the deposition. Thereafter Thomas H. Lipps filed in the superior court of Riverside county his petition reciting the foregoing facts, upon which petition an order to show cause was issued directing Lillian Earle Hall to appear before the court to show cause why she should not be held in contempt by reason of her disobedience to said subpœna.

In response to the order to show cause, Lillian Earle Hall duly appeared by her attorney and filed an affidavit reciting that Palm Springs is sixty-five miles from the city of Riverside, that she had failed to obey the subpœna upon advice from her attorney, and that the court had no jurisdiction to issue the same. It was further alleged in the affidavit that she was a registered voter and resident of Los Angeles county, and that her place of residence was 2302 Budlong avenue in the city of Los Angeles.

At the hearing upon the order to show cause evidence was introduced showing that Lillian Earle Hall was served with the subpœna at the Del Tahquitz Hotel in Palm Springs; that during the past three years she had an apartment in the hotel, kept her clothes and belongings there, and at the time of the hearing was still living in the apartment; that she then and for three years prior thereto had owned and operated a beauty shop in the hotel.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 12 P.2d 1057.

The court thereupon ordered that Lillian Earle Hall be adjudged guilty of contempt, and that she pay a fine of $100. Thereafter Lillian Earle Hall filed her petition in this court for a writ of review praying that the foregoing judgment of the superior court of Riverside county be annulled.

[1] Petitioner first contends that, conceding her residence to have been in Palm Springs, the court could not order her to appear for the taking of her deposition at a point more than fifty miles from her place of residence. The only statute bearing upon this matter is section 1989 of the Code of Civil Procedure, which states that "a witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial." From a reading of the section it clearly appears that a limitation upon the territorial force and effect of a subpœna issued from a court of record is only made where it is sought to compel a witness to attend outside of the county wherein he resides. In the instant case the subpœna was issued in Riverside county, and, if petitioner is a resident therein, the court had authority to order her appearance anywhere within the county, even though the place of appearance might be more than fifty miles from her place of residence.

[2-4] Petitioner next contends that her residence is in the county of Los Angeles. Her affidavit does so indicate. However, residence is a question of intent to be determined from all the evidence in the case. In re Estate of Brady, 177 Cal. 537, 171 P. 303; Chambers v. Hathaway, 187 Cal. 104, 200 P. 931. The testimony at the hearing showed that petitioner had her place of business in Riverside county and had actually lived and maintained an apartment there for a period of some three years. We are of the opinion that such evidence amply supported the court's conclusion that her residence was in Riverside county, and under the well-settled rule we are not disposed to disregard the finding of the court made upon conflicting evidence.

[5] Petitioner next attacks the judgment holding her in contempt because it does not show upon its face that a contempt was committed. The judgment or commitment for contempt need not recite the facts constituting the contempt, except where the contempt is committed within the presence of the court. In the case of a constructive contempt, the entire record may be scanned, and, if from the entire record it appears that a contempt was committed, the judgment is sufficient. In re Lake, 65 Cal. App. 420, 224 P. 126; Frowley v. Superior Court, 158 Cal. 220, 110 P. 817.

[6] In conclusion, petitioner attacks the sufficiency of the affidavit upon which the subpœna was issued, asserting that it fails to show that she had appeared in the action filed in Los Angeles county, claiming that the recital that she had "appeared in said action" is but a legal conclusion. Section 2021 of the Code of Civil Procedure provides that the deposition of a party to an action may be taken "at any time after the service of the summons or the appearance of the defendant."

"A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Section 1014, Code Civ. Proc. The fact to be determined is whether the defendant has appeared. Evidence to prove the fact would be the filing of an answer, or a demurrer, or giving written notice of appearance. The appearance in the action, however, is the ultimate fact and was properly so alleged. Hubbell v. Hubbell, 7 Cal. App. 661, 95 P. 664.

Having acted within its jurisdiction, the judgment of the respondent court must be affirmed, and it is so ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

124 Cal.App. 25

MATHIESON v. WALLACE.

Civ. 8124.

District Court of Appeal, First District, Division 2, California.

June 1, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court July 29, 1932.

1. Appeal and error ⇐237(2), 1050(1).

Error in admitting evidence *held* not to require reversal where other evidence sustained findings and evidence in question was admitted subject to motion to strike out, which motion was never made.

2. Appeal and error ⇐237(2).

Objection to evidence, admitted subject to motion to strike out, is deemed waived, where such motion is not made.

3. Money received ⇐18(3).

Evidence sustained finding, in action for money received, that association paid money to defendant's intestate for use of plaintiff.

4. Appeal and error ⇐882(6).

Variance between claim presented to estate and complaint thereon *held* not to warrant reversal where trial was had by consent on issues framed by pleadings.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Appeal and error ⇐1071(6).

Failure to make findings, which, if made, must have been adverse to appellant, *held* not error.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Alice B. Mathieson against Frances W. Wallace, as executrix of the estate of John W. Wallace, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph Edward Connolly, of San Francisco, for appellant.

J. F. Resleure and Resleure & Hill, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued upon a rejected claim for money had and received. The cause was tried without a jury, and plaintiff had judgment, from which defendant has appealed on typewritten transcripts.

Plaintiff's former husband, Capt. Mathieson, died May 17, 1919. He was then a member in good standing of the San Francisco Bar Pilots' Benevolent Association, and had paid for such membership the sum of $3,500. On July 18, 1919, Capt. Healy purchased Capt. Mathieson's membership by paying to the association a like sum of $3,500. On July 20, 1919, Capt. John W. Wallace, who was the secretary and general manager of the association, drew from the funds of the association the sum of $3,500 belonging to the widow of Capt. Mathieson and deposited that sum to his own account. From that date until the day of his death on July 20, 1929, Capt. Wallace, by both oral and written word, fraudulently concealed this fact from plaintiff, assured her that the sum was held for her by the association, falsely informed her that it could not be paid because of litigation, urged her to trust implicitly in him for the earliest possible settlement, and, to further deceive her and keep her from approaching the association, he paid her regularly from December 15, 1919, to June 15, 1929, semiannual interest at the rate of 7 per cent. a year.

The claim presented to the estate was in the simple form of one for money had and received. This was done upon the express stipulation of the parties to avoid the unpleasant publicity which might arise from open charges of fraud against the accused. Upon the rejection of the claim this action was instituted against the pilots' association and the estate jointly, but was voluntarily dismissed as to the association.

Appellant raised four points which we may consider in order.

[1, 2] (1) That the trial court erred in permitting the claimant to testify as to facts occurring prior to the death of Capt. Wallace. We may assume for the purpose of this opinion that this was error, but it does not call for a reversal because, first, there is ample evidence to sustain all the findings independent of the evidence of this witness; and, second, the evidence was admitted over objection, but subject to a motion to strike out, and such a motion was not made. For this reason this objection is deemed waived. In re Estate of Wempe, 185 Cal. 557, 564, 197 P. 949.

[3] (2) That the evidence is insufficient to support the findings that on the 18th day of July, 1919, the association paid to Capt. Wallace the sum of $3,500 for the use and benefit of plaintiff. There is unescapable evidence of this fact in the statements of the bank in which the money was deposited, in the statement of account rendered plaintiff by Capt. Wallace soon after the death of Capt. Mathieson, and in the letters of Capt. Wallace to plaintiff and the semiannual payments of interest. The only evidence lacking is in the canceled checks of Capt. Wallace which were destroyed under the direction of the administratrix of his estate after this claim was presented to her. Without resort to the testimony of plaintiff, the evidence demonstrates that Capt. Wallace drew this money from the association and held it as the confidential agent of plaintiff and the only inference which could be drawn reasonably from the evidence is that represented in the findings of the trial court. The finding does not, therefore, rest upon conjecture or surmise. It rests upon reasonable inferences drawn from undisputed facts proved.

[4] (3) That there is a variance between the claim presented to the estate and this action. As we have said, the claim was in the simplest possible form of money had and received. This form was adopted upon the express stipulation of counsel for the estate to save the family of the deceased from the publication of the deceased's dishonesty, and this course was followed for the benefit of the estate and with its full knowledge and acquiescence. If there is any virtue in the doctrine of estoppel, or if there is to be any verity in the promise of a member of the legal profession, the point is not available to appellant in this proceeding. The claim was sufficient on its face. There was no uncertainty and no misunderstanding on the part of either claimant or administratrix. In the preparation of the complaint in this action, many allegations were included to make out a case against the pilots' association, and, on first blush, these would appear to be inconsistent with a pleading on a common count for money had and received. But the cause of action against the estate is alleged to be

based upon the claim which was filed. Probably a more exact pleading would have included the claim in hæc verba or attached it to the complaint. But there was no demurrer to the complaint, and the plaintiff was not asked in any manner to segregate her allegations made against the joint defendants. The failure to plead the full claim was cured by defendant's answer. Hence the cause went to trial on the two issues framed by the complaint and answer, as if by common consent —the receipt of the money by deceased for the use and benefit of the plaintiff, and the concealment by the deceased and his acknowledgment of the obligation as tolling the running of the statute of limitations. Hence, if there be any variance, it was by consent of the parties, and, if there be any defect in the complaint, it was not prejudicial because defendant tried the cause with full knowledge of the issues. Etienne, Jr., v. Kendall, 202 Cal. 251, 259 P. 752. It is too plain for argument that this action is not based upon fraud, but that it is based upon the claim for money had and received, and that the allegations and proof of the fraudulent concealment by deceased were for the sole purpose of tolling the limitation statute.

[5] (4) That the claim is barred by various statutes of limitation and that the trial court erred in not finding on these special defenses. The claim was not barred, because, irrespective of any evidence of fraud and concealment there were sufficient evidences in writing to toll the running of all statutes. Concannon v. Smith, 134 Cal. 14, 20, 66 P. 40; Minifie v. Rowley, 187 Cal. 481, 485, 486, 202 P. 673. Thus there was no error in failing to find on all these defenses because, if findings had been made, they must have been adverse to appellant.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

124 Cal.App. 1

MILLS v. HOUCK, Mayor, et al.

Civ. 7087.

District Court of Appeal, Second District, Division 1, California.

May 31, 1932.

Rehearing Denied June 29, 1932. Hearing Denied by Supreme Court July 29, 1932.

Municipal corporations ⇐864(1).

Costs required to be paid by city for abandoning eminent domain proceeding *held* not within constitutional provision prohibiting city from incurring indebtedness in excess of its income and revenue (Code Civ. Proc. § 1255a; Const. art. 11, § 18).

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Petition for writ of mandate by Homer C. Mills against Reve E. Houck, Mayor, and others, to compel the City Council of the City of Culver City to include in the tax levy for the fiscal year of 1930–1931 a sum sufficient to pay plaintiff's judgment against the city. From a judgment granting the writ, defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

John J. Dillon and William S. Emmons, City Atty., both of Culver City, for appellants.

J. Marion Wright, of Los Angeles, for respondent.

YORK, J.

The plaintiff petitioned the trial court for a writ of mandate to compel the city council of the city of Culver City to include in the tax levy for the fiscal year of 1930–1931 a rate or sum sufficient to pay plaintiff's judgment against the city of Culver City in the sum of $2,753.50, with interest thereon at the rate of 7 per cent. per annum from June 18, 1928, or, in lieu thereof, a rate or sum sufficient to pay at least one-tenth of the whole amount of said judgment, interests and costs, and to so levy a tax in each succeeding year until the whole amount of judgment be paid. The writ was granted in accordance with said prayer.

As set forth in appellants' opening brief, the city of Culver City took all the necessary steps to institute eminent domain proceedings against certain property in the said city to be used for street purposes. The action was duly filed wherein plaintiffs herein were defendants. Subsequently, the eminent domain proceeding was dismissed and the proceedings were abandoned. Thereafter, judgment was rendered in favor of H. C. Mills, the plaintiff and respondent here, for the sum of $2,753.50, under the provisions of section 1255a of the Code of Civil Procedure, but the city council of the said city of Culver City refused to provide for payment of the judgment, whereupon the present mandamus action was instituted.

As stated by appellants, the sole question on this appeal is whether the city of Culver City is precluded from paying the said judgment, due to the inhibition of section 18, article 11 of the Constitution of the state of California, which reads as follows: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for

that purpose. * * *" Appellants concede that the inhibition of this constitutional provision does not apply to indebtedness involuntarily incurred by a municipal corporation.

On the trial of the action, the trial judge ordered and gave judgment for a peremptory writ of mandate, wherein it was ordered that the demurrer to plaintiff's amended complaint "be and the same is overruled," and that plaintiff was entitled to a peremptory writ of mandate as provided in "section 3 of Act 3918, General Laws of the State of California," for the payment of plaintiff's judgment with interest and costs; and providing that the members of the city council of the city of Culver City and each of them be commanded to include in the tax levy for the next fiscal year (beginning July 1, 1930, and ending June 30, 1931) a rate or sum sufficient to pay plaintiff's judgment herein in the sum of $2,753.50, with interest thereon at the rate of 7 per cent. per annum from June 18, 1928, until paid. (The statute referred to is Act 3918 of Deering's Gen. Laws, 1923 Ed.) "Or in lieu thereof, said defendants and each of them are commanded to include in the tax levy for the next fiscal year (beginning July 1st, 1930, and ending June 30th, 1931) an aliquot part or fraction of the amount of said judgment with interest and costs, and thereafter a like aliquot part or fraction of the amount of such judgment, with interest and costs, shall be levied and paid each successive year until the whole thereof shall be paid; but such fractional levy and payment shall in no case be less than one-tenth of the whole amount of such judgment with interest and costs."

Said judgment also provided that, in case the levy was not made for the next fiscal year (beginning July 1, 1930, and ending June 30, 1931), for the whole amount of said judgment, with interest and costs, that the defendants and each of them must make their returns to the writ on the first Monday of the first month of the next fiscal year, until such time as a tax levy sufficient to pay plaintiff's judgment with interest and costs has been levied and paid. Said order and judgment also provided that plaintiff have judgment for costs expended.

Appellants concede that, if an indebtedness such as the one here involved is a liability arising out of tort or a liability imposed by law, the section of the Constitution herein referred to does not apply. The main question therefore for determination is whether or not the liability incurred by the defendants under section 1255a of the Code of Civil Procedure is one imposed by law, i. e., fixed by statute.

In the case of Lewis v. Widber, 99 Cal. 412, 33 P. 1128, it was held that the payment of the salary of a public officer, whose office has been created and whose salary has been fixed by a law of the state, is not within the prohibition of section 18, article 11, of the Constitution, which section, it was there held, refers only to indebtedness or liability incurred by the act or conduct of the municipal body.

In Bradford v. San Francisco, 112 Cal. 537, 44 P. 912, 915, it was said: "It will be observed that the constitutional inhibition runs, not against the legislature of the state, but against the cities, towns, etc., against the several local governments enumerated. If, therefore, the legislature shall create offices and fix the salaries to be paid to them from the local treasuries, or devolve other indebtedness or liabilities upon the city within its legislative power, and without their volition, it only remains for the municipal authorities to comply with such laws of the state."

Again, in City of Sacramento v. Swanston, 29 Cal. App. 212, 155 P. 101, 106, in which case it was contended that section 1255a, supra, violates the Fourteenth Amendment of the Federal Constitution, and that it contravenes certain provisions of our State Constitution requiring that laws of a general nature shall be uniform in their operation (article 1, § 11), and prohibiting the passage of special laws (article 4, § 25), it was said:

"The right of eminent domain involves an extraordinary power of sovereignty. While it is an eminently proper and necessary right of sovereignty, its exercise should be carefully guarded so as to prevent abuses arising under it. The Legislature can, as stated, and it should, impose upon its exercise such reasonable conditions as will discourage litigation not founded upon merit arising under it or as will penalize to a reasonable extent those who resort to it with the intention of securing property at the price they appraise it for and abandoning the proceeding if the value fixed by the jury and court are in excess thereof even only in a reasonable amount. Under the statute complained of here, if the plaintiff accepts the property at the price at which it is judicially appraised, the defendant only receives the compensation so fixed. If the property is not accepted by the plaintiff, then he must reimburse the defendant for the expenses which he has been compelled to bear in litigation for which he was not responsible.

"Thus it is plainly to be seen that the section of the Code in question does not impinge upon any provision either of the state or federal Constitution."

From this it would appear that by section 1255a of the Code of Civil Procedure it was the intention of the Legislature to impose reasonable conditions upon the exercise of the right of eminent domain, and that the liability so created is in the nature of a penalty imposed by law—fixed by statute—and therefore not controlled by section 18, article 11, of the Constitution. The liability to pay costs is not caused by the direct act of the city in

incurring a debt or a liability, but is a mere incident fixed by law, whereby the costs of litigation are required to be paid by the city, and the provisions of section 18, article 11, of the Constitution could not be construed to prohibit the payment of a mere incident to the litigation, to wit, costs in an eminent domain proceeding, and which costs are the only items required to be paid by this writ of mandate.

Undoubtedly, payment of costs in an action of this kind is a liability fixed by statute, regardless of the fact that it is incurred by an individual, a private corporation or a public corporation.

The judgment is affirmed.

CONREY, P. J. (concurring).

I concur in the judgment. The limitation of liability for which section 18, article 11, of the Constitution provides, has reference only to contract indebtedness or liability. "In McQuillin on Municipal Corporations it is stated to be the well-settled rule that such provisions in the Constitutions and statutes of the various states apply only to indebtedness which arises ex contractu, and have no application to involuntary liabilities arising ex delicto." City of Long Beach v. Lisenby, 180 Cal. 52, 57, 179 P. 198, 200. "This constitutional provision has been held applicable only to contractual obligations." Birch v. Monroe, 70 Cal. App. 656, 661, 234 P. 125, 127, citing City of Long Beach v. Lisenby, supra. "It is conceded that, if the liability in question is contractual, the judgment must be affirmed. Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698. On the other hand, it is conceded that, if such liability is one created by statute, the judgment must be reversed." Kennedy v. City of Gustine, 210 Cal. 18, 20, 290 P. 38. In Oscar Heyman & Brother v. Bath, 58 Cal. App. 499, 208 P. 981, the petitioner for writ of mandate was seeking to compel the levy and collection of a tax sufficient to pay a judgment for recovery of taxes paid under protest. In defense the respondents relied upon section 18, article 11, of the Constitution. The court said: "We are satisfied that the payment of the tax involved here was involuntary, and that the judgment is evidence of an obligation imposed by law, rather than one implied in fact. Such being the case, the city is not asked to 'incur' an indebtedness in excess of its income and revenue, but is asked to provide the necessary income and revenue sufficient to meet an indebtedness imposed upon it by law."

The commencement and prosecution of the action for condemnation of plaintiff's property did not depend upon consent of the plaintiff. The abandonment of the proceeding was likewise without his consent. No relation of contract either express or implied existed between the parties. The expenses for which the judgment provides reimbursement were forced upon the plaintiff (defendant in the condemnation action) without his consent. The term "liability," as used in the Constitution, includes implied contracts. Buck v. City of Eureka, 124 Cal. 61, 68, 56 P. 612. But at least they must be contracts. In Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698, the claim of the petitioner arose out of a contract, and the city was given the protection of the above-mentioned section of the Constitution. In the course of its discussion of the question, the court said (page 220 of 175 Cal., 165 P. 698, 699): "We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that the limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss." In using the language just quoted, Chief Justice Angellotti was quoting from a preceding decision of the court written by Mr. Justice Ross. San Francisco Gas Co. v. Brickwedel, 62 Cal. 641. It seems to me that, in giving expression to these views of the subject, the Supreme Court had in mind a distinction which would have prevented it from applying the constitutional limitation relied upon herein to a liability to compensate for a loss which was imposed upon the judgment creditor just as completely without his consent as if his cause of action had resulted from a tort.

HOUSER, J.

I dissent. City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873, and authorities there cited.

124 Cal.App. 33

PETERSON v. HOPKINS, County Assessor.

Civ. 8278.

District Court of Appeal, Second District, Division 1, California.

June 1, 1932.

Rehearing Denied June 29, 1932. Hearing Denied by Supreme Court July 29, 1932.

1. Taxation ⇐545.

Tax collector may collect unsecured personal property taxes, shown on assessment book delivered to him, notwithstanding repeal of statute so requiring (Pol. Code, § 3756, and § 3790, repealed by St. 1931, p. 2501, § 1).

2. Taxation ⇐310.

Statute fixing time for county assessor to return unused personal property tax receipts *held* impliedly repealed by statute extending time for collection (Const. art. 13, § 12½, as added in 1924; Pol. Code, § 3627a, as amended by St. 1931, p. 2479; §§ 3738, 3820, 3821).

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Proceeding by Isabelle Peterson for a writ of mandate to Ed W. Hopkins, as Assessor of the County of Los Angeles. From a judgment granting the writ, respondent appeals.

Reversed.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for appellant.

C. M. Booth, of Los Angeles, for respondent.

CONREY, P. J.

In accordance with the provisions of section 3738 of the Political Code, the auditor of Los Angeles county furnished to defendant assessor of said county blank "personal property" receipts, of the year 1931, in the required form and duly numbered, and charged the assessor with the number of receipts so issued and delivered. In said section 3738 it is provided that: "On the first Monday in August, the assessor shall return all unused receipts, and the auditor shall credit him with the numbers returned."

This proceeding was commenced in the superior court by petition filed November 4, 1931. At that time, and thereafter, the assessor had in his possession a large number of said blank receipts, unused, and which he refused to return to the auditor. This is a proceeding by petitioner as a taxpayer of said county, to compel the return of said unused blank receipts, by the assessor to the auditor. From the judgment entered, ordering that the writ of mandate issue, the assessor appeals.

Since the amendment of section 3738 of the Political Code, in the year 1907 (St. 1907, p. 697, § 14), there has been no further amendment thereof, and the section has never been the subject of a direct repeal. The case for the plaintiff herein rests upon the above-quoted provisions of the section. It is the contention of appellant that by virtue of subsequent legislation there is an implied repeal of this section in so far as it required that "on the first Monday in August, the assessor shall return all unused receipts."

Prior to the enactment of section 12½, of article 13, of the Constitution of California (section adopted Nov. 4, 1924), taxes upon taxable notes, debentures, shares of capital stock, bonds, solvent credits, or mortgages (commonly known under the term intangible property), were assessed at the same time and in the same manner as other personal property. The duty of the assessor to assess all property for each fiscal year was provided for by Political Code, § 3629. Under that section the duties of the assessor with relation to assessments began on the first Monday of March and, as far as actual assessment was concerned, ended on the first Monday of July of the same year. The only extensions of time for the performance of the duties of the assessor were those provided for in section 3681 during sessions of the county board of equalization, and the provisions in section 3881 authorizing the correction of clerical errors in the assessment roll. Aside from such incidental duties on the part of the assessor as were provided by said sections 3681 and 3881 of the Political Code, the power of the county assessor to assess property ceased and terminated in any year on the first Monday in July. Also: "The power of assessment in matters involving discretion as to the amount thereof was exhausted when the board of equalization finally adjourned." Southwest Land Co. v. Los Angeles County, 46 Cal. App. 9, 13, 188 P. 575, 576.

[1] Sections 3820 and 3821 of the Political Code, as amended from time to time, have authorized and still authorize the assessor to collect the taxes on all property when in his opinion said taxes are not a lien upon real property sufficient to secure payment of the taxes. Unless the time limitation upon the exercise of this power of the assessor has been extended by the subsequent legislation to which we shall hereinafter refer, the right to exercise such power ceases prior to the first day of August. It has been said that such collections by the assessor must be enforced before the meeting of the board of equalization and before the rate for the ensuing year is ascertained and the levy made. Rode v. Siebe, 119 Cal. 518, 520, 51 P. 869, 39 L. R. A. 342. The assessor makes his collection according to the rate of the previous year, and provisions are made for subsequent adjustment to correspond with the levy when

made, of the current year. It was by reason of this limitation of time for unsecured personal property tax collections by the assessor that section 3738 required that on the first Monday in August the assessor must return to the auditor all unused receipts. It was then provided by section 3790, Political Code, that the collection of the taxes due on personal property, except when real estate is liable therefor, must be made by the tax collector of the county at any time after receiving from the county auditor, the assessment books. In the year 1931 (Stats. 1931, p. 2501, § 1) section 3790 was repealed. There remains in force, however, notwithstanding various amendments, the provision in section 3756, Political Code, "that the taxes on all personal property unsecured by real property shall be due and payable immediately after the assessment of said personal property is made." We think that this provision of section 3756, together with its context, may reasonably be construed to mean that the tax collector may collect and receipt for all personal property taxes shown upon the assessment-book delivered to him, including those unsecured by real property, and that the repeal of section 3790 has not taken from him that authority. But, as we shall see, this conclusion does not determine the question now before us with relation to the limits of continuance of authority of the assessor in relation to so-called unsecured personal property taxes which have escaped assessment while the tax roll was being prepared by the assessor.

[2] Section 12½ of article 13 was added to the Constitution of the state by amendment adopted November 4, 1924. It provided for a new rule of assessment, levy, and collection of taxes upon so-called intangible personal property, and authorized the Legislature by appropriate legislation to carry into effect these new provisions of the Constitution. One of the acts of legislation adopted for this purpose is found in section 3627a of the Political Code, which in its present form is shown in the amendments of 1931 (Stats. 1931, p. 2479). In that section, after stating the duty of the property owner to make his return to the assessor between the first Monday in March and the first Monday in July, it is further provided: "Penalties for failure to file return. In the event of the failure or neglect of any person to return such taxable property between the said dates, it shall, upon the discovery of the escape, be assessed and levied upon, and entry thereof immediately made upon the assessment roll, such entry to be followed by the words 'penalty for failure to file return within the time required by law.' Thereupon, a penalty shall attach to the tax so levied and entered in an amount equal to two times the tax." And further: "The authority herein granted to the assessors to place any tax or penalty upon property which has escaped taxation upon the assessment or tax roll of the year for which said property should have been assessed or taxed shall be limited to a period of not more than three years from the date upon which the lien attaches for the current assessment roll."

These various provisions for assessment and collection of taxes of the kind now under consideration primarily contemplate and intend that such taxes shall be collected by the assessor. The movable and elusive character of the property requires that such assessments shall be followed by very prompt collection. It is for this reason that the tax is made collectible immediately upon assessment, and that the assessor (sections 3820 and 3821) is empowered to make the collection. The additional provisions (quoted above) found in section 3627a do not change this power or duty, but they merely extend the time within which the power may be exercised. In order that the assessor may properly perform the duty thus cast upon him, it is appropriate, if not necessary, that the assessor be prepared to give to the taxpayer a receipt in the form provided by law. In regular course he has been provided with blank numbered receipts. To take those receipts from the assessor by requiring him to surrender them to the auditor before the expiration of the time allowed for making such assessments and collections, would be to interfere with the performance of an official duty. The Legislature, while enacting the law now contained in Political Code, § 3627a, either neglected or for some unknown reason omitted to directly repeal that part of section 3738, which requires that on the first Monday in August the assessor shall return to the auditor "all unused receipts": but the inconsistency between that requirement and the terms of section 3627a is so plain that we must infer that there is an implied repeal of the time limitation. It follows that the judgment directing issuance of the writ of mandate herein is erroneous.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

124 Cal.App. 106

PURTELL et al. v. PACIFIC ELECTRIC RY. CO.

Civ. 7163.

District Court of Appeal, Second District, Division 2, California.

June 6, 1932.

1. Railroads ⇐348(8).

Evidence established that motorist killed in crossing collision was contributorily negligent as matter of law in not looking in direction of approaching train.

2. Railroads ⇐350(13).

Under evidence establishing, as matter of law, contributory negligence of motorist killed in crossing collision, statutory presumption that person takes care of his own concerns *held* not to require submission to jury (Code Civ. Proc. § 1963, subd. 4).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Ethel E. Purtell and others against the Pacific Electric Railway Company. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Victor F. Collins, of Los Angeles, and Joseph W. Pierce, of El Monte, for appellants.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This action was instituted for the purpose of recovering damages for the death of James W. Purtell alleged to have been caused by the negligence of the defendant in the operation of an interurban train running between Los Angeles and Redondo. The trial court granted a motion for a nonsuit on the ground apparently that the testimony established contributory negligence on the part of the decedent. This is an appeal from the judgment.

The accident occurred March 28, 1928, about five minutes before 7 o'clock in the morning at the intersection of Cedar avenue in Hawthorne and the right of way of the respondent company. The car of the respondent was going east, and the deceased was traveling south on Cedar avenue in his automobile. The intersection of the street with the railroad line was marked by the cross-arms customarily employed to designate such a crossing with the words "Railroad Crossing—Look Out for the Cars" in large letters painted thereon. The deceased was observed on several previous occasions to have passed the place driving the automobile used by him on the unfortunate occasion. Immediately prior to the accident he was seen about 100 feet north of the crossing driving at a speed estimated at about 15 or 20 miles per hour which had slackened, if anything, when he was about 20 feet from the tracks. A garage located on the northwest corner of the intersection set back from the tracks about 25 feet and some small trees, were to the rear of it. However, the top portion of an approaching car of the railroad company was observable over the trees and garage by the driver of an automobile for a hundred or more feet north of the intersection, and when the line of the garage was passed the tracks were entirely unobstructed. Both east and west of the streets the rails of the tracks are laid on exposed ties with the rails above the level of the ground. During the time that the deceased was observed to be approaching the tracks he was looking to the east or directly ahead—the witness first saying that "he was looking straight ahead," but denying it when his attention was directed to testimony given by him at the coroner's inquest to the statement, "That the driver's head was looking east," with the affirmation that the latter assertion was "correct, positively."

[1] Under the recited facts we must affirm the order of the trial court. In the case of Young v. Pacific Electric Ry. Co., 208 Cal. 568, 283 P. 61, 65, where the identical line of railroad was involved as here, it was said: "This court has had frequent and recent occasion to define the duty of persons approaching in vehicles railroad crossings similar to that existing in this case and similarly obscured, and in each of these cases this court has uniformly held that the conduct of persons thus approaching such crossings without stopping, looking or listening for approaching trains amounted to contributory negligence, as a matter of law, which would prevent the recovery by themselves, or, in the event of their death, by their personal representatives, in the event of a consequent casualty. Griffin v. San Pedro, etc., R. R. Co., 170 Cal. 772, L. R. A. 1916A, 842, 151 P. 282; Murray v. Southern Pac. Co., 177 Cal. 1, 169 P. 675; Billig v. Southern Pac. Co., 192 Cal. 357, 219 P. 992; Parker v. Southern Pac. Co., 204 Cal. 609, 269 P. 622; California Rendering Co. v. Pacific Elec. Ry. Co., 205 Cal. 73, 269 P. 922; Koster v. Southern Pac. Co., 207 Cal. 753, 279 P. 788." Reference may also be had to Riney v. Pacific Electric Ry. Co., 45 Cal. App. 145, 187 P. 50.

[2] It is urged by appellants that the presumption mentioned in subdivision 4 of section 1963 of the Code of Civil Procedure "that a person takes ordinary care of his own concerns" raises a conflict which they were entitled to have go to the jury. In the face of the testimony herein set forth, it is patent that there was no room for the operation of

the presumption. To this effect are numerous authorities, among which we need only to cite Young v. Pacific Electric Ry. Co., supra, and Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788.

Judgment affirmed.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

124 Cal.App. 72

GEORGIA CASUALTY CO. v. LINDAUER CORPORATION.

Civ. 7265.

District Court of Appeal, Second District, Division 1, California.

June 3, 1932.

1. Master and servant ⇐389.

In compensation insurer's action to recover money expended for medical services and compensation for employee, on ground that defendant's negligence caused employee's injury, finding that employee directly "contributed to" his injuries *held* not finding that employee was contributorily negligent, and not, therefore, at variance with finding that defendant was not negligent (St. 1917, p. 855, § 26, as amended by St. 1919, p. 920, and p. 860, § 30 (f), as amended by St. 1929, p. 1169).

2. Trial ⇐404(1).

Findings are to be liberally construed in support of judgment, and all findings are to be considered together, and, if possible, reconciled to prevent any conflict on material points.

Appeal from Superior Court, Los Angeles County; Maurice T. Dooling, Jr., Judge.

Action by the Georgia Casualty Company against the Lindauer Corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. H. Blum and J. L. Kearney, both of Los Angeles, for appellant.

Head, Wellington & Jacobs, of Santa Ana (Albee & Watkinson, of Los Angeles, of counsel), for respondent.

TAPPAAN, Justice pro tem.

Appellant instituted this action to recover certain moneys expended by it for one Buis for medical services and compensation and for future compensation to be paid him. The injured man, Buis, was the employee of certain independent contractors, and was injured while working on a bin which was a part of respondent's rock crusher. The action is brought under the provisions of sections 26 (St. 1917, p. 831, as amended by St. 1919 p. 920) and 30 (f) of the Workmen's Compensation Act, as amended by St. 1929, p. 1169.

The judgment was in defendant's favor, and from this judgment plaintiff appeals, "upon the judgment roll in that said findings are at variance." The facts found by the court, in so far as material here, may be summarized as follows: Defendant contracted with the injured man's employers for the doing of certain carpenter work consisting in the repairing of a conveyor and the building of bins under the conveyor. That at the time of the injury complained of, defendant was operating the conveyor and the injured man was working upon a bin. The control of the operation of the plant during the period of the work was with defendant at times, then with the contractors, and again at times both were in control. There are findings that there was no negligence upon the part of defendant; that the contractors were in control and direction of the work and their employees; that the bins, pulleys, conveyors, and runways were fit and proper for the use made of them and were carefully inspected and examined by defendant; that the contractors and their employees, including the injured man, were requested and advised by defendant to notify defendant in the event any work was to be done in an exposed or dangerous place so that the operation of the plant could be stopped; that no such notice was given to defendant; that, if defendant had had such notice, the operation of the plant would have been stopped; that defendant had no knowledge that the injured man was at work or intended to work at the place he was injured. The court then finds that Buis, the injured man, failed and neglected to use and exercise ordinary care and caution, and that the injuries suffered or caused him "were directly contributed to and proximately caused by the neglect and carelessness of the said Alvah D. Buis."

[1, 2] Appellant's theory upon this appeal is that the findings are in conflict, in that defendant is found not guilty of negligence, while it is found that the injuries "were directly contributed to and proximately caused by the negligence and carelessness of said Alvah D. Buis." This theory as advanced by appellant rests upon the assumption that there can be no contributory negligence on the part of Buis without negligence on the part of defendant. Appellant cites Zechiel v. Los Angeles Gas & Electric Corp., 183 Cal. 777, 192 P. 720, in support of this position. The rule as announced in that case, that the ultimate fact of contributory negligence cannot be upheld upon contradictory findings as to probative facts, has no application to the instant case. In Zechiel v. Los Angeles Gas & Electric Corp., supra, the findings ascribed

the primary negligent act to both plaintiff and defendant. In the instant case the only negligence found is that of the injured man, and no conflict appears in the probative facts. Read as a whole, the findings cannot fairly be construed to mean that Buis, the injured man, was guilty of contributory negligence. The use of the term "directly contributed," when considered with the context and the findings read as a whole, does not support the inference that contributory negligence was found. The rule is well established that findings are to be liberally construed in support of the judgment, and that all of the findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on material points. Haight v. Haight, 151 Cal. 90, 92, 90 P. 197.

In the case at bar there is no conflict or variance in the findings when considered together. Even though there had been a finding of contributory negligence, it would have been immaterial, under the circumstances here present. Rath v. Bankston, 101 Cal. App. 274, 287, 281 P. 1081; Rosewarn v. Mining Co., 84 Cal. 219, 220, 23 P. 1035. Inasmuch as the findings here discussed are sufficient to sustain the judgment entered in defendant's favor, it becomes unnecessary to comment upon the other points presented by appellant.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

124 Cal.App. 65

BRIX v. PEOPLE'S MUT. LIFE INS. CO.

Civ. 8471.

District Court of Appeal, First District, Division 1, California.

June 3, 1932.

1. Venue ⇐7.

Insurance contract *held* made in county where insurer's officers signed it, not where delivered, so that insured could sue thereon in former county (Const. art. 12, § 16; Civ. Code, § 1652).

Contract, providing that there should be no insurance in force until the policy was issued and accepted by insured while in good health, and the premium paid, and also that the policy, if issued, should be in force at specified time, in view of Civ. Code, § 1652, providing for the reconciliation of repugnancy in a contract, was construable as meaning that the contract should be complete upon its signing by the officers of the company, but that liability to pay insurance under the contract should depend upon the happening of the condition precedent, i. e., the acceptance of the policy while in good health, etc., so that the insurance contract was made in the county where it was signed, within Const. art. 12, § 16, providing that a corporation may be sued upon a contract, among other places, in the county where the contract is made.

2. Contracts ⇐146.

Contract is made when parties agree it shall come into existence, and they may bring contract into being whenever they agree.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Arthur J. Brix against the People's Mutual Life Insurance Company. From an order denying defendant's motion for change of venue, defendant appeals.

Affirmed.

A. B. Weiler, of San Francisco, for appellant.

Samuel M. Samter and J. J. Posner, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from an order denying a motion for change of venue from San Francisco to Los Angeles county. The action was brought upon a policy of accident insurance issued by defendant and appellant, a corporation. At the time the policy was issued and at the time the accident to the insured occurred the principal place of business of appellant was in San Francisco, but prior to the time suit was brought appellant transferred its principal place of business to Los Angeles county.

Under section 16 of article 12 of the state Constitution a corporation may be sued upon a contract, among other places, "in the county where the contract is made." If the contract of insurance here sued upon was made in San Francisco, the order appealed from must be affirmed.

The application for the policy here in question was signed by respondent at Valley Springs, Cal., and forwarded by appellant's resident agent there to appellant's San Francisco office. The policy of insurance was executed by appellant in San Francisco and mailed to its agent at Valley Springs with instructions not to deliver it to respondent unless respondent paid the premium and was in good health. Pursuant to these instructions the policy was delivered to respondent by the agent at Valley Springs. It is appellant's contention that the contract was made at Valley Springs by delivery to respondent

there. It is respondent's position that the contract was made in San Francisco when the policy was signed by the appellant's officers.

The application contained the two following provisions:

"21. I agree that there shall be no insurance in force until the policy is issued and accepted by me while I am in good health and free from injury and I have paid the policy fee, if any, and the full premium as stated in the policy.

"22. I agree that policy, if issued, shall be in force at 12 o'clock noon, standard time, the date of issuance."

At first blush it may seem that these two provisions are in hopeless conflict. However, they must be reconciled, if possible, so as to give them both a reasonable effect. Section 1652, Civ. Code; 6 Cal. Jur. p. 280, § 172.

Section 22 of the application provides that the policy shall be in force at 12 o'clock noon, the date of issuance. "The words 'issue,' 'issuance,' and 'issued,' in reference to an insurance policy, are used in different senses, sometimes as meaning the preparation and signing of the instrument by the officers of the company, as distinguished from its delivery to insured, and sometimes as meaning its delivery and acceptance. * * *" 32 C. J. p. 1123, § 225. That the words "issued" and "issuance" are used in the application in the former rather than the latter sense seems clear from the provision of section 21 "that there shall be no insurance in force until the policy is *issued* and *accepted*." (Italics ours.) Construing the words "issued" and "issuance" as referring to the signing of the policy by appellant's officers avoids the tautology that would otherwise exist in this provision, using as it does the words "issued" and "accepted" in the conjunctive.

It will be noted that section 21 provides that "there shall be no *insurance* in force until the policy is issued and accepted," etc. Section 22, on the other hand, provides that "*policy*, if issued, shall be in force at 12 o'clock noon, standard time, the date of issuance." (Italics ours.) Section 21 refers to "insurance," and section 22 to "policy." The "policy" is the contract of insurance, while "insurance" is used in section 21 in the sense of the liability of the company to pay upon the happening of the event insured against. With this in mind the two sections are perfectly consistent with one another.

Section 22 may be paraphrased to read: "I agree that the contract of insurance, if signed by the officers of the company, shall be in force at 12 o'clock noon, standard time, date of signing."

Section 21 may likewise be paraphrased: "I agree that there shall be no liability to pay insurance in force until the policy is signed by the officers of the company and accepted by me while I am in good health," etc.

[1, 2] As so construed the agreement is that the contract shall be complete upon its signing by the officers of the company, but that liability to pay insurance under the contract shall depend upon the happening of a condition precedent, the acceptance of the policy while in good health, etc. We thus have the not unusual case of a present contract with liability thereunder contingent upon the happening of a future event. It is no different in principle than if the contract was made today to cover the insured commencing January 1, 1933, or during a contemplated trip to Europe which the insured intends to take in the future. The contract is made when the parties agree that it shall come into existence. The liability under it comes into force when the specified contingency occurs, i. e., in the supposed cases, on January 1, 1933; when the insured starts his contemplated trip to Europe; or, in the case at hand, when the policy is accepted while the insured is in good health, etc. The parties may by their agreement bring the contract into being at such time as they see fit [Paez v. Mutual Indemnity Accident, Health & Life Ins. Co. (Cal. App.) 3 P.(2d) 69]; and here they agreed that the contract should arise when the officers signed the policy. The signing was in San Francisco, and hence the contract was made there.

The order appealed from is accordingly affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 48

PEOPLE v. TATE.

Cr. 1657.

District Court of Appeal, First District, Division 2, California.

June 2, 1932.

1. Forgery ⇐43.

In forgery prosecution, evidence regarding alleged meretricious relations between complaining witness and defendant *held* not admissible to establish defendant was authorized agent of witness to draw check.

2. Criminal law ⇐1144(14).

Where refused instruction contained correct statements of law, but record did not disclose instructions given, court assumed in support of judgment that identical instruction or other instructions fully covering subject were given.

3. Forgery ⇐44(½).

Evidence *held* to support conviction for forgery.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Lewis G. Tate was convicted of forgery, and he appeals.

Affirmed.

Gerald F. Harrington and W. L. Claiborne, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

STURTEVANT, J.

The defendant was convicted of the crime of forgery and has appealed from the judgment. The complaining witness, Mrs. L. D. Feighner, is a married woman residing in San Francisco. The defendant is a married man residing in Oakland. He is a painter by trade and while doing some work in an apartment house in which the complaining witness resided they became acquainted. Their acquaintance became very intimate and the families visited each other at times covering a period of four years. The check which was the gravamen of the offense set forth in the information was drawn on the Humboldt branch of the Bank of America for the sum of $11. It was dated September 8, 1931, was made payable to cash, and the name of L. D. Feighner was signed. The check was indorsed by L. G. Tate.

[1] The defendant complains because the trial court limited his cross-examination of the complaining witness and did not allow him to show by that witness the meretricious relations that existed between her and himself. He asserts that it was his theory of the case that he was the authorized agent of the complaining witness and as such was authorized by her to draw the check pleaded in the information. If he had been appointed the agent of the complaining witness, it will not be disputed but what he should have been allowed to prove that fact. No question confined to that subject was objected to and no such evidence was excluded. However, certain questions regarding sexual relations were objected to and the objections were sustained. We see no error whatever in those rulings. Such evidence could only be relevant for the purpose of impeaching the credibility of the prosecuting witness, but it was not proper for that purpose. People v. Yslas, 27 Cal. 630. All material and relevant evidence on the subject of agency was admitted. To go into the subject of the illicit relations existing between the prosecuting witness and the defendant would have been to run far afield and submit to the jury an issue which was wholly foreign to the case on trial.

[2] The defendant requested, and the trial court refused to give, an instruction as follows: "If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt of the guilt of the defendant not to vote for a verdict of guilty nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty." The instruction was a correct statement of law, and it may be conceded that it should have been given. However, there is nothing whatever in the record showing, or tending to show, that the defendant was in the least prejudiced because the instruction was not given. The same question was presented in the case of People v. Perry, 144 Cal. 748, 78 P. 284, nevertheless the court adverted to other instructions that were given and that it was not prejudicial error to refuse the requested instruction. In the instant case the record contains instructions requested and refused. It does not give us the instructions that were given. So far as the record before us is concerned, it may be assumed in support of the judgment that the identical instruction was given or it may be assumed that other instructions were given that fully covered the subject.

[3] The last point made by the defendant is that the verdict is contrary to the evidence. However, the defendant is altogether frank in admitting that the complaining witness testified that she had not authorized the defendant to draw the check, although some other witnesses gave evidence to the contrary. It is perfectly clear that there was a conflict in the evidence. If the jury believed the prosecuting witness, and from its verdict we must assume that it did, there was substantial evidence to support the verdict.

We find no reversible error in the record. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

123 Cal.App. 742

JONES et al. v. HEDGES.

Civ. 7854.

District Court of Appeal, First District, Division 1, California.

May 31, 1932.

As Modified on Denial of Rehearing June 30, 1932. Hearing Denied by Supreme Court July 29, 1932.

1. Highways ⇐168.

Right to public use of highway, while road work is being done, is subordinate to right of public authorities to have improvements made.

2. Highways ⇐153.

Person obstructing highway unlawfully is trespasser, and, where engaged in unlawful act, may be chargeable with creating nuisance.

3. Highways ⇐156.

Person doing road work under lawful permit has right to use road in performance of his contract, and is not trespasser.

4. Highways ⇐153.

Temporary obstruction in course of authorized road work is not "nuisance," notwithstanding, through failure to provide protection for public, some one is injured (St. 1919, p. 138; Pol. Code, § 2640).

[Ed. Note.—For other definitions of "Nuisance," see Words and Phrases.]

5. Negligence ⇐1.

"Negligence," as distinguished from "trespass," involves doing lawful act in careless way.

[Ed. Note.—For other definitions of "Negligence" and "Trespass," see Words and Phrases.]

6. Highways ⇐156.

Authority to do road work relieves negligent contractor of imputation of trespassing, and makes him chargeable with negligence only.

7. Automobiles ⇐163(1).

Road contractor's failure to take reasonable precautions to protect public would not absolve motorist whose negligence caused death of contractor's employee working on highway.

8. Automobiles ⇐243(1).

In action for death of road worker struck by motorist, specifications, offered to prove road contractor's failure to take precautions required by his contract, *held* properly excluded.

Specifications were properly excluded because, while failure on part of construction company to take reasonable precautions to protect public might have subjected that company to liability in favor of an injured traveler, any such negligence of the contractor would not absolve motorist of liability, if negligence on her own part caused the death of the contractor's employee while lawfully engaged in his work on the highway.

9. Automobiles ⇐168(8).

Driving automobile at 35 to 40 miles an hour into smoke obscuring view *held* negligence authorizing recovery for death of road worker struck by automobile.

10. Automobiles ⇐219.

Road worker did not assume risk of death through negligent propulsion of automobile upon him.

11. Automobiles ⇐245(75).

Road worker struck by automobile *held* not contributorily negligent as matter of law in being in path of automobile while wrapped in smoke raised in oiling road.

12. Automobiles ⇐244(52).

Evidence *held* not to show that road worker struck by automobile violated statute requiring pedestrian to walk on left-hand edge of highway (St. 1923, p. 517, § 150½, as added by St. 1929, p. 508).

13. Negligence ⇐122(1).

Defendant had burden to prove contributory negligence.

14. Automobiles ⇐242(8).

Absent countervailing evidence, road worker struck by automobile presumably exercised all reasonable care under circumstances.

15. Automobiles ⇐244(36).

Evidence sustained finding that road worker's death was proximately caused by negligence of motorist striking him.

16. Automobiles ⇐243(5).

In action for death of road worker struck by automobile driven through smoke raised by oiling, evidence regarding previous accident somewhere else, when automobile ran into oiling truck, *held* properly excluded as irrelevant.

While the evidence of previous similar accidents under like conditions is sometimes admissible to show the dangerous character of a particular place or instrumentality, and to bring home to one charged with its maintenance or control knowledge of a hazard, evidence offered by motorist regarding previous accident was irrelevant, since the issue was not whether the construction company had failed in some duty owed to motorist, but whether motorist was herself guilty of negligence causing road worker's death.

17. Death ⇐86(1).

Damages recoverable for death of head of family should reasonably compensate for loss of benefits legally measurable in money, and

which heirs might reasonably have expected from deceased had he not been killed.

18. Death ⇐86(1).

In determining pecuniary value of loss from death of head of family, deceased's earnings, expectancy, and other elements should be considered in connection with changes normally attending advancing years.

19. Death ⇐99(4).

$40,000 for death of road worker, 59, leaving wife, 49, and eight children, including three dependent minors, where deceased earned $36 per week and had 14.74 years expectancy, *held* excessive by $15,000.

Appeal from Superior Court, San Benito County; H. G. Jorgensen, Judge.

Action by Mabel Jones and others against Elizabeth M. Hedges. Judgment for plaintiffs, and defendant appeals.

Modified and, as modified, affirmed.

Myrick & Deering and Scott, of San Francisco, and George W. Jean, of Hollister, for appellant.

James Snell, of Hollister, for respondents.

JOHNSON, Justice pro tem.

The plaintiff Mabel Jones is the widow, and the eight other plaintiffs are the children, of Samuel A. Jones, who, while engaged in paving work on a highway in San Benito county, was killed on October 8, 1929, by being hit by an automobile driven by the defendant, Elizabeth M. Hedges.

The action, seeking damages for the death alleged to have been caused by negligence on the part of the defendant, was tried with a jury which rendered a verdict of $40,000 in favor of plaintiffs; and from the judgment entered in that amount, the defendant has appealed.

Besides charging error in respect of evidence and instructions, the defendant presents for consideration the legal status of the decedent as a worker on the highway, and contends that he not only assumed the risk of injury, but was guilty of contributory negligence barring recovery by his heirs, and that the amount awarded by the jury is grossly excessive.

Jones was an employee of the Granite Construction Company, which had a contract with San Benito county for the improvement of certain county roads, and among them a road known as Llewellyn-Bixby lane, which meets, without crossing, the state highway between Hollister and San Juan, and which will hereafter be referred to as Bixby lane. The highway, having a width of 60 feet, runs east and west; and Bixby lane, which is 40 feet in width, runs north and south, connecting with the highway at a right angle on the northerly side and there terminating. The highway had a paved strip in the center 16 feet wide, with a concrete shoulder of 2 to 2½ feet on each side, and with the ground to the north and the south of those shoulders left unimproved.

At the time of the accident, the work of improving Bixby lane to its junction with the northerly boundary of the highway had been completed; and the construction company was then called upon to construct for the county, under a permit from the state highway commission, an apron to cover the unimproved part of the highway between the terminus of Bixby lane and the central paved portion of the highway, thereby completing a surfaced connection between the two roads. The distance so covered was about 17½ feet, the apron being about 17 feet wide at the northerly edge of the highway and flaring to about 66 feet where it united with the highway pavement.

The accident resulting in the death of Jones occurred close to this apron. After the apron had been laid, it had to be oiled, so as to bind the structural material together with oil heated to a high temperature. To spread the oil, a large oiling-truck, about 27 feet in length and 10 feet in width, was used with a crew of four men, of whom Jones was one. The others were Scrivani the foreman, Wilson the driver, and Le Grande, who was stationed at the rear end of the truck in charge of the spraying. As the hot oil is released and comes in contact with the cool pavement, a black smoke, varying in density with weather conditions, is generated and carried in the direction in which the wind may be blowing.

The truck, until needed on this occasion, had been stationed on Bixby lane close to the highway; and when the apron had been made ready for oiling by Scrivani and Jones the truck was brought into position by the driver Wilson, so that it would travel from east to west across the apron for the distance of 66 feet where the apron made contact with the highway pavement. Before the oiling started, Wilson placed a red flag about 60 feet to the rear of the truck at a point about 4 feet to the north of the highway pavement. He then resumed the driver's seat, and Le Grande was in his place at the rear to attend to the spraying. As the truck was about to start, the foreman, Scrivani, was standing near the center of the truck, on the northerly concrete shoulder of the highway; and Jones was a little closer to the rear end of the truck, and about on the line of demarcation between that shoulder and the highway pavement. As the two men so stood, Scrivani ordered Jones to go further to the rear when the truck started, and to place himself beyond the northerly shoulder of the highway,

and keep traffic off the freshly oiled portion of the apron. Seeing no vehicle approaching, Scrivani then gave the signal to start the truck; and as it thereupon moved slowly westward, he followed alongside, walking near the edge of the concrete shoulder. Scrivani and the two men on the truck were looking forward, and none of them saw whether Jones moved from the spot where he had stood or not. But in about three seconds after the truck had begun to move, the body of Jones was hurled past the truck after being hit by a La Salle car operated by the defendant, Mrs. Hedges; and apparently death was instantaneous. The distance from the point where Jones was last seen alive to the point where the body fell was 154 feet.

Mrs. Hedges, who lived in the neighborhood and was well acquainted with the locality, approached the junction of Bixby lane and the highway from the east, and had with her in the front seat her two children, aged respectively seven and four. She testified that as she drove along, at the rate of about 40 miles an hour, on the northerly half of the paved highway with one wheel on the concrete shoulder, she was suddenly confronted with a smoke so dense that she said she could see nothing, not even the hood of her car; that she reduced her speed to a rate of about 25 miles as she entered the smoke, and almost instantly became aware of having hit something, whereupon she swung to her left and then again to her right, and came to a stop some distance ahead of the oiling-truck. While Mrs. Hedges said she reduced her speed, when faced with the smoke, to about 25 miles an hour, Wilson, the driver of the truck, estimated that as he saw the car pass him, it was being driven at the rate of 35 to 40 miles an hour.

The accident occurred at about half past two in the afternoon on a clear day, with a light breeze blowing from the westward, and the road was a straight, level road. Mrs. Hedges knew that men had been at work on Bixby lane close to the highway; but notwithstanding the smoke rising from the junction point, she does not appear to have given any warning of her approach. And while she said she applied her brakes when she was entering the smoke, yet she avoided clamping them hard, as she had had experience of throwing the children forward and hurting them by slowing the car suddenly. Presumably, Jones was hit by the right headlight of the car, which was found to have been damaged.

As regards the density of the smoke and the ability to penetrate it with the eye, there is evidence contradictory of the testimony of Mrs. Hedges. About a quarter of a mile to the east of Bixby lane, Mrs. Hedges had passed the witness Dake, an automobile salesman, who was also driving westward on the highway. Dake testified that as Mrs. Hedges passed him, she was traveling at a rate of at least 60 miles an hour. He said further that just before she passed, he observed the forms of two men near the truck moving their arms as if at work; and then as Mrs. Hedges drove by him, smoke began to rise from behind the truck in a cloud which was heavy near the ground, but became lighter at a height of about 3 feet, and after blowing toward him for about 15 or 20 feet, drifted away, as it thinned out, over a field to the north of the highway. The smoke, he stated, was thin enough at the top so that as he proceeded, he could see the upper part of the bodies of some men and the upper part of the truck. He testified also that he saw Mrs. Hedges' car run into the smoke until it reached the truck, and then as he saw men descend, the smoke ceased. These things were observed by him as he drove toward Bixby lane until he came to a halt where the red flag stood.

In addition to Dake, there was also the Japanese witness, Nakata, who had been working in a neighboring field. Standing on the south side of the highway near the truck, he looked in both directions before venturing to cross, and saw a car approaching from the east about half a mile away. Then, while looking to the west, he heard a sudden noise. As he turned, he saw, at a height of about 3½ feet above the ground, "a black line coming out of the smoke," which in a moment was followed by the car of Mrs. Hedges; and as the car stopped, he saw the body of Jones lying on the ground. Nakata said that to his eye the smoke from the oiling-truck was thick from the center to the northerly side of the highway, the thin portion reaching to a distance of about 50 feet back of the truck, but there was little, if any, smoke on the southerly side.

A considerable portion of the defendant's briefs is devoted to a discussion of the status of Jones while on the highway during the oiling operation; and it is charged that he was a trespasser, and was aiding and abetting the creation of a nuisance. This contention has for its basis the circumstances attending the contract between the county and the Granite Construction Company for laying the apron. There had been a formal contract for the improvement of Bixby lane, and that contract was completed when the pavement had been laid to the northerly boundary of the state highway. As the apron was to be built on the highway, it was necessary for the county to have a permit therefor from the state highway commission; and that permit was duly issued on September 11, 1929, pursuant to law. St. 1919, p. 138. Under the authority of that permit, the county engineer, with the approval of the supervisors, made a verbal contract with the construction company, through its foreman Scrivani, to lay the apron at the unit price per square foot prescribed

in the contract already completed. The cost of laying the apron being nominal, less than $50 in fact, the county was at liberty to dispense with the formalities prescribed in section 2640, Political Code, for work of an expensive character. In due course, the apron was finished to the satisfaction of the county and payment made.

The defendant complains of a ruling of the court sustaining objection to her offer of the contract and specifications for the improvement of Bixby Lane. And stress is laid on provisions embodied in the specifications requiring the contractor to take suitable measures to protect the work and prevent accidents during construction, also to maintain all necessary barriers, danger signs, and watchmen, and to provide so that public travel might be maintained alongside the work during its progress. The permit of the state highway commission likewise specified that adequate provision should be made for the protection of the traveling public, and that flagmen should be employed as might be required by the particular work in progress.

Defendant's contention is that there was failure to provide adequate protection of the public, and that, by reason of such omission, the construction company and its employees were maintaining through their work a nuisance on the highway, and that Jones was a trespasser. We do not, however, share this view.

[1] Under the permit of the state highway commission, the county had authority to construct the apron; and the county caused the work to be done by the Granite Construction Company. That company, acting in a sense as the agent of the county, had the right, therefore, to use the equipment ordinarily employed in such work, and to occupy such portion of the highway as was reasonably necessary for the due performance of its task. Though independently of any express stipulations, the contractor was under obligation to exercise reasonable care and caution in behalf of the traveling public, yet the right to public use of the highway, while roadwork is being done, is subordinate to the right of the public authorities to cause improvements to be made in the public interest. Township of Crescent v. Anderson, 114 Pa. 643, 647, 8 A. 379, 60 Am. Rep. 367. And even with the exercise of reasonable care and circumspection, the very nature of the work may sometimes create perils against which travelers must be on guard.

[2-6] A distinction is to be marked between one who undertakes to do road work without authority and one who has permission, but in performing his work is guilty of want of care in some particular. A person obstructing a highway unlawfully is classed as a trespasser, and, being engaged in the performance of an unlawful act, may be chargeable with creating a nuisance. But when his work is being done under a lawful permit, he has the right to use the road in performance of his contract, and to employ machinery reasonably adapted to the various operations. Under such circumstances he is not a trespasser; nor is a temporary obstruction, in the course of work done under lawful authority, to be treated as a nuisance, even though, through failure to provide protection for the public, some one should be injured. Negligence, as distinguished from trespass, involves doing a lawful act in a careless way; but authority to do the work relieves even a negligent contractor of the imputation of trespassing, and places him in the position of one chargeable with negligence only. Cunningham v. Wright, 28 Hun (N. Y.) 178, 182; Malkan v. Carlin (Sup.) 93 N. Y. S. 378; Power v. Rodgers & Hagerty (Sup.) 144 N. Y. S. 747; Scarpolla v. Oliver Typewriter Co. (Sup.) 165 N. Y. S. 885, 887; City of North Vernon v. Voegler, 103 Ind. 314, 327, 2 N. E. 821.

In Boston v. Abraham, 91 App. Div. 417, 86 N. Y. S. 863, 864, there was a situation analogous to that exhibited here. The plaintiff was the employee of a street contractor; and while engaged in digging a trench to make a water connection, he was injured through negligence of a person driving a horse of the defendants so close to the excavation that the horse lost his footing and fell upon the plaintiff. It was contended there that the excavation constituted a nuisance, and that no liability attached to the defendants. Upon this subject the court said: "Many authorities are cited upon the proposition that a public nuisance, resulting in injury to one lawfully in the highway, gives a cause of action to the party so injured, with all of which we fully agree; but the question here presented is not an injury to the defendants or their servants, but an injury to the plaintiff, who was in the employ of one John J. Flaherty, engaged in relaying a water main in Twelfth street. * * * When the plaintiff had established a state of facts from which the jury might find that he was not guilty of any common-law nuisance, he had made a case entitling him to go to the jury, assuming that he had evidence to support the allegation of negligence on the part of the defendants, and lack of contributory negligence on his part."

[7, 8] So in this case it may be said that while any failure on the part of the construction company to take reasonable precautions to protect the public might have subjected that company to liability in favor of an injured traveler, nevertheless any such negligence of the contractor would not absolve this defendant of liability, if negligence on her own part caused the death of the contractor's employee while lawfully engaged in his work on the highway. Hence, even if specifications for the improvement of Bixby lane were to be treated as part of the contract for the apron,

they would furnish no defense to the charge of negligent operation of her automobile by the defendant; and accordingly there was no error in excluding the specifications.

[9] We are thus brought to a consideration of the case in the light of the rules applicable in actions grounded on negligence in the operation of an automobile on the highway. There was assuredly evidence sufficient to justify a finding of negligence on the part of Mrs. Hedges. Her opportunities for seeing what was before her were as good as those of the witness Dake when she passed him, and were presumably better as she drew nearer Bixby lane. The road was straight and the day was clear; and before any smoke appeared, the oiling-truck, with men near by, was visible to one who looked. Yet Mrs. Hedges drove on at a rapid rate past the red flag of warning; and when the smoke rose, plunged into it without knowing, as she said, what was beyond, and without sounding the horn or effectively applying the brakes. In Kastel v. Stieber (Cal. Sup.) 8 P.(2d) 474, it was held to be gross negligence as a matter of law to propel an automobile past intersecting city streets at a speed approaching 40 miles an hour; and in like manner we think it must be said to show indifference to the rights and safety of others on the state highway when an automobile is driven heedlessly at a speed of 35 to 40 miles an hour into a cloud of smoke so dense as to obscure the view ahead. Warren v. State, 219 App. Div. 124, 219 N. Y. S. 530, 534. The smoke was itself a sign of danger as categoric as a stop-signal.

[10, 11] The defendant contends, however, that whatever may be said of herself, the deceased was not only guilty of contributory negligence on his part, but that he came to his death as the result of a risk assumed by him; and that his heirs are therefore precluded from recovery of damages. As is said by Judge Holmes in Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 12, 27 S. Ct. 407, 51 L. Ed. 681, the difference between assumption of risk and negligence is one of degree rather than of kind, the practical difference being in the degree of their proximity to the particular harm. It may be conceded that in a controversy between Jones or his heirs and a driver exercising ordinary care, Jones might be regarded as having assumed the usual risks incident to his employment; but he cannot be held to have assumed the risk of death through the *negligent propulsion* of an automobile upon him. Graff v. United Railroads, 178 Cal. 171, 176, 172 P. 603; Gornstein v. Priver, 64 Cal. App. 249, 256, 221 P. 396; Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 555, 556, 186 P. 800. If, however, Jones did or omitted something operating as a real cause of the accident, then there would be such proximity between his conduct and the collision as to constitute contributory negligence.

It must be remembered, however, that Jones was one of the crew engaged in work on the highway, and had orders from his foreman to proceed to a position on the roadside and keep traffic off the apron. The measure of his duty to exercise care in his own behalf was therefore quite different from that of the ordinary pedestrian using the roadway merely for travel. The standpoint from which his conduct is to be viewed is that of a laborer whose duties required him to station himself on the highway as directed; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions, and would approach with their cars under reasonable control. Speaking of a street-sweeper injured while at work, this court in State Comp. Ins. Fund v. Scamell, 73 Cal. App. 285, 291, 238 P. 780, 782, said: "We do not wish to be understood as holding that one so engaged is not bound to use ordinary care, but his rights cannot be determined by the same rules applicable to pedestrians generally. His care or want of care is a fact to be determined from a different standpoint. Clark v. Bennett, 123 Cal. 275, 55 P. 908; King v. Green, 7 Cal. App. 473, 94 P. 777. The question of negligence under such circumstances is one for the jury or trial court. Berry on Automobiles (3d Ed.) 465; Blackwell v. Renwick, 21 Cal. App. 131, 131 P. 94."

Asserting that in being in the path of the car while wrapped in smoke, Jones was guilty of contributory negligence as a matter of law, defendant cites numerous cases; but a review of them shows that they are either cases in which a pedestrian stepped from the sidewalk into the roadway when smoke or dust temporarily obscured the view of approaching vehicles, or cases involving collisions at railroad crossings where again different rules obtain. The distinction between such cases and this is obvious.

[12-15] Defendant contends also that there was some evidence given by the witness Dake that when defendant passed him on the highway, he saw two men near the truck, who appeared to him to be moving westward; and defendant argues that if Jones was one of those men, he should have been proceeding, under section 150½ of the California Vehicle Act of 1929 (St. 1929, p. 508), close to the southerly, or left-hand, edge of the highway. Dake's testimony had reference to a time before the spraying of oil started; and the evidence is undisputed that just as the oiling was about to begin, Jones was standing near the truck, and there received his orders to station himself at a point to the eastward on the northerly side of the roadway beyond the shoulder. Under these circumstances, no violation of the section cited is shown.

There is no evidence before us fixing the precise place of the impact, nor from the record is any one able to say what specific

efforts Jones made for his own preservation. The burden to prove contributory negligence rested on the defendant; and in the absence of countervailing evidence it is to be presumed that Jones exercised all reasonable care under the circumstances in his own behalf. This presumption is equivalent to affirmative proof in favor of the plaintiffs, and is fortified by the fact that Jones had been in the employ of the construction company in road work for a period of eight years, and, according to his foreman, was a trusted employee who always did his work conscientiously. The jury were entitled, therefore, to act upon the proof so afforded; and the evidence in general, supplemented by the presumption of law, is sufficient to sustain the implied finding of the jury that Jones was free of contributory negligence, and that his death was proximately caused by negligence of the defendant. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 96, 97, 239 P. 709, 41 A. L. R. 1027; Broedlow v. LeGros, 88 Cal. App. 671, 677, 263 P. 1027. As is said in Gay v. Winter, 34 Cal. 153, 164, and quoted in Hollowell v. Cameron, 186 Cal. 530, 533, 199 P. 803, 805, "To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another."

[16] The defendant deems herself to have been prejudiced, however, by the exclusion of evidence touching some previous accident somewhere else, when, it is represented, an automobile ran into the rear of one of the construction company's oiling-trucks while enveloped in smoke. Evidence of previous similar accidents under like conditions is sometimes admissible to show the dangerous character of a particular place or instrumentality, and to bring home to one charged with its maintenance or control knowledge of a hazard against which others should have been safeguarded. The issue here, however, was not whether the construction company had failed in some duty owed to Mrs. Hedges, but whether she was herself guilty of negligence causing the death of Jones. An excursion into the facts and circumstances of some other accident under different conditions at a different place would not have been relevant to the issues in this case, and would have tended to create confusion. Accordingly, the court properly excluded such evidence.

In submitting the case to the jury the court gave 88 instructions, 28 of which were proposed by the defendant. Of the remainder, 21 are put under the spotlight of error. It may well be that fewer instructions would have been preferable, and that in some instances language more in consonance with the peculiar circumstances of this case might have been chosen. We have examined all the instructions criticised, and also the rest of the instructions given; and when the instructions as a whole are considered, we believe that prejudice was not suffered by the defendant by reason of the particular instructions complained of. It is true that according to the record instruction No. 45 is garbled by the use of the word "plaintiff" instead of "defendant" in the latter portion; but since throughout the instructions Jones was referred to either as the decedent or by his name, and since none of the plaintiffs was present at the time of the accident, we cannot believe that the jury was misled by the inadvertence. We pass the remaining instructions without special comment for the reason that several of them have already received approval in appellate decisions, and discussion of others would involve only repetition of what has previously been said by us in regard to the legal principles applicable to the case.

[17-19] Finally, the defendant insists that the verdict of $40,000 is a grossly excessive amount to be awarded as damages to the plaintiffs. At the time of his death, Mr. Jones was 59 years of age and his wife 49. His wages were $36 a week, and his expectancy of life was 14.74 years. He left surviving as his heirs his wife and eight children, three being minors, aged respectively 14, 11, and 7 years; but only the wife and the three minors were dependent on him for support. Damages recoverable for the death of the head of a family are intended to be such as will fairly and reasonably compensate for the loss of the benefits and advantages which are legally measurable in terms of money, and which the heirs mights reasonably have expected to receive from the deceased, if his life had not been taken. In determining the pecuniary value of the loss, the earnings of the deceased, together with the reasonable expectation of life of one of his years, and the other elements entering into an award of damages, are to be considered in connection with the changes that normally come with advancing years and the fluctuations that ordinarily occur in the span of every human life. It is in the light of such considerations that appraisal is to be made by a jury of the present value in money of the loss sustained by the heirs of the deceased.

Mr. Jones was close to sixty; and as age creeps on, some loss of physical powers is to be expected, and employment is likely to be subjected to interruptions and to become less remunerative. Then again, a considerable proportion of the totality of the weekly earnings throughout the estimated period of expectancy of about 15 years would have to be deducted to fix the present value at the time of the trial.

It is a delicate and difficult task to appraise the value of the life of the head of a family; but in view of the age and moderate earning capacity of the deceased and the other facts and circumstances disclosed by the evidence, the conclusion is forced upon us that an award of $40,000 is so disproportionate to reasonable compensation for the monetary

loss sustained by the plaintiffs as to be explicable only on the ground that passion or prejudice was allowed to play a strong part in the rendition of the verdict.

Believing from a study of the record that the sum of $25,000 is the maximum that can fairly be allowed to plaintiffs, it is our conclusion that in justice to the defendant the judgment should be reduced accordingly.

The judgment is modified by reducing the amount thereof to the sum of $25,000; and as so modified the judgment is affirmed.

The respondents shall recover their costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

123 Cal.App. 709

JOHN A. VAUGHAN CORPORATION v. TITLE INS. & TRUST CO. et al.

No. 8463.

District Court of Appeal, First District, Division 1, California.

May 27, 1932.

1. Judgment ⇐139.

Application to be relieved from default judgment is addressed to discretion of trial court (Code Civ. Proc. § 473).

2. Appeal and error ⇐957(1).

Trial court's action on application for relief from default judgment will not be set aside unless abuse of discretion clearly appears.

3. Judgment ⇐160.

Any deficiency in affidavit of merits on application to set aside default was removed by denials of verified answer.

4. Judgment ⇐162(4).

Attorney's affidavit, on application to set aside default judgment, that stipulation for continuance was not intended as general appearance, sufficiently showed mistake of law warranting relief.

5. Judgment ⇐143(9).

Attorneys' affidavit showing belief that trustee expected them to appear and their belief it would appear by own counsel furnished sufficient support for order relieving trustee from default.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the John A. Vaughan Corporation against the Title Insurance & Trust Company and others. Judgment for plaintiff, and from a subsequent order vacating the judgment, plaintiff appeals.

Affirmed.

F. E. Davis, of Hollywood, for appellant.

Elbert W. Davis and J. H. Hoffman, both of San Francisco, for respondents.

GRAY, Justice pro tem.

In an action against respondent Pan American Bank, the payee of appellant's note, secured by a deed of trust, respondent Title Insurance & Trust Company, the trustee named in such deed of trust, and respondents Edward Rainey, state banking commissioner, and A. Q. Robison, his deputy, then liquidating said bank, to restrain the threatened foreclosure of said deed of trust upon the ground that the debt had been overpaid, appellant recovered a default judgment against all respondents. Upon respondents' motion supported by affidavits of respondent Robison and their attorneys, jointly, and accompanied by their verified answer, raising material issues, and without countershowing by appellant, such judgment was vacated on the very day upon which respondents first learned of its rendition. This appeal from the order of vacation questions the sufficiency of the affidavit of merits and the affidavits purporting to show excusable neglect or mistake.

[1, 2] These objections must be decided in the light of the following legal principles:

"An application to be relieved from a default, under section 473 of the Code of Civil Procedure, is addressed to the sound discretion of the trial court; and the action of that court will not be set aside on appeal, unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. The appellate court will therefore be less inclined to reverse an order granting, than one refusing, an application to open a default. Indeed, the cases in which this court has held that such relief was improperly granted are very rare; while in a number of instances an order refusing to open the default has been reversed." Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426.

"Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice, or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default." Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95, 97.

[3] Conceding the correctness of appellant's contention that no sufficient affidavit of merits was filed, that objection is not fatal because such deficiency is removed by the denials of the verified answer. Salsberry v. Julian, 98 Cal. App. 638, 277 P. 516.

[4] The defaults of the bank, the banking commissioner, and the latter's deputy were entered upon the assumption that the signing by their attorneys of a written stipulation providing for a continuance of the hearing upon a temporary restraining order and the filing of an affidavit in opposition to the continuance of such restraining order constituted a general appearance. The statement in the attorneys' affidavit that they did not intend by such acts to enter a general appearance sufficiently shows their mistake of law from the effect of which the trial court properly relieved their clients. Jones v. Southern Pac. Co., 71 Cal. App. 773, 236 P. 336; Davenport v. Superior Court, 183 Cal. 506, 191 P. 911; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204.

[5] The default of the trustee was entered for failure to answer after personal service of the summons and complaint. The attorneys' affidavit merely states that they were informed and believed that the trustee expected them to appear for it and that they believed it would appear by its own counsel. Appellant's criticism that the facts upon which such beliefs were founded should have been stated is well taken. However, the trial court had the right to examine the complaint and the verified answer in passing upon the motion. From these, it appears that this respondent was merely a trustee, that the other respondents were the real parties in interest, and that the issues to be tried were the same as to all respondents. These circumstances are sufficient support for the order, so far as this respondent is concerned. Montijo v. Sherer & Co., 5 Cal. App. 736, 91 P. 261.

The order is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 75

In re PETERS' ESTATE.

MARTINI v. BAUER.

Civ. 4632.

District Court of Appeal, Third District, California.

June 3, 1932.

1. Wills ⇨249.

Question of testator's residence or domicile is mixed question of law and fact (Code Civ. Proc. § 1294; Pol. Code, § 52).

2. Wills ⇨386.

Trial court's determination on conflicting evidence of testator's residence is conclusive on appeal (Code Civ. Proc. § 1294; Pol. Code, § 52).

3. Wills ⇨300.

Finding that testator at time of death was resident of county in which will was offered for probate *held* supported (Code Civ. Proc. § 1294; Pol. Code, § 52).

4. Wills ⇨384.

Whether court erred in refusing to permit introduction of affidavits regarding testator's residence would not be determined, where statements contained therein had been testified to by others whose testimony was undenied.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Application by Chriska Martini for the probate of the will of Carl Peters, deceased. From the judgment admitting the will to probate, Louisa Bauer, contestant, appeals.

Affirmed.

J. E. Hood and J. S. Blaine, both of Oakland, for appellant.

G. P. Hall and Henry J. Soldati, both of Petaluma, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This appeal is by Louisa Bauer from an order of the superior court of Sonoma county, admitting the will of Carl Peters, deceased, to probate. Carl Peters died in the city of Oakland, on June 11, 1931. On June 18, 1931, the will of deceased was filed for probate in said county of Sonoma, together with a petition for its probate, by the executrix named therein. The will was dated July 2, 1924, and contained the statement that deceased was a resident of Petaluma, Cal.

It appears, from the order of the court admitting the will to probate, that notice was given of the hearing for the probate of the will, and, at the time of the hearing, opposition to the admission of the will to probate in Sonoma county was made by attorneys representing appellant, a sister of deceased, on the ground that decedent, at the time of his death, was a resident of Alameda county. At the same time, the attorney for the executrix asked leave to amend the petition for probate of the will by striking out the word "Alameda," and inserting the word "Sonoma" in lieu thereof, stating that the word "Alameda" had been inadvertently used. This request was granted.

Thereafter, the attorneys for appellant filed a written opposition or contest, and the matter was set down for hearing. The said opposition or contest alleged that the superior court of Sonoma county had no jurisdiction to probate the said will for the reason that,

at the date of his death, the decedent was a resident of Alameda county. Upon the hearing, the court made its order admitting the will to probate, and from this order appellant has appealed.

The main question for consideration on this appeal is whether at the date of his death decedent was a resident of the county of Alameda or of the county of Sonoma.

The evidence on the part of the respondent was to the effect that deceased was a laborer, working most of the time as a farm hand; that in pursuing this occupation he worked on farms in various counties in the state, including Sonoma county; that he was not married, nor a naturalized citizen of the United States; that in 1924 he made his will, declaring therein that Petaluma, in the county of Sonoma, was his home; that when out of work he always returned to Petaluma, where he stayed with his brother, L. R. Peters, or with his niece, the respondent; that he kept his mattress and blankets at the home of his brother, L. R. Peters, and always spent his vacations in Petaluma, and placed his savings in a bank at Petaluma, and did what business he had at that place. In 1925, he was offered a position as poultryman in the Masonic Home at Decoto, Alameda county, which he accepted and lived there, and continued in that employment until a short time before his death. He died in the county hospital of Alameda county on June 11, 1931, and was buried at Petaluma. That while living at the Masonic Home he spoke of his home as being at Petaluma.

It also appears that he owned a house and lot in Petaluma, which he sold to a niece about two years before his death, on the installment plan, and that these installments, by his request, were deposited in the bank at Petaluma. The trial court found, on conflicting evidence, that Petaluma was, at the date of his death, the place of residence of deceased.

Section 1294 of the Code of Civil Procedure provides that: "Wills must be proved, and letters testamentary or of administration granted—1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died." Section 52 of the Political Code provides that every person has, in law, a residence. "1. It is the place where one remains when not called elsewhere for labor or other special or temporary purposes, and to which he returns in seasons of repose; 2. There can only be one residence; 3. A residence cannot be lost until another is gained; * * * 7. The residence can be changed only by the union of act and intent." Absence from one's residence for months, or even for years, on business or pleasure, if all the while the person intends to be absent for a temporary purpose, and to be followed by a resumption of the former residence, is not an abandonment of, or change of, residence. 9 R. C. L. 554; 19 Cor. Jur. 423. If a party has two residences, that will be esteemed his domicile which he himself selects or deems to be his home, or which appears to be the center of his affairs. Chambers v. Hathaway, 187 Cal. 104, 200 P. 931; 9 R. C. L. 558.

[1, 2] The question of residence or domicile is a mixed question of law and fact, and the determination of the trial court, upon conflicting evidence, is conclusive upon this court. Quinn v. Nevills, 7 Cal. App. 231, 93 P. 1055; Bradley v. Davis, 156 Cal. 267, 104 P. 302.

[3] We are of the opinion that there was sufficient evidence to uphold the order of the court to the effect that the decedent was, at the time of his death, a resident of Sonoma county.

[4] Appellant contends that the court erred in refusing to permit the introduction in evidence of the affidavits of F. B. Hartman, the superintendent of the Masonic Home, and Otto Myer, an employee of said home. These affidavits set forth, in substance, that decedent was employed in January, 1925, as poultryman at said home, and thereafter continued in said occupation until a few days prior to his death; that during all that time he lived continuously at said home, except for two or three times a year, when he would be absent for two or three days; that he received his mail, and kept his personal belongings, consisting of clothes, books, and papers, at the home, and had his laundry done there, and that he intended to return to the said home and to his said employment, upon his recovery from his illness. The facts set forth in these affidavits were merely cumulative, the statements therein contained having been testified to by other witnesses, and they were not denied by respondent.

Under these circumstances we consider it unnecessary to pass upon the question of whether or not the court erred in excluding these affidavits. The evidence is conflicting as to whether decedent regarded Petaluma or the Masonic Home as his residence. The trial court decided this conflict in favor of respondent. Therefore the judgment must be, and it is hereby, affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 721

BOUDREAU et al. v. IBBETSON.

Civ. 7143.

District Court of Appeal, Second District, Division 2, California.

May 27, 1932.

1. Vendor and purchaser ⊜349.

Complaint of purchaser's assignees for damages for vendor's refusal to convey *held* to allege compliance with purchase contract.

Complaint of purchaser's assignees suing for damages for vendor's wrongful refusal to make conveyance containing allegation that certain payments and tender of entire balance due had been made was sufficient since the contract merely required money payments on part of purchaser's assignees.

2. Vendor and purchaser ⊜349.

Allegation that vendor rejected tender made by purchaser's assignees of entire balance due *held* sufficient to excuse noncompliance with contract requiring payment of taxes and assessments.

3. Vendor and purchaser ⊜95(2).

Vendor accepting alleged delinquent payment and thereafter accepting further payments *held* precluded from urging delay as ground of forfeiture.

4. Vendor and purchaser ⊜77.

Under land sale contract requiring payment of balance "in one, two and three years," no claim of default could be maintained prior to expiration of three-year period.

5. Vendor and purchaser ⊜344.

Where vendor refused without just cause to accept payment, no tender was necessary to maintain action for refusal to make conveyance (Civ. Code, §§ 1511, 1512, 1515).

6. Vendor and purchaser ⊜349.

In action for vendor's refusal to convey, amendment of complaint setting forth vendor's letter claiming cancellation and proof in support of allegation *held* proper.

Amendment of complaint and proof in support thereof was proper as showing excuse for failure to make subsequent payments and as evidencing vendor's refusal to perform contract.

7. Limitation of actions ⊜21(1).

Action by purchaser's assignees, commenced March 6, 1929, for vendor's unwarranted cancellation on February 26, 1926, of written contract *held* not barred by limitation (Code Civ. Proc. §§ 337, 339).

8. Vendor and purchaser ⊜352.

Where construction of contract was necessary to determine whether purchaser's assignees had defaulted, findings regarding ambiguity of due dates of payments *held* within issues.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by Adele Boudreau and another against R. E. Ibbetson. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Edwin J. Miller, of Los Angeles, for respondents.

FRICKE, Justice pro tem.

The complaint alleges that on or about November 11, 1923, the assignor of plaintiffs, one J. Kertis, entered into an agreement with the defendant for the purchase of certain real property, a copy of which agreement is attached to and made a part of the complaint as an exhibit, and that defendant was paid thereunder the total of $2,500 as follows: $100 on November 11, 1923; $900 on December 13, 1923; $500 on December 2, 1924; $500 on May 14, 1925, and $500 on June 4, 1925, the first two payments by J. Kertis and the others by the plaintiffs. The complaint further alleges that on or about April 15, 1926, and on or about August 10, 1926, "plaintiffs tendered to defendant the entire balance due to the defendant under the terms of said agreement," and demanded a conveyance of said property, but that defendant refused to accept the tender and refused to execute a conveyance. The complaint asks for judgment in the amount of money paid, $2,500, with interest.

[1, 2] Appellant contends that the complaint fails to state a cause of action and that the court erred in overruling an objection to the introduction of evidence made upon that ground. The contention that the complaint nowhere alleges performance by plaintiffs of their part of the contract is without merit, the contract requiring of plaintiffs only certain payments, and the complaint alleging the payment of certain sums and a tender of "the entire balance due under the terms of said agreement." The quoted allegation also meets appellant's contention that there is no allegation of compliance by plaintiffs with the requirement of the contract that they pay taxes and assessments nor any allegation excusing such compliance.

[3] Appellant contends that it appears from the complaint that the payments made by respondents' predecessor were not made as called for by the terms of the agreement. The provision of the agreement requires payments from the purchaser as follows: "One Hundred Dollars upon the execution and de-

livery of this agreement receipt of which is hereby acknowledged, and the further sum of Nine Hundred Dollars on or before the 11th day of December, 1923, and Two Thousand Nine Hundred Ninety Dollars, in one, two, and three years, with interest at the rate of seven per cent per annum, payable quarterly from date. Taxes for the second half of the current years 1923–1924 to be paid by buyer. Buyer agrees to pay all assessments levied subsequent to date hereof." Appellant presents no argument on this point and does not indicate the deficiency sought to be attacked. If the point is based upon the fact that the sum of $900 to be paid on or before December 11, 1923, was not paid until December 13, 1923, it is answered by the fact that the payment of that amount accepted by appellant, followed by the payment and acceptance of further sums under the agreement, precludes appellant from thereafter urging the delay of two days in the making of this payment.

[4] Appellant contends that it appears from the face of the complaint that the total payments made do not equal the amount due at the time of the filing of the complaint and that plaintiffs were in default at the time of the alleged tender. A reading of the terms of the agreement relating to the making of payments thereunder (quoted above) fails to disclose any requirement for payments upon any specific dates subsequent to December 11, 1923, the only provision for subsequent payments being that the balance of $2,990 be paid "in one, two and three years." It was within the seller's power, at the time of entering into the agreement, to provide more definitely for the time of payment of the balance, and to provide for definite installment payments thereon, if such was his desire. Not having done so, he cannot now be heard to urge a right of forfeiture based upon what he now desires to read into the agreement, which is so ambiguous and uncertain that no claim of a default in the making of payments by the purchaser could be maintained prior to the expiration of the three-year period. Appellant's other points based upon the false premise of a default are without merit.

[5, 6] Appellant contends that there is no evidence to support the finding that on August 10, 1926, the plaintiffs tendered the entire balance due appellant under the agreement and demanded a conveyance of the property, but that appellant refused the tender, refused to execute a conveyance, and told plaintiffs that they no longer had any interest in the property. It may be here noted that it is the contention of appellant that the contract had been forfeited and canceled for the unexcused default of the respondents on or about February 26, 1926. The transcript shows that about April 16, 1926, respondents sent to appellant a check for $44.50 to cover taxes and interest due, which appellant returned twelve days later inclosed in a letter declaring that the contract "was cancelled Feb. 2, 1926, account of non-payment"; and the evidence also shows that on February 26, 1926, appellant wrote a letter to respondents notifying them that he had on that date canceled the contract, this letter following up a letter of appellant under date of January 28, 1926, in which he stated that unless the sum of $508.30 was paid in full by February 12, 1926, "R. E. Ibbetson will exercise his right under said contract to terminate the same and retain all moneys previously paid by you." In view of the fact that there was no default on the part of respondents, this cancellation of the contract and forfeiture of the amounts paid thereunder were wholly unwarranted and were a declaration in no uncertain terms that the appellant refused to be further bound by the contract and refused to perform his part thereof. Appellant having thus refused, without just cause or excuse, to accept a payment under the contract, respondents were excused from further performance or offers or tenders of performance. Civ. Code §§ 1511, 1512, 1515. It therefore not only is immaterial whether the tender was in proper form, but no tender was necessary to give rise to the cause of action here prosecuted. Were the action for specific performance the question of tender, its sufficiency and timeliness would be material; but we have here an action for damages arising from a refusal of the appellant to perform his obligations under the contract. Upon such refusal the right of action arose, and no tender thereafter was necessary. The finding as to the tender is therefore not necessary to the sustaining of the judgment. The damages recoverable resulted not because the cancellation was ineffectual, but because appellant refused to perform the contract and prevented respondents from performing their part of the agreement. The amendment of the complaint setting forth appellant's letter of February 28, 1926, and the proof in support of the allegation were proper not only as showing an excuse for the failure to make subsequent payments, but as evidencing appellant's refusal to perform the contract.

[7] Appellant contends that the action is barred by the statute of limitations set forth in sections 339 and 337 of the Code of Civil Procedure. Section 339 applies to actions on contract "not founded upon an instrument of writing" or on contract evidenced by a certificate, abstract of guaranty, or policy of title insurance, and obviously has no application here. Section 337 prescribes a limitation of four years. As this action was commenced March 6, 1929, upon a cause of action which arose on February 26, 1926, it was well within the limitation of the statute.

[8] The point that the findings as to the provisions of the agreement relating to payments under the agreement and as to the ambiguity and uncertainty of the due dates of such payments are without the issues is not well taken. The agreement was made a part of the complaint, and a construction of the contract was necessary to a determination of the rights of the parties, whether respondents had defaulted in their payments, and whether there was any justification for appellant's attempt to cancel the agreement.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

124 Cal.App. 79

CAPITAL GLENN MINING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4657.

District Court of Appeal, Third District, California.

June 3, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

1. Insurance ⇐377(4).

Checks and correspondence received charged compensation insurer with knowledge of change in insured's name, and placed insurer upon inquiry regarding insured's identity, as regards issuing new policy.

2. Insurance ⇐389(10).

Where new compensation policy was issued after insured partnership incorporated, insurer could not avoid liability because of policy clause forbidding assignment.

3. Master and servant ⇐417(7).

Accident Commission's findings in direct conflict with uncontradicted evidence are not controlling (St. 1917, p. 876, § 67(c).

It is only where the evidence supports the findings or there is a conflict of evidence that the conclusions of the commission become final.

4. Insurance ⇐389(10).

Compensation insurer, put on inquiry regarding change in insured's name, but issuing new policy under old name without inquiry and accepting premiums thereunder, *held* estopped to deny liability.

Insurer received and cashed three checks which were executed in the new name of the insured, and sent a letter addressed to the same name, so that the insurance company was put upon inquiry regarding the identity of the organization which it proposed to insure, and by issuing the policy and retaining premiums in payment therefor, without written application for the new policy, and without inquiry regarding the identity or character of the insured, it was estopped from denying its liability under the terms of the new policy.

Proceedings under the Workmen's Compensation Act by Marie Henry, claimant, for the death of her husband, George B. Henry, opposed by the Capital Glenn Mining Company, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurer. To review an award of the Industrial Accident Commission rendered against it, and exempting the insurer from liability, the employer brings certiorari.

Award annulled, and cause remanded to the Accident Commission, with directions.

P. G. West, of Sacramento, for petitioner.

A. I. Townsend, Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondents.

H. N. Dyke, of Imperial, amicus curiæ, for respondents.

PER CURIAM.

This is a proceeding in certiorari to review the award of the Industrial Accident Commission which was rendered against the petitioner, as the employer, on account of the death of George B. Henry, which occurred in the course of his employment in the operation of a mine. The Ocean Accident & Guarantee Corporation, Limited, was exempted from liability by the commission, as the insurer of the petitioner, on account of a mistake in the name of the assured as it appears in the policy.

The essential facts of the case are undisputed. Prior to November 15, 1929, Senator J. M. Inman, A. F. Giddings, C. L. O'Brien, and E. C. Coates, as copartners, were engaged in operating a gold mine in Placer county under the name of "Glenn Mine." On the last-mentioned date, these same individuals and the Stark Bros. incorporated this mining enterprise under the name of "Capital Glenn Mining Company." Its articles were duly recorded. The mine continued to operate as a corporation in exactly the same manner it was previously conducted as a copartnership. Among the miners who were employed by the partnership and continued to serve in the same capacity under the management of the corporation was George B. Henry. Prior to the organization of the corporation, on June 13, 1929, the Ocean Accident & Guarantee Corporation, Limited, insured the copartnership mining enterprise under the name of "Glenn Mine." This policy remained in force for the period of one year.

[1] During the life of this first policy and after the organization of the corporation in November, 1929, two premiums were paid to the insurance company by means of checks of the mining corporation, signed "Capital Glenn Mining Co., By J. M. Inman, By A. F. Giddings." These checks were received and cashed by D. F. Ferguson, the agent of the insurance company. In November, 1929, in response to a letter of inquiry from the mining corporation regarding its employees who were presumed to be covered by the policy, the insurance company addressed its reply to "Capital Glenn Mine," and forwarded it in an envelope similarly addressed. These checks and correspondence furnish undisputed evidence which will charge the insurance company with knowledge of a change of name of the insured company. These facts do not furnish evidence that would inform the insurer that the copartnership had been transformed into a corporation, but they do furnish information which should place the insurance company upon inquiry regarding the identity of the assured before a new policy is issued. No such inquiry was made.

Subsequently, on May 21, 1930, when the first insurance policy was about to expire, the same insurance company issued a new policy No. 813443 in the name of "Glenn Mines," as the name of the insured. This new policy was issued and forwarded to the Capital Glenn Mining Company without an application therefor, without a declaration of facts, and without any previous inquiry on the part of the insurer regarding the change of name or the identity of the assured. It is not contended there was any fraud exercised or misrepresentations made by the insured in procuring the policy. Regarding the issuing of this new policy, Mr. Ferguson, the agent of the insurance company, testified:

"The transaction was handled in the usual manner. It was renewed and mailed out to the assured.

"Q. As far as you know, you received no further information from any person, or asked for none? A. Yes.

"Q. Just took the old policy and without any consultation with anybody, or without instructions from anybody, you issued the new policy in the due course of business? A. Yes sir."

On July 12, 1930, the premium on this policy was paid by the mining company executing and delivering to the agent of the insurance company its check for $500, signed, "Capital Glenn Mining Co., by J. M. Inman." This check was accepted and cashed by the insurance company.

After the issuance of this new policy, and the payment of the premium therefor, a fire occurred in the mine on July 14, 1930, and the employee, George B. Henry, was asphyxiated. J. M. Inman, as president of the corporation, immediately rendered a written report of the casualty and made a demand for indemnity under the terms of the policy. This report was furnished in the name of "Glenn Mine," in the form in which the policy was issued. The insurance company thereupon repudiated its liability. The policy was canceled, and the premium was prorated. The insurance company retained a part of this premium.

Upon application, the Industrial Accident Commission awarded Marie K. Henry, the surviving widow of the deceased, George B. Henry, compensation in the sum of $4,449.24, to be paid in specified installments. The commission also found that the Ocean Accident & Guarantee Corporation, Limited, was the carrier of the insurance policy and liable to the employer of said deceased person for the payment of the award. Subsequently, upon application therefor, under the provisions of section 20 (d) of the Workmen's Compensation Act of California (St. 1917, p. 850), this award and findings were set aside. Additional testimony was supplied and other findings were adopted to the effect that, at the time of the casualty, the Ocean Accident & Guarantee Corporation, Limited, was an insurer of the copartnership, "Glenn Mine," but was not an insurer of the Capital Glenn Mining Company, a corporation, and therefore was not liable to indemnify the employer of said deceased person. An award for the sum of $4,449.24 was rendered in favor of Marie K. Henry, widow of George B. Henry, against the Capital Glenn Mining Company, a corporation. From this award the present writ of review was instituted.

In support of its final award, the Industrial Accident Commission asserts the insured is bound by its declaration of facts which is contained in the written application for a policy, to the effect that the mining company is a "co-partnership," and that the policy contains a clause that "no assignment of interest under this policy shall bind the company unless the consent of the company shall be endorsed thereon."

[2] Neither of these contentions is supported by the record on review. The evidence is without conflict that no written application for this policy was made. It was issued, as the agent, Mr. Ferguson, testified, without inquiry and without request. The written copy of the application for a policy which was filed as an exhibit in the record affirmatively shows there was no signature of any applicant for a policy. The record also shows without conflict that there was no assignment of interest by the mining company after the policy was issued. The corporation was organized November 15, 1929. The insurance policy in question was not issued until May 21, 1930. The exemption clause of the policy in the event of an assignment of interest,

therefore, has no application to the undisputed facts of this case.

[3] It is asserted this court is powerless to review the findings of the Industrial Accident Commission, under the provisions of paragraph (c) of section 67 of the Workmen's Compensation Act (St. 1917, p. 876) for the reason that its findings become final and conclusive. But it may not be said that findings of the Industrial Accident Commission which are in direct conflict with the uncontradicted evidence of the record are controlling on this court in this proceeding. It is only where the evidence supports the findings, or there is a conflict of evidence, that the conclusions of the commission become final. 27 Cal. Jur. 575, § 218; Knock v. Industrial Acc. Com., 200 Cal. 456, 253 P. 712.

[4] The evidence of the circumstances heretofore related regarding the change in the name of the mining enterprise before the issuing of the policy in question is likewise uncontradicted. The agent of the insurance company did not deny the receipt and cashing of the three checks which were executed in the name of Capital Glenn Mining Company. He also admitted sending the letter addressed to the same name. He did deny that he knew the copartnership had been transformed into a corporation. There is, however, no conflict of evidence regarding the knowledge on the part of the insurance company of the change in the name of the mining enterprise. The insurance company was therefore placed upon inquiry regarding the identity of the organization which it proposed to insure. Since the insurance company issued this policy and retained premiums in payment therefor when it was possessed of knowledge of a change of the name of the insured, without written application therefor, and without inquiry regarding the identity or character of the insured, and in the absence of fraud or misrepresentation on the part of the assured, the insurance company will be estopped from denying its liability under the terms of the policy. It is inconceivable that the law will become a party to the injustice of permitting an insurance company possessed of actual knowledge of the real name of an assured, to issue a policy without written application, without inquiry regarding the identity of the proposed assured, and without fraud or misrepresentation on the part of the assured; permit it to collect and retain premiums in payment therefor, and then repudiate its liability because of error in the name or identity of the assured which is primarily the result of the negligence or mistake of the insurance company.

This proceeding does not involve the question of transferring a policy from a copartnership to a corporation. There is no question that the legal definition of the term "company" does not include that of a corporation. The change of the entity of the assured is not necessarily involved. The sole question is whether an insurance company may repudiate its liability under the terms of an insurance policy for which it has received and retained premiums, when a mistake in the name of the assured occurs through its own negligence. Under such circumstances the insurer will be estopped from denying its liability. It will then be presumed to have had knowledge of the change of entity of the assured, and to have insured the employer against accident or death resulting to its employee in the course of his employment. Under such circumstances, it is immaterial that the name of the assured or the character of the entity is erroneously entered in the policy.

In the present case the record shows there was no increase of hazard on the part of the insurance company on account of the error in the name of the assured, or from the transformation of the copartnership into a corporation. The individual members of the copartnership were originally insured. After the organization of the corporation they continued to remain the chief managers of the enterprise. The mine and its equipment were the same, the management had not changed, and the employees continued to render services exactly as they had previously done. The insurance company was not harmed by the mere artificial transformation from a copartnership to a corporation, nor by the fiction of assuming that the miners were employed by a different entity. Under the circumstances of this case the insurance company should not be permitted to enjoy the fruits of their contract, and repudiate their obligations thereunder when the error in the name of the assured is largely due to the fault of the insurance company and the careless manner in which the policy was issued.

This principle of estoppel was applied in the case of Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 279 P. 1050, 1051. In that case without misstatement or fraud on the part of the insured, and without inquiry regarding the title to property, an insurance company issued a policy to Sam Wong upon a building to which he held no title. The policy contained a provision that it should become void unless the assured owned the property in fee. The court very appropriately said: "Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the buildings or the title to the property on which the same was situate.

Plaintiff herein, as owner, had an insurable interest in the building, he being in possession and operating the same as a dryer. 14 Cal. Jur. 465; 14 R. C. L. 915. Prior to the adoption of the standard form of policy in this state it was held that, where the assured had an insurable interest in property, and without fraud in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213–228, 107 P. 292; 14 R. C. L. pp. 926–932. After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 315, 197 P. 99; 14 R. C. L. p. 932."

When an insurance company, through its own fault, issues a policy to an assured under a wrong name, and accepts and retains premiums in payment therefor, it will be estopped from denying that the real employer was insured by the terms of the policy, and in this case every equitable principle demands that the words "Glenn Mine" be read as meaning "Capital Glenn Mining Company, a corporation."

The award is annulled, and the cause remanded to the commission for further adjudication in accordance with this opinion.

124 Cal.App. 775

CAPITAL GLENN MINING COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Colin B. Hislop, Individually, and/or as Administrator of the Estate of Thomas Capitani, and Ocean Accident & Guarantee Corporation, Limited, Respondents.

Civ. 4656.

District Court of Appeal, Third District, California.

June 3, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for death. Award annulled and remanded.

P. G. West, of Sacramento, for petitioner.

A. I. Townsend, Redman, Alexander & Bacon, R. P. Wisecarver, all of San Francisco, for respondents.

H. N. Dyke, of Imperial, amicus curiæ, for respondents.

PER CURIAM.

For the reasons given in Capital Glenn Mining Company, a Corporation, petitioner, v. Industrial Accident Commission, Marie Henry and Ocean Accident & Guarantee Corporation, Ltd., respondents (Cal. App.) 12 P.(2d) 122, the award in this case is annulled and the cause remanded to the commission for further adjudication.

124 Cal.App. 776

CAPITAL GLENN MINING COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Luigi Campini, and Sabini Campini, Colin B. Hislop, and Ocean Accident & Guarantee Corporation, Limited, Respondents.

Civ. 4658.

District Court of Appeal, Third District, California.

June 3, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for death. Award annulled and remanded.

P. G. West, of Sacramento, for petitioner.

A. I. Townsend, Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondents.

H. N. Dyke, of Imperial, amicus curiæ, for respondents.

PER CURIAM.

For the reasons given in Capital Glenn Mining Company, a Corporation, petitioner, v. Industrial Accident Commission, Marie Henry and Ocean Accident & Guarantee Corporation, Ltd., respondents (Cal. App.) 12 P.(2d) 122, the award in this case is annulled and the cause remanded to the commission for further adjudication.

124 Cal.App. 778

CAPITAL GLENN MINING COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Colin B. Hislop, Joseph H. Shepherd and Ocean Accident & Guarantee Corporation, Limited, Respondents.

Civ. 4659.

District Court of Appeal, Third District, California.

June 3, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for death. Award annulled and remanded.

P. G. West, of Sacramento, for petitioner.

A. I. Townsend, Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondents.

H. N. Dyke, of Imperial, amicus curiæ, for respondents.

PER CURIAM.

For the reasons given in Capital Glenn Mining Company, a Corporation, petitioner, v. Industrial Accident Commission, Marie Henry and Ocean Accident & Guarantee Corporation, Ltd., respondents (Cal. App.) 12 P.(2d) 122, the award in this case is annulled and the cause remanded to the commission for further adjudication.

124 Cal.App. 777

CAPITAL GLENN MINING COMPANY (a Corporation), Petitioner, v. Colin B. HISLOP, Industrial Accident Commission, and Ocean Accident & Guarantee Corporation, Limited, Respondents.

Civ. 4660.

District Court of Appeal, Third District, California.

June 3, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for death. Award annulled and remanded.

P. G. West, of Sacramento, for petitioner.

A. I. Townsend, Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondents.

H. N. Dyke, of Imperial, amicus curiæ, for respondents.

PER CURIAM.

For the reasons given in Capital Glenn Mining Company, a Corporation, petitioner, v. Industrial Accident Commission, Marie Henry and Ocean Accident & Guarantee Corporation, Ltd., respondents (Cal. App.) 12 P.(2d) 122, the award in this case is annulled and the cause remanded to the commission for further adjudication.

124 Cal.App. 46

STONE et al. v. HEYMAN BROS. et al.

Civ. 8359.

District Court of Appeal, First District, Division 2, California.

June 2, 1932.

Rehearing Denied July 2, 1932.

1. Negligence ⇐54.

Vendor having disposed of real estate, and being in no position to control use thereof, is no longer liable for happenings on premises.

2. Negligence ⇐54.

Vendor of residence *held* not liable for injuries to purchaser's wife falling through skylight not constructed as required by ordinance.

Facts disclosed that, after purchaser and wife had occupied house for one year, wife placed portion of her weight lightly on skylight, and fell through same, receiving injuries, and that skylight was constructed of clear glass one-eighth of an inch thick, while ordinance required skylight to be protected by railing or wire screen, or to be glazed with wire glass not less than one-fourth inch thick.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Suit by J. W. Stone and another against Heyman Brothers and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Robert P. Cahen and J. Horton Beeman, both of San Francisco, for appellants.

Jacob Samuels and Oscar Samuels, both of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

NOURSE, P. J.

Plaintiffs sued for damages for personal injuries sustained by Mrs. Stone in falling through a skylight in a building which plaintiffs purchased from defendant. The appeal is from a judgment for defendant following an order sustaining a demurrer to the third amended complaint.

This complaint alleged that the building was constructed by defendant and sold to

plaintiffs on May 2, 1929, for residential purposes; that the skylight was constructed of clear glass one-eighth of an inch thick and did not comply with the requirements of the municipal building ordinance; that this defect was unknown to plaintiffs and was not discoverable by the use of reasonable care; that defendant represented to plaintiffs that the building was free from defects; and that, on August 20, 1930, plaintiff Elin M. Stone, "placed a portion of her weight lightly on said skylight" and was precipitated through the skylight, sustaining bodily injuries for which damages were asked.

[1, 2] The plaintiffs predicate their cause of action upon the theory that the construction of the skylight in violation of the terms of the ordinance was negligence per se and that the defendant is liable under the rule of Lewis v. Terry, 111 Cal. 39, 44, 43 P. 398, 399, 31 L. R. A. 220, 52 Am. St. Rep. 146. That case involved the sale of a folding bed. In holding that the purchaser had an action in tort for injuries arising from a latent defect in the bed, the Supreme Court say: "But when the seller * * * represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts." The Lewis Case and the authorities therein cited related to the sale of personal property containing latent defects. None of the cases involved the sale of real property where, as here, the alleged defect was open to view and might have been discovered. (The ordinance required the skylight to be inclosed by a substantial railing at least three feet high, or protected by a wire screen kept at least four inches above the glass, or glazed with wire glass not less than one-quarter inch thick. It is needless to say that the omission of any one of these requirements would be readily discernible especially after a full year's occupancy of the premises.)

The rule applicable to the vendor of realty is stated in Upp v. Darner, 150 Iowa, 403, 130 N. W. 409, 410, 32 L. R. A. (N. S.) 743, Ann. Cas. 1912D, 574, as follows: "After the owner of such premises has disposed of them he is no longer liable for what may happen thereon for the reason that he is in no position to control the use thereof." In accord are Smith v. Tucker, 151 Tenn. 347, 270 S. W. 66, 41 A. L. R. 830. 842 note; Palmore v. Morris, T. & Co., 182 Pa. 82, 37 A. 995, 61 Am. St. Rep. 693; Slavitz v. Morris Park Estates, 98 Misc. Rep. 314, 162 N. Y. S. 888. We had occasion to follow the same principle in Denman v. City of Pasadena, 101 Cal. App. 769, 773, 778, 282 P. 820, where we held that the members of the Tournament of Roses Association were not liable for injuries sustained by a guest through the collapse of a grandstand maintained on private property over which the association had no supervision or control. The appellants have cited no authority supporting a claim of the character here in suit and we have found none.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

124 Cal.App. 56

AMBASSADOR AIRWAYS, Inc., v. FRANK.

Civ. 7127.

District Court of Appeal, Second District, Division 1, California.

June 2, 1932.

1. Appeal and error ⇐193(9).

On appeal, defendant, who filed no demurrer and raised no objection on trial, cannot claim that complaint failed to state cause of action.

2. Bailment ⇐14(1).

In absence of special qualifying agreement, hirer of thing must repair all injuries thereto occasioned by his want of ordinary care (Civ. Code, § 1929).

3. Pleading ⇐433(3).

Mistake in theory in framing complaint is cured by verdict or judgment

4. Bailment ⇐30.

Complaint for money expended in repairing airplane damaged while in defendant's possession and for damage for loss of use thereof *held* to state cause of action on ordinary statutory liability (Civ. Code, § 1929).

Complaint alleged that defendant agreed to accept course in training with plaintiff as a student in practical and theoretical flying, wherein plaintiff was to furnish airplanes to defendant for his use in learning to fly; that defendant agreed to pay all costs of repairs to any machine damaged by him over and above $50 when defendant was flying alone; that the time the airplane was out of service and use by plaintiff caused by the accident was 35 days, and the value of the use of the airplane to the plaintiff during the time was $75 per day, and the plaintiff had thus been damaged $2,625.

5. Bailment ⇐1.

Rights, duties, or obligations of parties to bailment are determinable from their contract.

6. Bailment ⇐32.

That bailee bound himself to pay cost of repairs to any airplane he damaged *held*

not to subject bailee to liability for loss of use during time airplane was undergoing repairs (Civ. Code, § 1929).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Ambassador Airways, Inc., against Ben L. Frank. From a judgment in favor of plaintiff, defendant appeals.

Modified, and, as modified, affirmed.

Anderson & Anderson & Sheahan, of Los Angeles, for appellant.

A. P. Michael Narlian and Joseph N. Beardslee, both of Los Angeles, for respondent.

HOUSER, J.

Broadly stated, the action upon which the instant appeal is based was brought by the plaintiff against defendant for the purpose of recovering a judgment on account of moneys alleged to have been expended by the plaintiff in repairing an airplane which was the property of the plaintiff, but which had been damaged while in the possession of defendant. In said action additional damages were claimed by the plaintiff because of the loss of "service and use by the plaintiff" of the airplane during the time that it was undergoing repairs.

In greater detail, the facts appear to be that in the pursuit of the business in which the plaintiff was engaged it agreed to give to defendant, "called 'student,' a course in practical and theoretical flying" of an airplane. Thereafter, and in the course of such instruction, defendant "when flying alone" had two separate accidents, each of which resulted in the expenditure of moneys by the plaintiff in making necessary repairs to the airplane. Following the latter of such accidents, defendant signed an instrument in writing by which he agreed "to pay to the corporation all cost of repairs and/or for all damage to any machine damaged or wrecked by any act of student, or in any accident in which any act of student is a contributing cause, over and above $50.00, when flying alone." Some weeks thereafter a third accident occurred, also at a time when defendant was "flying alone," which accident necessitated the outlay by the plaintiff of an additional sum of money in repairing damage thereby occasioned to said airplane. In making such repairs, the airplane was "out of service and use" by the plaintiff for a period of thirty-five days.

The complaint in the action contained three counts, each of which in form was identical with each of the others, with the exception that the third count thereof contained an allegation which was not incorporated in either of the others, to wit: "That the time the said airplane was out of service and use by the plaintiff, caused by said accident, was thirty-five days, and the value of the use of the said airplane to the plaintiff during said time was $75.00 per day and the plaintiff has been damaged by the loss of the use of said airplane for said period of time in the sum of $2,625.00."

With reference to each of the three counts of the complaint, for the recovery of a judgment against defendant on account of the "cost of repairing said airplane," the plaintiff apparently relied upon its allegations therein set forth as follows: "That on or about the 15th day of June, 1928, the defendant agreed in writing to accept the course in training with the plaintiff as a student in practical and theoretical flying wherein the plaintiff was to furnish airplanes to the defendant for his use in learning to fly airplanes, learn their construction and general allied subjects in connection with airplanes. Among other provisions the defendant agreed to pay to the plaintiff all costs of repairs, and/or for all damage to any machine damaged or wrecked by any act of defendant or in any accident in which any act of defendant is a contributing cause, over and above the sum of $50.00 when defendant was flying alone."

On the trial of the action, although the execution of the agreement was satisfactorily established, and although the evidence likewise showed that each of two of the accidents in question occurred on a date which preceded the execution of the said agreement, nevertheless, by order of the trial court, judgment was rendered in favor of the plaintiff not only for the amount of money expended by it on account of the accident which occurred after the execution of said agreement, but as well for moneys paid out by the plaintiff for a like purpose on account of each of the accidents which occurred prior to the execution of said agreement. The judgment also included damages which were awarded to the plaintiff in the sum of $2,257.85 as compensation for the period "that said airplane was out of service and use by the plaintiff as a result of said (third) accident." It is from said judgment that the appeal herein is prosecuted.

[1] At the outset of the appellant's objections to the judgment, it is contended that because neither of the several counts of the complaint contained an allegation to the effect "that the airplane was damaged or wrecked by any act of defendant or in any accident in which any act of defendant was a contributing cause," the complaint failed to state a cause of action. In that connection it should first be noted that no demurrer was interposed by defendant to the complaint; nor on the trial of the action was any objection whatsoever registered by defendant to the fact that in the respect mentioned the complaint was at all defective. In that re-

gard the trial was conducted as though the complaint was properly subject to no adverse criticism. In such circumstances, the law is well established that after judgment has been rendered and on appeal therefrom it is too late for a dissatisfied litigant to then suggest for the first time an objection of the nature of that here urged by appellant.

But specifically, as to each of the first and the second counts of the complaint, it is contended by appellant that, because the plaintiff relied upon an express agreement that defendant would "pay the plaintiff all cost of repairs and/or for all damage to any machine damaged or wrecked by any act of defendant," etc., which said undertaking on the part of defendant was executed after the happening of both accidents specified in said two counts of the complaint, the judgment as to each of said counts should be reversed. Such legal conclusion, however, does not necessarily result from the facts presented.

[2] As appears in section 1929 of the Civil Code, in circumstances such as existed between the interested parties, in the absence of any special qualifying agreement between them, "the hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care." To the same effect, see 6 Corpus Juris, 1113, and authorities there cited. From such authorities it may fairly be assumed that by the terms of the agreement between the instant parties no greater liability on the part of defendant was created than would have existed in the absence of such agreement; in other words, the maximum of the ordinary liability of defendant was in no wise increased or enlarged by virtue of the agreement which he executed. If he was liable at all for the cost of repairs of the airplane which was the property of the plaintiff, the execution of the agreement added nothing thereto. Defendant was liable for "cost of repairs" in the same manner and to the same extent before he signed the agreement as he was after he had attached his signature thereto. It follows that, as to each of the accidents which occurred before the agreement was executed, for the recovery of a judgment against defendant the plaintiff might have successfully relied upon the general law which fixes defendant's liability, rather than upon the express agreement which was set up in the complaint. From an examination of the findings of fact made by the trial court, it appears that, as to each of such two counts of the complaint the judgment was apparently based upon the express contract entered into between the plaintiff and defendant. But, although the evidence shows that each of the accidents which formed the basis of such two counts respectively occurred before the date of the express contract, the evidence also discloses the fact not only that the said accidents occurred while the airplane was in the possession of defendant, but as well that each of said accidents was caused by an "act of the defendant." Neither by allegation in his answer to the complaint, nor by evidence adduced in his behalf on the trial of the action, did defendant either show or make any attempt to show that as to either count in the complaint the damage which resulted to the plaintiff was in any wise excusable as far as he was concerned, or that the liability for such damage should be shifted from his shoulders. Indeed, especially as to the damages which arose from the third accident, he expressly admitted his liability therefor. As a consequence, it is apparent that, unless defendant show some material prejudice arising either from other alleged infirmities of the complaint in the action, or, on the trial of the action, from the abuse or the denial of some substantial right to which he was clearly entitled, he is in no position to complain of the judgment which was rendered against him. 4 Cal. Jur. 42; Cussen v. So. Cal. Sav. Bank, 133 Cal. 534, 65 P. 1099, 85 Am. St. Rep. 221; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Greer v. Los Angeles A. Club, 84 Cal. App. 272, 258 P. 155.

[3, 4] From a consideration of the foregoing, it becomes obvious that the plaintiff adopted an incorrect theory in framing its complaint in the action. But the rule is quite generally and thoroughly established that in circumstances such as are here presented, the mistake is cured by the verdict or judgment. 49 Cor. Jur. 879; 1 Cor. Jur. 1008. In the instant pleading and considering the fact that no demurrer was interposed thereto, the allegations were sufficient to state a cause of action on the ordinary statutory liability of defendant, as provided by section 1929 of the Civil Code and the other authorities to which attention hereinbefore has been directed. In such circumstances, the additional allegations contained in the complaint with reference to the express agreement of the parties, which in effect created no greater liability than that provided by the statute, may be disregarded and treated as surplusage. It follows that the objections of defendant to the effect that, in the particular hereinbefore stated, the complaint failed to state a cause of action, cannot be sustained.

For the reason that the findings of fact as nearly as practicable followed in "hæc verba" the allegations of the complaint, and therefore omitting from consideration all facts therein which related to the express contract of the parties, sufficient remains to support the judgment. In consequence of such conclusion it necessarily results that the further contention by defendant to the effect that the findings of fact do not support the judgment is likewise untenable.

In addition to that which hereinbefore has been declared a sufficient foundation for the recovery of a judgment for the "costs of re-

pairs" which related to each of two counts of the complaint, that part of the judgment for "costs of repairs" which related to the third count in the said complaint and which depended upon the expenditure by the plaintiff of certain moneys in repairing damages to the airplane which resulted from the third accident, and which occurred after the execution of the agreement between the parties, may securely rest upon the express contract of the parties, rather than upon the contract created by law. But as to that part of the judgment which has its foundation in the complaint and the evidence which related to the alleged damage of $2,257.85 to the plaintiff because of the fact that the "said airplane was out of service and use by the plaintiff as a result of said accident for a period of thirty-five days" remains for consideration by this court.

[5] In answer to the contention by the appellant to the effect that in circumstances such as are here portrayed by the evidence such an item of damage is not recoverable, respondent has again directed attention to the general language contained in the agreement of the parties, but more particularly to the contents of a certain telegram sent by defendant to the plaintiff in which defendant requested the plaintiff to "bill me for repairs." But, on consideration of the agreement, the telegram, and the entire evidence in the case, it is impossible to place a construction upon the conduct of the parties by which either an express or an implied agreement may be discovered on the part of defendant to pay for the damage which may have resulted from the loss of the use of the airplane. It may be that in a bailment of the nature of that here under consideration, in the absence of an agreement between the parties limiting the liability of the bailee, a liability such as that sought to be established herein would be created as a matter of law. However, that question is not necessary of decision herein. The respective rights, duties, or obligations of the parties to a bailment are properly determinable from the contract, if any, entered into between them. As is stated in 6 Corpus Juris, 1110: "The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement." Also, in the same volume, at page 1112, the following may be noted: "The parties to a bailment may diminish the liability of the bailee by special contract, the principle being that the bailee may impose whatever terms he chooses, if he gives the bailor notice that there are special terms and the means of knowing what they are; and if the bailor chooses to make the bailment, he is bound by them, provided the contract is not in violation of law or of public policy. * * *"

[6] In the instant case, whatever may have been the original liability of defendant, after the agreement between him and the plaintiff was executed the liability of defendant was properly and legally measurable solely by its terms. If by such agreement the statutory or the common-law liability of defendant was increased, or, on the other hand, if by such agreement his ordinary liability was decreased or in any wise limited, such fact must be ascertained by an examination and construction of the agreement itself and by or through no other source. Turning, then, to the language used by the parties by means of which they expressed their respective rights, duties, and liabilities in the premises, it is discovered that in plain and unmistakable terms defendant bound himself "to pay to the corporation (plaintiff) all cost of repairs and/or for all damage to any machine damaged or wrecked by any act of student (defendant) * * *" Nowhere in the agreement is any other or different liability sought to be imposed on defendant. His liability is specially limited to cost of repairs and damage to the airplane. A most significant circumstance is noted in the total absence of any provision in the contract by which defendant may be charged for loss of use of the airplane during the time that it may be undergoing repairs, etc. It therefore follows that, since by their express agreement the parties excluded the item of damage of $2,257.85, for which the plaintiff was awarded judgment, and which item arose from the fact that the airplane "was out of service and use * * * for a period of thirty-five days," the judgment is erroneous in that regard.

No other specification of error by appellant is deemed worthy of serious consideration.

It is ordered that the judgment be, and it is, modified by deducting therefrom the sum of $2,257.85. As thus modified, the judgment is affirmed; appellant to recover costs on appeal.

We concur: CONREY, P. J.; YORK, J.

124 Cal.App. 51

NEIL v. GANE et al.

Civ. 7268.

District Court of Appeal, Second District, Division 1, California.

June 2, 1932.

1. **Appeal and error** ⇐966(1).
Continuance ⇐22.

Granting continuance to secure evidence of material witness rests in trial court's discretion, and will not be disturbed unless discretion is abused.

2. **Continuance** ⇐22.

Granting continuances to secure plaintiff's deposition *held* no abuse of discretion, where defendant caused delay by failing to submit agreed cross-interrogatories, and refusing stipulation to take deposition (Code Civ. Proc. § 595).

3. **Bills and notes** ⇐527(1).

Evidence *held* sufficient to sustain finding note sued on was unpaid.

4. **Bills and notes** ⇐499.

Payment of note is affirmative defense to be established by party asserting it, and plaintiff's possession of note without indorsement or evidence of payment raises presumption note is unpaid.

5. **Dismissal and nonsuit** ⇐60(2).

Action brought to trial within less than five years from filing of answer could not be dismissed for want of prosecution (Code Civ. Proc. § 583).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Charles E. Neil against Bertha J. Gane and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Cradick, Clute & Sullivan, of Los Angeles, for appellant.

H. W. Shaw, of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

This appeal is from a judgment had upon a promissory note signed by appellant only. The codefendant was appellant's husband, and was made a party solely for that reason.

The complaint in the action was filed on October 15, 1924, and defendants duly answered November 15, 1924. The case came on for trial February 26, 1929, and plaintiff's counsel made a motion for a continuance, so that he could file an affidavit showing that a deposition had been taken in the action and had disappeared from the files. On February 27, 1929, the affidavit having been filed, the trial was continued to March 27, 1929, to enable plaintiff to take a new deposition, defendants' attorneys at this time stating that they would submit cross-interrogatories. When the case was called on March 27, 1929, it appeared that no cross-interrogatories had been filed, and the trial was continued to April 25, 1929. On both April 25, 1929, and May 28, 1929, the trial was continued because of defendants' failure to stipulate as to the taking of the deposition or to submit cross-interrogatories. On February 26th and 27th and again on May 28, 1929, defendants had moved to dismiss the action on account of lack of prosecution. These motions were denied. The cause came on for trial on July 1, 1929, and evidence was received on behalf of both plaintiff and defendants. Plaintiff's counsel offered the deposition of plaintiff, taken before a notary public in the state of Michigan, to which defendants objected, and their objection was sustained. Plaintiff's counsel moved the court for a continuance to correct the deposition, which the court granted. Defendants renewed their motion to dismiss, which was denied. On October 7, 1929, the cause again came before the court, and the deposition, failing to have attached the authenticating certificate of the clerk of the county court where the deposition was taken, was again rejected, and counsel permitted to withdraw the deposition to secure the lacking certificate, and the trial of the cause continued. On December 6, 1929, the cause was heard, the deposition admitted in evidence, the matter duly submitted, findings filed, and judgment entered. At the hearing on December 6, 1929, defendants moved to dismiss the action on the ground that the cause had not been brought to trial within five years after answer filed, and that no written stipulation extending the time for said action to be brought to trial had been made, as provided by section 583 of the Code of Civil Procedure. This motion was denied.

Thereafter, defendants made a motion for a new trial, supported by an affidavit alleging that no stipulation extending time had been filed, and setting up the minute order of October 7, 1929, which stated that the deposition had been rejected and a continuance granted. This motion for a new trial was denied.

Appellant's numerous specifications of error, for the sake of brevity, are here considered in three groups.

[1, 2] Appellant first complains that the court erred in granting the continuances of May 28, 1929, and July 1, 1929, and contends that in neither instance did plaintiff make a proper or sufficient showing of diligence to justify the granting of the continuance. Appellant cites a part of section 595 of the Code of Civil Procedure, which provides as follows:

"A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. * * *"

The section also contains the following language: "The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain. * * *"

The record, as presented here, shows that prior to the continuance of May 28, 1929, the cause had been continued to secure plaintiff's evidence by deposition, and that defendants' counsel had agreed to submit cross-interrogatories. This defendants' counsel failed to do, and further he refused to join in a stipulation to take plaintiff's deposition, thus necessitating the taking of the deposition on formal notice. The facts were all before the court. The delay was the result of defendants' own action. A deposition is but the method, permitted in certain prescribed cases, of securing the evidence of material witnesses in trials had before our courts. The matter of the continuance of the time of trial for the purpose of securing the evidence of a material witness is a motion addressed to the sound and judicial discretion of the trial court, and, unless there has been a clear abuse by the court of this discretion, the order granting the continuance will not be disturbed upon appeal.

"On a motion for a continuance of the trial of a case it is the duty of the trial judge, which the law presumes he will faithfully perform, to work out the justice of the situation; his action in the exercise of a sound discretion is final and cannot be disturbed." Flynn v. Fink, 60 Cal. App. 670, 675, 213 P. 716, 717.

In the case of Light v. Richardson, 3 Cal. Unrep. Cas. 745, 31 P. 1123, 1124, in holding that the requirement of section 595 of the Code of Civil Procedure as to the filing of an affidavit where a continuance was sought on account of the absence of a material witness was not imperative, the court said: "It is clearly the intention of the Code, while protecting the court from imposition and unnecessary delays, to secure a reasonable opportunity to litigants to try their causes on the merits, to the end that justice may be done; and while no definite rule can be laid down, embracing all the different circumstances under which continuances should be granted, this spirit and intention of the Code, which is especially manifest in section 473, Code Civil Proc., should always be borne in mind; for this much, at least, is certain: that, where the circumstances are such as would authorize the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect, a continuance should be granted."

Under the circumstances of the instant case, the granting of the continuances complained of by appellant cannot be said to amount to an abuse of discretion on the part of the trial court.

[3] Appellant next assigns as error certain alleged irregularities in the deposition of plaintiff offered in evidence at the trial. The consideration of these alleged irregularities is unnecessary here, for the reason that, if it be conceded that the deposition was erroneously admitted in evidence, there is still ample evidence present in the bill of exceptions to support the finding made by the court and the judgment appealed from. Plaintiff's complaint alleges the due execution and delivery of the note in question, and defendants' answer admits these facts, and by way of affirmative defense alleges payment of the note. The note was offered by the plaintiff at the trial and received in evidence. The record here fails to disclose any evidence whatsoever in support of defendants' plea of payment, or that the note had upon it any endorsement whatsoever.

[4] "The defense of payment is affirmative matter and requires proof by the defendant to support and establish it, and possession by the plaintiff of the note itself, bearing no indorsement or other evidence of payment, raises a presumption that the note is wholly unpaid. Light v. Stevens, 159 Cal. 292, 113 P. 659. * * * Conceding that there was other evidence to the contrary, the result would merely be a finding against the defendants upon conflicting evidence. With such a finding we cannot interfere." Levey v. Henderson, 177 Cal. 21, 23, 169 P. 673, 674.

[5] The last question presented by appellant involves the refusal of the trial court to dismiss the action on December 6, 1929. Appellant rests her contention that the action should have been dismissed as of that date upon the fact that the answer in the action was filed November 15, 1924, more than five years prior to the date of the motion to dismiss, and that no written stipulation extending time had been made or filed. The record here shows that the action was brought to trial on July 1, 1929, some four months before the running of the five-year period specified by section 583 of the Code of Civil Procedure. This section only requires that the action be brought to trial within the five-year period, and places no limitation upon when the trial shall be completed. In the instant case, the action was brought to trial within less than five years, the only requirement of the statute.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

MOREHOUSE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8339.

District Court of Appeal, Second District, Division 2, California.

June 1, 1932.

Rehearing Denied June 30, 1932.

1. Prohibition ⇐10(1).

Prohibition arrests proceedings of tribunal when such proceedings are without or in excess of its jurisdiction (Code Civ. Proc. § 1102).

2. Courts ⇐1.

"Jurisdiction" is power to hear and determine, and does not depend upon regularity of its exercise, nor upon correctness of decision.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words and Phrases.]

3. Prohibition ⇐10(3).

Prohibition will not lie to restrain superior court from proceeding with trial upon indictment upon ground there was no evidence before grand jury tending to show petitioner guilty of public offense.

4. Indictment and Information ⇐137(4).

That indictment was based wholly or in part upon incompetent evidence *held* not ground for setting indictment aside (Pen. Code, § 995).

5. Indictment and Information ⇐10.

Validity of indictment cannot be attacked upon mere ground of insufficiency of evidence to support it (Pen. Code, § 995).

Petition by Lydia J. Morehouse against the Superior Court of the State of California, in and for the County of Los Angeles, for a writ of prohibition.

Alternative writ discharged, and peremptory writ denied.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIG, J.

The petitioner, charged by indictment with a violation of the Corporate Securities Act (St. 1917, p. 673, as amended), applied for a writ of prohibition, following an adverse ruling upon a demurrer, and motion to dismiss, and asserts that said indictment was not founded upon sufficient evidence to warrant its rendition.

[1-4] It is familiar law that prohibition arrests the proceedings of a tribunal when such proceedings are without or in excess of its jurisdiction. Code Civ. Proc. § 1102. "Jurisdiction" is the power to hear and determine. It does not depend upon the regularity of its exercise, nor upon the correctness or justness of the decision of the court. The power to decide carries with it authority to decide wrongly as well as rightly. Sherer v. Superior Court, 96 Cal. 653, 31 P. 565; Central Pac. R. R. Co. v. Placer County Equalization Board, 43 Cal. 365; Dahlgren v. Superior Court, 8 Cal. App. 622, 97 P. 681. It has been held that prohibition will not lie to restrain the superior court from proceeding with a trial upon an indictment, upon the ground that there was no evidence before the grand jury tending to show that the petitioner was guilty of a public offense. Brobeck v. Superior Court, 152 Cal. 289, 92 P. 646. The fact that the grand jury may have received incompetent evidence upon which it found an indictment, or have based the same either wholly or in part upon incompetent evidence, does not constitute one of the grounds enumerated in section 995 of the Penal Code upon which an indictment may be set aside. People v. Collins, 60 Cal. App. 263, 212 P. 701. To the same effect are Whitney v. Superior Court, 182 Cal. 114, 187 P. 12; Harris v. Superior Court, 51 Cal. App. 15, 196 P. 895; People v. Casanova, 54 Cal. App. 439, 202 P. 45.

[5] However, it is contended by the petitioner that in none of the cases considered had a motion to dismiss the indictment been interposed; that all of the evidence adduced before the grand jury was before the trial court; that such motion was made; and that there was none tending to show that she had committed a public offense. We are impelled to hold that the court below was authorized to differ, but it is equally well settled that the validity of an indictment cannot be attacked upon the mere ground of insufficiency of evidence to support it. People v. Panagoit, 25 Cal. App. 158, 143 P. 70; People v. Fealy, 33 Cal. App. 605, 165 P. 1034, 1037; In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. In People v. Fealy, supra, approved by the Supreme Court, it was said: "It is true that section 919 of the Penal Code provides that the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence. It is also true that section 921 of said Code declares that 'the grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction,' which, no doubt, also means that, unless the evidence is such as is thus described, an indictment ought not to be returned, although it has been held that as far as said section was intended to go

was to operate 'only as a matter of advice to the jury.' State v. Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; In re Kennedy, 144 Cal. 634, 103 Am. St. Rep. 117, 1 Ann. Cas. 840, 67 L. R. A. 406, 78 P. 34. It has, however, repeatedly been held in this state that there is no method provided for revising the action of a grand jury on the ground that there was not sufficient evidence to support it. In re Kennedy, 144 Cal. 636, 103 Am. St. Rep. 117, 1 Ann. Cas. 840, 67 L. R. A. 406, 78 P. 34, and cases therein cited; Brobeck v. Superior Court, 152 Cal. 289, 92 P. 646. See, also, Bishop on Criminal Procedure, § 872, and United States v. Reed, 2 Blatchf. 437, Fed. Cas. No. 16,134. In the Kennedy Case, it is said: 'An indictment is the record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for revising it; and there is no method for revising it on the ground that there was not sufficient evidence to support it.' * * * In all the cases just named, the question was reviewed on appeal, and in the Kennedy Case, supra, our Supreme Court said that: 'The statutes of the states where the decisions above referred to were made do not differ materially on the subject of grand juries * * * from those of this state.'"

The alternative writ of prohibition is discharged, and the peremptory writ is denied.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

124 Cal.App. 90

CRUM et ux. v. MT. SHASTA POWER CORPORATION.

Civ. 4264.

District Court of Appeal, Third District, California.

June 4, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

1. Eminent domain ⇐265(2).

In eminent domain action, private landowner is entitled to costs, though taker of land is successful on appeal (Const. art. 1, § 14; Supreme Court Rule 23).

Owner of private property which is sought to be taken for public use is entitled to his costs because payment for value of property taken or damages resulting from taking would not amount to "just compensation" if it were reduced to extent of costs of suit.

[Ed. Note.—For other definitions of "Just Compensation," see Words and Phrases.]

2. Pleading ⇐49.

Nature of action must be determined by issues tendered.

3. Pleading ⇐49.

Issues involved in action will ordinarily be ascertained from consideration of pleadings as whole.

4. Eminent domain ⇐265(4).

Riparian owner's suit to restrain water diversion, and for damages, in which defendant justified diversion for public hydroelectric power purposes by virtue of its riparian rights, *held* not to involve "eminent domain"; hence appeal costs were properly assessed against landowner on reversal of favorable judgment (Const. art. 1, § 14; Supreme Court Rule 23).

Case not being originally an action in eminent domain, it did not become an inverse condemnation suit, since neither pleadings nor evidence necessarily involved a claim, on part of defendant, to right to take private property for public use, where answer alleged that only water which had been diverted and used by defendant for hydroelectric power purposes had been diverted by virtue of defendant's lawful riparian rights, and defendant's allegations that power plant was designed to use entire output from diversion of waters to generate and sell electric energy for use of public, and that certificate of necessity and public convenience was obtained, were intended merely to furnish lawful reason to prevent enjoining of operation of plant in accordance with demand of complaint.

[Ed. Note.—For other definitions of "Eminent Domain," see Words and Phrases.

5. Eminent domain ⇐265(1).

Suit for water partition between riparian owners has no relation to "eminent domain," as regards costs, though one owner, with its share, generates electricity for public use (Const. art. 1, § 14; Supreme Court Rule 23).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

On motion to recall the remittitur and modify it by assessing costs against appellant.

Motion denied.

For opinion reversing the judgment, see 4 P.(2d) 564, which superseded opinion reported in 299 P. 822.

William B. Bosley, Thomas J. Straub, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, Arthur C. Huston, of Woodland, and Annette Abbott Adams, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an original motion which was made in this court to recall the remittitur and assess the costs to the appellant, on the theory that the action is in the nature of an inverse condemnation suit, and that the owners of the property which is involved therein are entitled to costs under the provisions of article 1, § 14, of the Constitution of California, independently of the outcome of the litigation.

This suit was instituted by the plaintiffs, as the owners of land riparian to Fall river, to enjoin the defendant from diverting the water of that stream, and to secure damages for the appropriation thereof. The injunction was issued, and the plaintiffs secured damages in the sum of $20,000 for the taking of the water and the damaging of their property by the diverting of the stream. On appeal to this court, the judgment was reversed. Crum v. Mt. Shasta Power Corporation (Cal. App.) 4 P.(2d) 564. Following the opinion of this court, a remittitur was issued directing the levying of costs against the respondents pursuant to rule XXIII of the Supreme Court. In due time the motion to recall and modify this remittitur was properly made. San Joaquin, etc., Co. v. Stevinson, 165 Cal. 540, 132 P. 1021.

[1-3] The sole question which is involved in this proceeding is whether the present action is a suit in eminent domain. If this is an action in eminent domain, then the owner of private property which is sought to be taken for public use is entitled to his costs, for the reason that payment for the value of the property taken or the damages resulting therefrom would not amount to "just compensation," if it were reduced to the extent of the costs of suit. Oakland v. Pacific Coast Lumber Co., 172 Cal. 332, 156 P. 468, Ann. Cas. 1917E, 259. It is apparent that the nature of an action must be determined by the issues which are tendered. These issues will ordinarily be ascertained from a consideration of the pleadings as a whole. Woolsey v. Woolsey (Cal. App.) 9 P.(2d) 605.

It is conceded this action was not originally a suit in eminent domain. The complaint primarily sought injunctive relief to prevent the diverting of the stream. The second cause of action therein contained incidentally asked for damages to the plaintiffs' riparian land by virtue of the unlawful diversion of the water. The plaintiffs, however, assert that the defendant "converted said action into inverse condemnation, or eminent domain" by affirmatively alleging in its answer that the stream was diverted and the water taken for hydroelectric purposes for public use, and that this transformation of the nature of the action entitles them to costs regardless of the result of the litigation. Inverse condemnation is a novel term, which we do not find defined in the authorities. From the manner in which this term has been used, we may assume it means that, even though an action is brought for some cause other than eminent domain, and issues are tendered by the answer or otherwise, which properly require a decision as to whether private property is taken or damaged for public use, the suit may nevertheless be treated as one in eminent domain. In other words, the term appears to have been used to mean that the converting of a suit of different nature into one of eminent domain amounts to inverse condemnation. Regardless of the application of this term, it is apparent that rule XXIII of the Supreme Court determines the right to costs in the present action, unless this cause is an exception to the rule there stated by virtue of the fact that it has been converted into a suit of eminent domain.

In support of their claim that this action has been converted into a suit in eminent domain, entitling the plaintiffs to their costs, they rely on the following cases: San Joaquin, etc., Co. v. Stevinson, 165 Cal. 540, 132 P. 1021; San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 67, 25 P. 977, 11 L. R. A. 604; San Francisco v. Collins, 98 Cal. 259, 33 P. 56; Collier v. Merced Irr. Dist. (Cal. Sup.) 2 P.(2d) 790, 794; Oakland v. Pacific Coast Lumber Co., 172 Cal. 332, 156 P. 468, Ann. Cas. 1917E, 259. In each of these cases the right of condemning private property for public use was directly tendered by the issues contained in the pleadings. In the Collier Case, supra, the court says: "The answer of respondent contained every element of a cross-complaint," which set up the right of eminent domain. In each of the other cases the complaint was drawn for the specific purpose of condemning private property for public use.

[4, 5] Having conceded this case was not originally an action in eminent domain, it follows that the plaintiffs' motion must fail unless the averments of the answer have tendered issues which convert it into a suit necessarily involving principles of eminent domain. In a critical examination of the answer, we are convinced the rights of eminent domain were neither directly nor indirectly involved. The answer denies that the lands of plaintiffs are riparian to Fall river. It specifically denies that the defendant took any water belonging to the plaintiffs or interfered with their riparian rights. It is then affirmatively alleged that the defendant is the owner of all the lands on both sides of Fall river from its confluence with Pit river up to a point on the first-mentioned stream above the diverting dam, penstock, and canal, and that the only water which has been diverted and

used by the defendant for hydroelectric power purposes was by virtue of its lawful riparian rights. Assuming that the defendant did use more water than its reasonable correlative share of the stream would entitle it to consume, the pleadings do not tender an issue of partition of water between riparian owners thereof. Even if that issue were involved, it may not be said a suit for partition of water between riparian owners has any proper relation to eminent domain, even though one of the riparian owners applies its reasonable correlative share thereof for manufacturing electric energy for sale to its customers and for use by the public. The answer does allege that the power plant is designed to use the entire output from the diversion of all of the waters of Fall river during certain seasons, and that the purpose of the power plant is to generate and sell electric energy "for the use of the public for light, heat and power purposes." It is also alleged that a certificate was procured from the railroad commission certifying to the necessity and public convenience of maintaining this hydroelectric power plant "for the public purpose hereinbefore mentioned." The use of the water by the defendant for hydroelectric purposes was specifically declared by the Supreme Court to be within its lawful riparian rights. Fall River Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A. L. R. 264; Seneca Cons. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 215, 287 P. 93, 70 A. L. R. 210. The allegations of the answer with reference to the use of the water for public power purposes are clearly intended to furnish a lawful reason to prevent the enjoining of the operation of the plant in accordance with the demand of the complaint. These allegations were intended to avoid the damage which would result in enjoining the operation of the plant as was done in the case of Joerger v. Mt. Shasta Power Corp. (Cal. Sup.) 7 P.(2d) 706, for the reason that it was there found the power plant was not devoted to public use.

The allegations of the answer may not be distorted into either a direct on an indirect admission that the defendant used or claims the right to appropriate plaintiffs' private water rights for public use. There are no allegations of appropriation of water rights by the defendant independent of its asserted lawful riparian rights.

In order to justify the injunction which was issued in this case, the plaintiffs insisted that a restraining order was necessary to prevent the defendant from acquiring water which might ripen into title by adverse possession. But the defendant specifically disclaimed any such purpose. This court held that, under the pleadings and the facts of this case, no such title could be acquired.

Finally it is asserted that this court, in its opinion, recognized and declared that this proceeding constituted an action of inverse condemnation and eminent domain. In this regard we think the plaintiffs have misconstrued the language of the court. In support of the magnitude of the judgment for damages which was rendered in behalf of the plaintiffs, it was asserted on oral argument that damages should be estimated regardless of the value of the improvements in the nature of the dam which was constructed and which resulted in retaining the water in Pitville pool at the same level that it existed as a result of the natural flow of Pit river before the diversion of the stream, from which it appears that the plaintiffs were deprived of no water which they formerly enjoyed; that by virtue of this artificial improvement the riparian rights of the plaintiffs were not interfered with, and that therefore none of the water of Pit river belonging to the plaintiffs was actually taken. In response to this argument insisting that the damages should be estimated without regard to benefits which may have accrued, this court did not state this was an action of inverse condemnation or eminent domain. The author of that opinion was convinced that the doctrine of eminent domain was not involved. But solely to meet the contention of the plaintiffs, the court said: "It is asserted that damages should be estimated * * * regardless of the benefit," etc. We then said: "We are of the opinion the rule of excluding the value of improvements from an estimation of damages in certain eminent domain proceedings has no application in this case."

Since neither the pleadings nor the evidence adduced at the trial of this case necessarily involved a claim on the part of the defendant to a right to take private property for public use, the doctrine of eminent domain has no application. The costs were therefore correctly assessed pursuant to the provisions of rule XXIII of the Supreme Court.

The plaintiffs' motion to recall and modify the remittitur is denied.

We concur: PRESTON, P. J.; PLUMMER, J.

124 Cal.App. 779

William J. ALBAUGH, Plaintiff and Respondent, v. MT. SHASTA POWER CORPORATION (a Corporation), Defendant and Appellant.

Civ. 4318.

District Court of Appeal, Third District, California.

June 4, 1932.

Rehearing Denied July 1, 1932. Hearing Denied by Supreme Court Aug. 1, 1932.

Appeal by defendant from a judgment of the Superior Court of Shasta County, Walter E. Herzinger, Judge, in an action for damages for diversion of water and for damages. Motion to recall and modify remittitur denied.

William B. Bosley, Thomas J. Straub, and Athearn, Chandler & Farmer, and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, Arthur C. Huston, of Woodland, and Annette Abbott Adams, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

This is a companion case with that of Crum v. Mt. Shasta Power Corporation (Cal. App.) 12 P.(2d) 134. In this case an injunction was also issued and a judgment for $65,000 damages was rendered against the defendant. On appeal that judgment was reversed. Albaugh v. Mt. Shasta Power Corp. (Cal. App.) 4 P.(2d) 574. The legal principles which were involved in this case are, in every respect, similar to those which were determined in the Crum case.

Following the opinion of the Appellate Court in this case, a remittitur was issued directing the levying of costs against the respondent pursuant to rule XXIII of the Supreme Court. In due time a motion to recall and modify this remittitur was properly made. For the same reasons assigned in the opinion in the case of Crum v. Mt. Shasta Power Corporation (Cal. App.) 12 P.(2d) 134, this day filed, the motion to recall and modify the remittitur is denied.

We concur: PRESTON, P. J.; PLUMMER, J.

124 Cal.App. 41

PEOPLE v. MICHAELS et al.

Cr. 2205.

District Court of Appeal, Second District, Division 2, California.

June 1, 1932.

1. Criminal law ⇐1144(13).

Where findings supported by evidence are contrary to affidavits presented at trial, appellate court must assume trial court disbelieved averments of affidavits.

2. Criminal law ⇐998.

Entering plea of guilty on mistaken belief that lighter sentence would be received *held* not ground for granting motion to set aside judgment and permitting plea of not guilty.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Albert De Cesaro and others were convicted of a felony. From an order denying named defendant's motion to set aside judgment and permit the withdrawal of his plea of guilty and an entering of a plea of not guilty, the named defendant appeals.

Affirmed.

C. P. Temple, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant De Cesaro was sentenced, upon plea of guilty, to a term of imprisonment in the state prison. After judgment he moved the trial court that the judgment be set aside, and that he be permitted to withdraw his plea of guilty and to enter a plea of not guilty. An order was made denying the motion, and, from the order, De Cesaro appealed.

The ground of the motion was that, before entering his plea of guilty, in a conversation between a deputy district attorney and a deputy sheriff, held within appellant's hearing, it was said that a lighter punishment would be inflicted upon him if he pleaded guilty than if he pleaded not guilty and were found guilty upon trial. It is claimed that appellant entered the plea of guilty under a fraud thus alleged to have been practiced upon him, and that, therefore, his motion should have been granted. In connection with this claim, it is to be observed that appellant had counsel present at the time of the conversation—indeed, the same counsel who represents him here.

[1] The fact, if it was a fact, that the conversation actually occurred between the officers, was averred in affidavits presented to the court. In the discharge of our duty under the law to uphold the court's order, if possible, that rule of law being a concomitant of the rule that it is incumbent upon an appellant to show error, we must assume that the court disbelieved the averments of the affidavits concerning the conversation and found that it did not occur. There was ample evidence to support such a finding.

In addition to this point, respondent contends that, under the provisions of section

1018 of the Penal Code, a defendant may not be permitted after a plea of guilty and after judgment to withdraw his plea and to enter a plea of not guilty. It is also insisted "that the mere fact that the plea of guilty was entered under the mistaken belief that a lighter punishment would be received is not grounds for * * * a withdrawal" of the plea.

[2] We do not determine the first of these two contentions. Upon the second we think it sufficient to quote this language, to be found in the reports: "The mere belief on the part of a defendant that he will receive a punishment lighter than the one actually imposed is not a sufficient ground for granting such a motion as we are considering. People v. Manriquez, 188 Cal. 602, 20 A. L. R. 1441, 206 P. 63; People v. Junod, 85 Cal. App. 194, 259 P. 101. Furthermore, in the instant case, not only would appellant's attorney be presumed to know the penalty provided by law for such a case, but the record shows that the trial court had before it the testimony of the deputy district attorney that, on the occasion in question, he told the appellant and his attorney, that the offenses charged in the information brought appellant under a life sentence, but that he would be eligible to parole in 12 years, and that he supposed he would probably be paroled at the end of that time." People v. Toledo, 111 Cal. App. 204, 295 P. 353, 354. In employing this language the court was dealing with an appeal from an order denying a motion to set aside a judgment under circumstances similar to those presented here.

Finally, it is to be observed that no sentence other than to the penitentiary was possible in the case. Section 213, Pen. Code.

Order affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

124 Cal.App. 29

MENEAR v. NUTTER.

Civ. 7000.

District Court of Appeal, Second District, Division 1, California.

June 1, 1932.

'Rehearing Denied June 29, 1932. Hearing Denied by Supreme Court July 29, 1932.

1. Automobiles ⇐245(72).

Whether pedestrian crossing street was contributorily negligent when struck by automobile *held* for jury under evidence.

There was evidence that pedestrian had progressed beyond center of street when defendant's automobile approaching from left was 150 feet away on left side of street a little ahead of car it had passed, and that pedestrian then turned his attention to third automobile approaching from right, and, seeing such driver's purpose to pass behind him, hurried forward and collided with defendant's car which had turned farther to left as though to pass third car on left side of highway.

2. Trial ⇐296(4, 5).

Instruction that pedestrian had right to assume that automobilist would use required care *held* not to require reversal, in view of other instructions.

Judgment should not be reversed because of giving of instruction that plaintiff pedestrian had right, in determining what was prudent course for him to take, to assume that defendant would use such care and circumspection as circumstances required and would not closely approach him at an excessive rate of speed, nor endanger him without warning, especially in view of other instructions that there was continuous duty on plaintiff's part, as he crossed street, to maintain lookout to right and left to see whether automobiles were approaching, that negligence was always a matter of time, place, and circumstance, and that plaintiff was required to govern himself with the surrounding circumstances in view.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by William J. Menear against Daniel C. Nutter. Judgment for plaintiff, and defendant appeals.

Affirmed.

Superseding the opinion of this court, reported in 6 P.(2d) 975.

W. I. Gilbert, of Los Angeles, for appellant.

Leonard G. Shelton, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Two related reasons are advanced by the defendant in support of his appeal from a judgment following a jury's verdict: First, he urges that, as a matter of law, the plaintiff appears from the evidence to have been guilty of contributory negligence, and so not entitled to damages for the injuries, of which defendant's negligence was, at least, one of the causes; secondly, he finds fault with an instruction given the jury, respecting the reliance which the plaintiff could place upon the presumption that the defendant would comply with the law. We are of the opinion that the evidence does not lead to the conclusion that, as a matter of law, the plain-

tiff was guilty of contributory negligence; nor do we conclude that the giving of the instruction requires a reversal of the judgment.

[1] The plaintiff, a mail carrier, was injured while crossing a busy highway. As he approached the spot from which he stepped off the south curb into the street, he noticed two cars approaching from the west at a distance of four or five hundred feet. One, the defendant's, then drew past the other (the other is identified in the record as the "larger" car), and, in doing so, drove over on and along the left, i. e., the north side of the roadway. There was no traffic to prevent the defendant from returning to his own right side of the highway after he passed the larger car. During this passing, made at an increasingly high rate of speed, the plaintiff had progressed to a point beyond the center line of the highway, at which time the automobile of defendant was some 150 feet away from him and just a little ahead of the larger car. From this moment on plaintiff turned his attention to a third automobile approaching from his right and in whose path he now found himself. Walking slowly, until he saw that the third car purposed to pass behind him, he then hurried forward, without again looking to his left, only to collide with the car of the defendant, which had, not only continued on the left side of the highway, but at the last moment had been directed even more to the left, as though to pass the third car on the north side. This narrative, in spite of conflicting evidence, the jury could have accepted as containing the facts of the case. The question whether or not plaintiff was negligent in the manner of his crossing was one for the jury, which it decided in his favor. The facts do not warrant us in declaring that as a matter of law plaintiff was guilty of contributory negligence. Mann v. Scott (1919) 180 Cal. 550, 182 P. 281; Konig v. Lyon (1920) 49 Cal. App. 113, 192 P. 875; Simonsen v. L. J. Christopher Co. (1921) 186 Cal. 786, 200 P. 615; Smith v. Southern Pacific Co. (1927) 201 Cal. 57, 255 P. 500; Enos v. Norton (1930) 109 Cal. App. 19, 25, 292 P. 276.

[2] Because the question of plaintiff's negligence was one for the jury, the fairness and correctness of the instructions given concerning his conduct remains an important question. Our attention is called particularly to the following charge: "The court instructs the jury that the plaintiff herein, William J. Menear, had a right, in determining what was the prudent course for him to take, to assume that defendant would use such care and circumspection as the circumstances required and would not closely approach him at an excessive rate of speed nor endanger him without warning."

The most serious objections that can be made to this instruction, in our opinion, can also be made to the instructions given in the case of Page v. Mazzei (Cal. App.) 299 P. 119, 121:

"You are instructed that the plaintiffs had a right to presume that the defendant would perform his duty and obey the law in approaching the said intersection.

"I instruct you that if you find from the preponderance of the evidence that plaintiffs and defendant approached the intersection at approximately the same time and you further find that plaintiffs had reached the center of said intersection driving at a lawful rate of speed and that defendant at approximately the same time reached the center of said intersection driving at an unlawful rate of speed, plaintiffs had a right to expect that defendant would allow plaintiffs to cross said intersection first." For much the same reasons urged by appellant for a reversal in the case under review, the District Court of Appeal, Fourth District, reversed the judgment in Page v. Mazzei, on the ground that the giving of the instructions quoted was prejudicial error. 299 P. 119, 121. The Supreme Court granted a hearing in the case, however, and affirmed the judgment [3 P. (2d) 11, 12], prefacing its opinion with these words (the emphasis being ours): "Under proper instructions, and on ample evidence to support its verdict, the jury awarded the plaintiffs substantial damages."

We can only interpret these words as they were interpreted in Ying v. Pickwick Stages System (Cal. App. 1931) 3 P.(2d) 597, 598, that is, as approving of the instruction which had been criticized. A review of earlier cases touching on the right of one to assume that another will not violate the law or inflict injury becomes unnecessary.

It should also be noted that by other instructions the jurors were told that there was a continuous duty on plaintiff's part, as he crossed the street, to maintain a lookout to right and left to see whether automobiles were approaching, and that negligence is always a matter of time, place, and circumstance, and that plaintiff was required to govern himself with the surrounding circumstances in view. We conclude that the judgment should not be reversed because of the giving of any instruction.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

124 Cal.App. 43

JOHNSON v. SOLOMONS et al.

Civ. 8177.

District Court of Appeal, First District, Division 1, California.

June 2, 1932.

1. Appeal and error ⇐80(4).

Decree, in suit under contract for exchange of property, reserving for further determination certain issues requiring taking of certain accounts, further evidence, and ascertainment of additional facts, *held* "interlocutory" and not appealable.

[Ed. Note.—For other definitions of "Interlocutory Decree or Judgment," see Words and Phrases.]

2. Appeal and error ⇐76(1).

Test whether "judgment" is final or interlocutory is whether anything further in nature of judicial action is essential to final determination of parties' rights.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

3. Appeal and error ⇐66.

Appeals lie only from final judgments unless appeal from interlocutory decree or judgment is authorized by statute (Code Civ. Proc. § 963).

4. Appeal and error ⇐792.

Appellate court may of own motion dismiss appeal, where no appealable judgment has been entered.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Axel A. Johnson against Lucius L. Solomons and others, and Harold F. Cobb and others, in which Lucius L. Solomons and others filed a cross-complaint against Nathan Levy and Axel A. Johnson, wherein the Equitable Credit Company intervened. From an adverse interlocutory decree, Lucius L. Solomons and others appeal.

Appeal dismissed.

Keyes & Erskine, of San Francisco, for appellants.

Bianchi & Hyman, of San Francisco, for respondent Axel A. Johnson.

PER CURIAM.

The plaintiff in the above action sought a decree, declaring the rights of the parties under a contract for the exchange of real property. The property, conveyed to defendants Solomons, was improved by the erection thereon of two apartment houses. Said defendants filed a cross-complaint, alleging fraud by plaintiff inducing the exchange and asking for a rescission. The other parties to the action are the lessee of the two apartment houses, and certain persons who placed the furnishings therein at the instance of the tenant, and for which payment was not made in full. This furniture was mortgaged by the tenant as security for the rent, and the mortgages were assigned by plaintiff to defendants Solomons.

The trial court found the allegations of fraud to be untrue, and that defendants Solomons were not entitled to rescind, but that there was a partial failure of consideration for the exchange, namely, to the extent that the purchase price of part of the furnishings was unpaid by the tenant mortgagor. The court entered an interlocutory decree by which it found that "certain issues in this case will require further evidence, the taking of certain accounts and the ascertainment of certain additional facts, and this court does therefore reserve for further and future determination such issues as are not here finally determined."

In view of the finding that there was no fraud and no rescission should be allowed, and that the furnishings were partially paid for, it was evidently the conclusion of the court that this did not materially impair the benefits received by defendants Solomons under the contract, which involved property worth over $100,000. In such cases damages have been allowed in lieu of a rescission (Connell v. Higgins, 170 Cal. 541, 150 P. 769; Murphy v. Sheftel (Cal. App.) 9 P.(2d) 568, and this no doubt was one of the matters reserved for further consideration.

It was also decreed that certain parties who supplied furnishings should be paid by the tenant, but the decree provided that the party to the action who paid the amounts due thereon should receive title thereto. The decree further provided that a computation should be made of all losses and expenses incurred by plaintiff, defendants Solomons, and one of the parties claiming an interest in part of the furnishings who intervened in the action, and that they have several judgments therefor against the tenant and another defendant who also claimed an interest in some of the furnishings. Further, that, as to all matters set forth in the findings not requiring computation, judgment should be entered in accordance therewith as a part of the final judgment to be entered thereon.

Defendants Solomons appealed from the decree.

[1-3] We think it clear that the decree was intended by the trial court, not as a judgment which finally determined the rights of the parties, or that such was its effect, but as an interlocutory decree, leaving material matters for further litigation between the

parties. It has been held that the test applicable in determining whether a judgment is final or merely interlocutory is whether anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties. 2 Cal. Jur., Appeal and Error, § 18, p. 139. Appeals lie only from final judgments unless an appeal from an interlocutory decree or judgment is expressly authorized by statute; and this is not one of the instances enumerated in the statute. Code Civ. Proc. § 963; Title Insurance & Trust Co. v. Cal. Development Co., 159 Cal. 484, 114 P. 838.

[4] An appellate court may of its own motion dismiss an appeal where it appears that no appealable judgment has been entered. 4 Cor. Jur., Appeal and Error, § 2402, p. 590; Pedlar v. Stroud, 116 Cal. 461, 48 P. 371; Bienenfeld v. Fresno Mill Co., 82 Cal. 425, 22 P. 1113; Tingley v. Otis, 141 Cal. 71, 74 P. 448; Visscher v. Dixon, 46 Cal. App. 210, 188 P. 1029; Smith v. Questa, 58 Cal. App. 1, 207 P. 1036.

For the above reasons the appeal must be dismissed, and it is so ordered.

123 Cal.App. 640

HARLIE R. NORRIS CO., Limited, v. LOVETT.

Civ. 8332.

District Court of Appeal, First District, Division 2, California.

May 24, 1932.

1. Courts ⇐90(4).

Cases decided before statute regulating securities *held* no authority that contract to buy stock in contemplated brokerage corporation should not be weighed by statute in determining whether contract was for stock subscription (St. 1913, p. 715; St. 1917, p. 675, § 3).

2. Corporations ⇐76.

Validity of contract to buy stock in contemplated brokerage corporation *held* dependent upon setting forth contract in articles of incorporation (St. 1917, p. 685, § 25, as amended by St. 1925, p. 672, § 12).

3. Corporations ⇐84.

Agreement to subscribe for stock within 10 days after formation of corporation *held* revoked, where stock was not tendered until 14 days after formation (Civ. Code, § 1587, subd. 2).

4. Corporations ⇐78.

No liability is incurred under stock subscription contract unless corporation thereafter formed is specific corporation contemplated.

5. Corporations ⇐90(5).

Complaint in brokerage corporation's suit to recover subscription price on its stock *held* insufficient in not showing corporation formed was one contemplated.

Facts disclosed that the subscription contract recited that the intended purpose of the contemplated corporation was to carry on general insurance, brokerage, and agency business; that the contract did not provide as to the amount of capital stock, or the number of shares; that the complaint alleged the capital stock was $25,000 divided into 250 shares; and that it did not allege that the purpose of the corporation formed was to conduct a general insurance, brokerage, and agency business.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the Harlie R. Norris Company, Limited, against H. C. Lovett. From the judgment for defendant, plaintiff appeals.

Affirmed.

C. H. Sooy, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

STURTEVANT, J.

The plaintiff sued to recover the subscription price on a block of its stock. The defendant interposed a demurrer to plaintiff's amended complaint and the demurrer was sustained. The plaintiff declined to further amend. Judgment was entered in favor of the defendant, and the plaintiff has appealed and has brought up the judgment roll.

In its complaint the plaintiff alleged that it is and ever since the 5th day of November, 1930, has been a corporation organized under the laws of this state and having an authorized capital stock of $25,000 divided into one hundred shares; that on October 28, 1930, the defendant and Harlie R. Norris executed a certain contract; that said contract provided:

"This Agreement Made and Entered Into this 28th day of October, A. D. 1930, by and between Harlie R. Norris, hereinafter known as the First Party, and H. C. Lovett, hereinafter known as the Second Party;

"Whereas, the said First Party is now and has for many years last past been in the general insurance, brokerage and agency business, and he, with others, intends to form a corporation for the purpose of carrying on such business, to be known as Harlie R. Norris Company, Ltd., and the Second Party has

in connection with his business the placing of certain insurance applications;

"Now, Therefore, the parties hereto mutually covenant and agree as follows:

"The party of the first part agrees that he will carry on and manage the business contemplated by the beforementioned corporation when the same shall be formed; that he will devote all of his time to the business of said corporation save and except such time as may be necessary to fulfil his duties as Manager of the Union Mutual Insurance Company, such time, however, not to exceed two (2) days in any one week; that for such work for said contemplated corporation he is to receive from said corporation One Hundred Fifty Dollars ($150.00) per month salary, and not to exceed Fifty Dollars ($50.00) per month on account of necessary expenses of his personal solicitation of said business, including the expense of operating an automobile in said connection.

"The party of the first part further agrees that he will place no insurance of any nature or description, nor handle any brokerage or agency business except through said contemplated corporation, other than life insurance applications and brokerage in connection with and through the beforementioned Union Mutual Life Insurance Company, originating in the City and County of San Francisco.

"The second party agrees that all applications for insurance originating in connection with his business will be placed through said contemplated corporation; that he will within Ten (10) days after the formation of said corporation subscribe for Fifty (50) shares of stock of said corporation; and to pay into the Treasury of the same, upon issuance of said shares, the sum of Five Thousand Dollars ($5000.00); that immediately upon the receipt of said shares he will transfer to the first party Twenty-five (25) shares of the same upon and without any further consideration than the covenants hereinabove set forth; that within One (1) year from the date of incorporation of said corporation, should the business of said corporation so require, he will subscribe for an additional Fifty (50) shares of the stock of said corporation, and pay into the Treasury of the same upon the issuance thereof the sum of Five Thousand Dollars ($5000.00); that immediately upon the receipt of said stock he will transfer to the party of the first part Twenty-five (25) shares of the same upon no further consideration than the covenants hereinabove set forth.

"In Witness Whereof," etc.

That immediately thereafter the defendant caused his attorneys to prepare articles of incorporation, file them, pay the fees, and that plaintiff became a corporation; that immediately thereafter the defendant applied to the commissioner of corporations for a permit to issue stock, and that said permit was issued on the 17th day of November, 1930; that on the 19th day of November, 1930, the plaintiff elected to and did accept the defendant's subscription offer and tendered a certificate of said stock; that the defendant refused to accept said certificate, and that defendant is indebted to plaintiff in the sum of $5,000. The plaintiff did not allege that Norris had assigned to it his interests in the contract, nor that Norris had assigned to it his established business, nor that it had employed Norris as manager, nor that the plaintiff or Norris had done or performed all acts by them to be done and performed.

The defendant demurred to the complaint on the ground that it did not state facts sufficient and also that it was ambiguous, etc., specifying eight different grounds.

[1] 1. In its first point the plaintiff asserts that contracts similar to the one now before the court have been held to be not subscriptions for stock or contracts for the sale of stock within the meaning of the Corporate Securities Act (St. 1917, p. 673), but were to be regarded as contracts for the benefit of a third person, that is for the contemplated corporation. It cites a number of cases, but all of those cases were decided before the enactment of the Blue Sky Law (St. 1913, c. 353, p. 715), our first statute regulating these subjects. It follows that the cases cited are not authority to the effect that the contract sued upon is not to be weighed by the terms of a statute enacted subsequent to the dates of the decisions cited.

2. It is next contended by the plaintiff that the fact that the contract sounded in the future tense is not controlling. It cites and relies on Sanders v. Barnaby, 166 App. Div. 274, 151 N. Y. S. 580, and Positype Corp. of America v. Flowers (C. C. A.) 36 F.(2d) 617, 618. In the first case relied on the language was: "Will subscribe and pay." In the second case the language of the contract was: "We * * * do hereby agree with each other * * * to subscribe." However, in neither of those contracts were there any additional expressions showing, or tending to show, that a formal contract of subscription was thereafter to be executed. Nevertheless we do not consider the point as determinative of this case.

[2] 3. The next point made by the plaintiff is that it was not necessary to the validity of the contract that it be set forth in the articles of incorporation. The plaintiff cites and relies on Horseshoe Pier Co. v. Sibley, 157 Cal. 442, 108 P. 308, Nannizzi v. Caprile, 43 Cal. App. 498, 185 P. 673, and Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418. Those cases are not helpful. Each and all involved facts that arose long prior to the year 1925, but, by amendments to the statute (St. 1925, c. 447, p. 962), very ma-

terial changes were made in the law. As the statute then stood amended, by virtue of the provisions of section 3 (St. 1917, p. 675), no subscription might be taken before a permit was obtained. That restriction was modified by section 25, in which it was provided: "Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic corporation made prior to the incorporation thereof and set forth in the articles of incorporation. * * *" St. 1925, c. 447, p. 972, § 12. The plaintiff assigns no other reason why the statute was not binding on it. The statute is very broad, and we have no doubt that the plaintiff should have complied with its provisions.

4. Finally plaintiff contends that no permit was required for this contract. The plaintiff states that it is sufficient that a permit was contemplated, and that one was obtained before the certificate was tendered. The point may be conceded, but it does not help the plaintiff, because, as shown in the preceding paragraph, it does not appear that, considered from any angle, the plaintiff had complied with the provisions of the Corporate Securities Act.

[3] 5. The defendant makes an additional point. He says the contract offer was to subscribe "within ten days after the formation of the corporation"; that according to plaintiff's allegations the corporation was formed as early as November 5, 1930; that plaintiff did not make its tender until November 19, 1930; and that at the time of the acceptance the defendant's proposal stood revoked by the lapse of the time prescribed in his proposal. Civ. Code, § 1587, subd. 2. The point is well taken.

[4, 5] 6. The contract recites that, prior to its date, Norris had for many years been engaged in a "general insurance, brokerage, and agency business"; and that he intended to form a corporation for the purpose of carrying on that business. There was no provision in the contract as to the amount of capital stock, or the number of shares of the company so to be formed. The plaintiff alleges that it was organized with a capital stock of $25,000 divided into two hundred and fifty shares. As to how the total capital and number of shares was determined does not appear. It is not alleged that the plaintiff was incorporated for the purpose of conducting a "general insurance, brokerage, and agency business." The complaint is wholly silent on the subject. It should have been full and complete because it is the settled law of this state that no liability is incurred under a subscription contract unless the corporation thereafter formed is the specific corporation which was contemplated at the time of the agreement of subscription. Marysville E. L. & P. Co. v. Johnson, 109 Cal. 192, 195, 41 P. 1016, 50 Am. St. Rep. 34. For this additional reason the complaint was insufficient.

It follows that the trial court did not err in sustaining the demurrer. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 165

STACY-JUDD v. STONE et al.

Civ. 7124.

District Court of Appeal, Second District, Division 2, California.

June 8, 1932.

1. Evidence ⇐450(6).

Contract for architectural services *held* at least ambiguous as respects payments, permitting parol evidence to explain meaning thereof.

Plaintiff in one count pleaded written contract consisting of letter written by him to defendant, and defendants' acceptance thereof, and in a second count alleged action in assumpsit; but in neither cause of action did he seek to recover full stipulated price of 7 per cent. on total cost of buildings, but sought only sum of 5 per cent., because after entering on erection of contemplated structures work was abandoned. Court permitted plaintiff to testify over objection that he told manager of defendants' copartnership that fees would be 7 per cent., which would include 2 per cent. for supervision, and that if buildings were not actually constructed he should have 5 per cent. of estimate cost of constructing buildings.

2. Work and labor ⇐24(1).

Architect, having sued on express contract and in assumpsit for furnishing plans for abandoned project, could recover on implied contract, notwithstanding he proved express contract.

Appeal from Superior Court of Los Angeles County; L. T. Price, Judge.

Action by Robert B. Stacy-Judd against Charles Stone, R. W. Purpus, and others. Judgment for plaintiff, and defendant last-named appeals.

Affirmed.

Minor Moore and C. V. Caldwell, both of Los Angeles, for appellant.

Arthur L. Erb, of Beverly Hills, and L. V. Beaulieu, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The plaintiff recovered a judgment against the defendants for architectural services rendered to them. R. W. Purpus, one of the defendants, prosecutes this appeal therefrom.

[1] The plaintiff pleaded a written contract consisting of a letter written by him to the defendants and an acceptance thereof by them. He also in a second count alleged an action in assumpsit. The complaint set forth that respondent entered "upon the discharge of his duties and performed all the work, labor and services required of him" by the agreement. In neither cause of action, however, did he seek to recover the full stipulated price of 7 per cent. upon the total cost of the buildings, but sought only the sum of 5 per cent. because after entering upon the erection of the contemplated structures the work was abandoned. The court permitted respondent to testify over the objection of appellant that he told the manager of the copartnership "that the fees would be 7% and that would include 2% for supervision and that if the buildings were not actually constructed I should have 5% of the estimated cost of constructing the buildings." He was also allowed to state that 5 per cent. of the estimated value of the buildings was the reasonable value of his services, amounting in all to $34,180.49, and that it cost him to prepare the plans and specifications the sum of $28,000. Respondent had been paid $5,800 and judgment was in the sum of $28,180.49, together with interest and costs.

It is now claimed by appellant that the court erred in receiving the testimony already mentioned because he says such evidence tended to vary the terms of the written contract, was without the issues framed by the pleadings, and further that where the plaintiff pleads and proves an express agreement he cannot recover upon an implied contract.

Naturally enough, nothing is said in the letter of respondent constituting his offer nor in the acceptance thereof, concerning the abandonment of the plans and specifications. It is reasonable to assume that such a possibility was not in fact seriously, if at all, considered by the parties. It is true that the concluding paragraph of the letter says: "For each and every set of plans and specifications I prepare I am to receive a fee of two hundred dollars at the time I am given instructions to proceed with the working drawings, said fee to form part of my total fees in the event of the buildings being erected." But this quoted language relates to the method of payment—not to the amount thereof. It provides for a down payment, or perhaps, as it might be termed in our profession, a retaining fee. Nor is anything further said in the offer or in the acceptance concerning the method of payment. It is to be observed that immediately preceding the language quoted the respondent said in his letter:

"In reference to the preparation of ten complete sets of plans and specifications for buildings costing in the neighborhood of then [sic] thousand dollars, I herewith submit my cost percentage on three residence buildings, showing you the basis upon which I now make my proposition of compensation.

"Schelling residence cost 83% of total fee to produce.

"Worrell residence cost 55% of total fee to produce.

"Bishop residence cost 76% of total fee to produce. The last on the list is hillside property and shows a greater cost to me for preparing plans for hillside property."

From these figures in respondent's letter it appears that it cost him as an average 71 per cent. of his fee to produce the plans and specifications. He, very apparently, thought that the defendants, who were the subdividers, should bear a part of this expense before the time arrived for payment in the due course of things and therefore provided for a retaining fee of $200. From the average percentage of cost calculated upon the figures submitted by respondent, plans and specifications for a $10,000 building would have entailed an expense to him (exclusive of supervision) of a trifle more than $355. We cannot assume that he was foolish enough to adopt the inherently improbable plan of spending that sum of money in return for $200. The most that can be said with respect to the concluding phrase, "said fee to form part of my total fees in the event of the buildings being erected," and the argument of appellant that only the sum of $200 was to be paid unless the buildings were completed, is that the language introduces an element of ambiguity and uncertainty which parol evidence was competent to explain. All of the evidence introduced bore upon the uncertainty in this particular or upon another theory about to be stated.

A reading of the first cause of action reveals that it is not an action to recover the contract price. The complaint alleges that all of the services to be performed thereunder were rendered by respondent and that they were of the reasonable value of the amount sought to be recovered plus that which was paid. It is disclosed by the evidence that the organization composed of defendants collapsed after the respondent had done twenty-eight or thirty sets of plans and specifications. Through the default of defendants and not from the failure of the respondent the buildings were not constructed. The complaint in the first count seeks therefore to recover not the contract price but damages for its breach; i. e., the reasonable value of the services rendered pursuant to its terms. It is conceivable that respondent

might have brought his action to recover the entire contract price of 7 per cent. upon the cost of the buildings under the authority of Harris v. Central Union High School District, 45 Cal. App. 669, 188 P. 617, and Havens v. Donahue, 111 Cal. 297, 43 P. 962; but he chose rather to sue only for a part thereof.

[2] Adverting now to the argument of appellant that respondent having proved an express agreement could not recover upon an implied contract, what has been said virtually disposes of this contention. However, for the purpose of completely concluding the point we here make reference to Havens v. Donahue, supra, where a somewhat similar contention was advanced. It is there said: "Defendant's first claim is that under such contract, plaintiff was only entitled to recover his commissions upon the cost of construction as far as the building had proceeded at the time his employment was terminated. This contention cannot be sustained. Plaintiff had nothing to do with the construction of the building. His contract was simply to furnish the plans, drawings, and specifications, and this he did. The actual construction and cost of construction are only material to him as fixing the amount of defendant's liability for the services rendered. Again, the complaint also charged upon a quantum meruit, and the court found the value of plaintiff's services at the amount fixed by the judgment. This would seem to dispose of any question upon such contention."

Judgment affirmed.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

HOLLYWOOD CLEANING & PRESSING CO. v. HOLLYWOOD LAUNDRY SERVICE, Inc.*

Civ. 7166.

District Court of Appeal, Second District, Division 1, California.

June 9, 1932.

Rehearing Denied July 7, 1932. Hearing Granted by Supreme Court Aug. 8, 1932.

1. Corporations ⊂=398(3).

That corporate stock is owned by one individual does not warrant charging of every corporate act to owner, nor every act of owner to corporation.

2. Corporations ⊂=1.

Entity of corporation is separate and distinct from sole stockholder.

3. Corporations ⊂=1.

Where injustice will result from some conduct either of corporation or of sole stockholder, equity will interfere with legal fiction through which personality of corporation is legally recognized.

4. Corporations ⊂=378.

Laundries acquired by parent corporation and sole stockholder therein *held*, in effect, acquired by subsidiary corporation within agreement with third party to turn over cleaning, pressing, and dyeing business to latter, in view of apparent fraud.

Defendant, engaged in the general laundry business, entered into an agreement with the plaintiff, engaged in the cleaning, dyeing, and pressing business, which agreement provided that, covering a period of ten years next to ensue, for a specified compensation, the defendant would turn over to the plaintiff "all dry cleaning, dyeing, and pressing business" which the defendant might secure. The agreement contained a special provision that the defendant "agrees to include in this agreement any other laundry plant that it may acquire during the continuance of this agreement." All capital stock of the defendant corporation was owned by another corporation, and all the capital stock of the latter corporation was owned by a single individual. The latter corporation and the individual, after execution of agreement, acquired other laundries, but failed and refused to comply with the terms of the agreement as to such laundries.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the Hollywood Cleaning & Pressing Company against the Hollywood Laundry Service, Incorporated. From part of the judgment rendered, the plaintiff appeals.

Judgment modified, and, as modified, affirmed.

See, also, 12 P.(2d) 147.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant.

Walter H. Hewicker, of Los Angeles, for respondent.

HOUSER, J.

The point of law involved in the instant appeal arises from the following facts:

As indicated by the corporate names of the respective parties to this litigation, during all the times involved in the instant action the plaintiff was engaged in the business of cleaning, dyeing, and pressing different articles of clothing, etc., and the defendant was engaged in a general laundry business.

Supposedly in view of the opportunities afforded the defendant in the pursuit of its business to obtain many articles of clothing, etc., which were required to be cleaned, dyed,

or pressed and therefore suitable for and adapted to the business of the plaintiff, an agreement was entered into between said parties by which in general it was provided that, covering a period of ten years next to ensue, for a specified compensation to defendant moving, the defendant would turn over to the plaintiff "all dry cleaning, dyeing and pressing business" which the defendant might secure. Included within such agreement was a special provision that: "The party of the second part (the Hollywood Laundry Service) agrees to include in this agreement any other laundry plant that it may acquire during the continuance of this agreement. * * *"

It appears that all the capital stock of the defendant corporation was owned by another corporation, namely, Frank Meline, Inc., and that all the capital stock of the latter corporation was owned by one individual—Frank Meline.

About six months after the execution of the agreement between the parties hereto, and thereafter on each of several succeeding dates, either the corporation Frank Meline, Inc., or the individual Frank Meline, acquired other laundries located within or near the city of Los Angeles. Because of the failure and refusal of the defendant and both said Frank Meline, Inc., and Frank Meline personally, or either of them, to comply with the terms of the agreement entered into between the plaintiff and the defendant, to wit, "to deliver to the party of the first part (the appellant herein), exclusively, * * * all dry-cleaning, dyeing and pressing business which second party may secure," the plaintiff brought an action against the defendant for such damages as already had resulted to it and which presumably thereafter would accrue to it during the lifetime of the agreement. Although in the same action the plaintiff sought to recover a judgment for other damages suffered by it (and as to which it was successful), as to the alleged damages to which attention herein has been directed the judgment of the trial court was in favor of the defendant. It is from that part of said judgment that the plaintiff prosecutes this appeal.

In its last analysis, the legal question presented by the appellant is—considering the provisions of the special agreement of the parties in connection with the fact of ownership of all the capital stock of the defendant corporation by the corporation Frank Meline, Inc., and the ownership of all the capital stock of the latter corporation by the individual Frank Meline—whether the acquisition of other laundries by either the corporation Frank Meline, Inc., or the individual Frank Meline, in law was the same as though each of such other laundries had been acquired by the defendant corporation.

The principle of law upon which the appellant relies is succinctly stated in the case of Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 214, 155 P. 986, 987. In substance, it is there held that when it appears that a corporation is but the instrumentality through which, for convenience, an individual has transacted his business, not only equity but the law itself will hold such a corporation bound as its owner may be bound; or, conversely, "hold the owner [of the corporation] bound by acts which bound his corporation."

To the same effect, see Wenban Estate v. Hewlett, 193 Cal. 675, 227 P. 723; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Ellet v. Los Altos C. C. Properties, 88 Cal. App. 710, 264 P. 270; Commercial Security Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 P. 964; Walter & Co. v. Zuckerman (Cal. Sup.) 6 P.(2d) 251.

[1-3] Notwithstanding such authorities, it should be observed that it does not necessarily follow that because all the capital stock of a corporation is owned by one individual, every act of the corporation may be directly charged to the owner, nor every act of the owner be likewise charged to the corporation. The entity of the corporation is wholly separate and distinct from the owner of its capital stock; and ordinarily, the liability of each is separate and distinct from the other. It is only when an injustice will result from some conduct of either which is connected, intermingled, and interwoven with the particular business or act in question, that equity will interfere with the operation of the legal fiction by and through which the personality of the corporation is legally recognized. In such a situation, the only point at issue is the establishment of the fact that in the performance of the act in question, either the corporation or its owner, as the case may be, has assumed the individuality of the other, and in so doing has caused an injustice to result to some person who has dealt with it or him upon the faith of appearances, if not of actual representation of facts, which are either contrary to or inconsistent with the result or the effect of the main act under consideration.

[4] Concretely, in the facts of the instant case may be discerned, if not a deliberate and intentional fraud which was attempted to be covered or concealed by the cloak of corporate entity, at least in the conduct of the defendant corporation and its "alter ego," and as a direct and proximate result thereof, there is readily discoverable a considerable financial loss or detriment to the plaintiff, which, in the instant circumstances, satisfies every requirement of either law or of equity to the effect that before the legal fiction of respective separate entities of the corporation and its "alter ego" will be disregarded, the existence of either some threatened or executed injustice to the defrauded party must be established.

On examination of the findings of fact made by the trial court, it is discovered that it was expressly found that "if defendant had re-

quired the other laundries * * * to deliver to plaintiff dry cleaning, dyeing, and pressing business of said laundries respectively from the dates that said laundries were acquired, * * * that plaintiff would have received dry cleaning, dyeing, and pressing business from such other laundries prior to the commencement of the trial of this action in such amount that plaintiff would have realized and would have made as its net profit in the handling of said dry cleaning, dyeing and pressing business from such other laundries the sum of $488.90; and would have in like manner realized a profit from the time of the trial of this action to and including the 17th day of April, 1934, from such business of said other laundries in the sum of $9,542.50."

It follows that on said findings of fact made by the trial court with reference to the loss of profits suffered by the plaintiff because of the failure and refusal of the defendant to deliver and to turn over to plaintiff the cleaning, dyeing, and pressing business, past as well as future (during the lifetime of the agreement in question), of the several laundry companies acquired and owned by either the defendant corporation, or by Frank Meline, Inc., or by Frank Meline as an individual, after the execution of the agreement between the parties thereto, the judgment of the trial court should be, and it hereby is, modified by adding thereto, first, the sum of $488.90 as and for the damages to the plaintiff which had resulted to it at the time the judgment was rendered; and, secondly, the further sum of $9,542.50 as and for the damages which thereafter and during the remainder of the lifetime of the agreement of the parties would have accrued had the said agreement been carried out as in law was contemplated by the parties thereto.

As thus modified, the judgment is affirmed —appellant to recover its costs on appeal.

We concur: CONREY, P. J.; YORK, J.

HOLLYWOOD CLEANING & PRESSING CO. v. HOLLYWOOD LAUNDRY SERVICE, Inc. *

Civ. 7396.

District Court of Appeal, Second District, Division 1, California.

June 9, 1932.

Rehearing Denied July 7, 1932. Hearing Granted by Supreme Court Aug. 8, 1932.

1. Appeal and error ⇐1010(1).

Findings of trial court, if supported by substantial evidence, will not be disturbed on appeal.

2. Damages ⇐40(2).

In action for breach of contract by defendant to turn over cleaning, pressing, and dyeing business to plaintiff, prospective future profits which would have accrued to plaintiff to reasonable certainty *held* recoverable.

3. Trial ⇐382.

Trial court has power and authority to weigh facts and to make proper deductions therefrom.

4. Appeal and error ⇐1010(1).

Appellate court cannot say as matter of law that trial court in determining question of fact involving weighing of evidence and proper deductions therefrom was erroneous.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the Hollywood Cleaning & Pressing Company against the Hollywood Laundry Service, Incorporated. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

See, also, 5 P.(2d) 20.

Walter H. Hewicker and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

HOUSER, J.

The facts upon which the instant appeal depends arose from the transaction or circumstances outlined in appeal No. 7166, 12 P.(2d) 145, this day decided by this court, and in which appeal the parties are identical with those herein. But it should be noted that in the two appeals the respective positions of the appellant and the respondent are reversed; that is to say, in appeal numbered 7166 the Hollywood Cleaning & Pressing Company is the appellant, while in the instant appeal it is the respondent.

[1] The appellant complains of the asserted failure of the plaintiff on the trial of the action to establish the fact that the plaintiff complied with the requirements set forth in the written agreement of the parties relative to the time which should elapse between the date of the receipt by the plaintiff of articles of clothing received by it for the purpose of cleaning, dyeing, or pressing the same and the date when such treated clothing should be or was delivered to the owner thereof. But since the question here presented relates solely to the determination of an issue of fact by the trial court, and since it clearly appears that substantial evidence was adduced on the trial of the action in support of the finding made by such court, it follows

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 17 P.2d 712.

that, in accordance with the well-established rule relating to such question, the conclusion reached by the trial court may not be disturbed by this tribunal.

The appellant likewise complains of the claimed refusal by the trial court to make an express finding of fact as to whether the acts of the parties to their agreement, as therein set forth, were subject to or were governed by an asserted custom or usage of the business of cleaning, dyeing, and pressing articles of clothing, etc., with reference to the "time of service" as outlined in the preceding specification.

On examination of so much of the record as has been supplied herein, it appears that, although in express terms no finding of fact as to custom or usage was made by the trial court, the findings which were made clearly and unequivocally indicate that in all respects, including any act required of the plaintiff which might have been embraced within the or any custom or usage which might have been applicable in the premises, the plaintiff fully complied with each and every condition imposed upon it by the provisions of the agreement of the parties thereto. It follows that in that regard the appellant has no just cause for complaint.

[2] It is also contended by the appellant that prejudicial error was committed by the trial court in the matter of allowing "prospective profits" as damages to the plaintiff on account of that part of the unexpired life of the agreement of the parties which ensued subsequent to the date of the trial of the action.

Although the respective decisions in the cases of Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313, and Selden v. Cashman, 20 Cal. 57, 81 Am. Dec. 93, lend support to the position assumed by the appellant in that regard, by the great weight of subsequent authority, as indicated by the appellate tribunals of this state and as well by the courts of other jurisdictions, in circumstances analogous to those which exist in the instant case, the rule is announced with the greatest positiveness contrary to the principle of law suggested by the appellant. As indicating that the argument of the appellant in that particular is unsound, the cases of McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L. R. A. (N. S.) 1171, and Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, wherein respectively many authorities supporting the principle there enunciated are cited or reviewed, are specially noted. See, also, Mount Pleasant Stable Co. v. Steinberg, 238 Mass. 567, 131 N. E. 295, 15 A. L. R. 749; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953.

From a consideration of the authorities generally, it becomes clear that, as applied to the facts of the instant case, no error was committed by the trial court in awarding to the plaintiff such "prospective profits" as to a reasonable certainty would have accrued to it after the date of the trial of the action.

[3, 4] Finally, it is urged by the appellant that the damages allowed to the plaintiff for such "prospective profits" of the plaintiff were excessive. Viewed from the standpoint of the appellant, the conclusion for which it contends should follow as a matter of course. On the other hand, the respondent quotes from the record herein such an array of facts—the correctness of which was attested by various respective witnesses—that if believed by the judge of the trial court would form a most substantial basis for the conclusion which was reached. Thus considered, the question of whether the damages were excessive becomes one of fact only. The trial court had the power and the authority to weigh the facts and to make proper deductions therefrom. As a matter of law, this court cannot say that in reaching its decision in that regard the trial court was in error. In such circumstances, the duty and the province of this court alike indicate that the judgment of the trial court should not be disturbed.

No error prejudicial to the defendant appearing in the record of the proceedings of the trial of the action, it is ordered that that part of the judgment from which the instant appeal herein is taken be and the same is affirmed.

We concur: CONREY, P. J.; YORK, J.

124 Cal.App. 154

FERRIS et al. v. INDEPENDENCE INDEMNITY CO.

Civ. 877.

District Court of Appeal, Fourth District, California.

June 7, 1932.

Rehearing Denied June 30, 1932. Hearing Denied by Supreme Court Aug. 4, 1932.

1. Judgment ⇐564(1).

Generally judgment does not become final until it has been finally determined on appeal.

2. Judgment ⇐910(3).

Right of action on judgment generally does not mature until judgment becomes final.

3. Pleading ⇐49.

Action to recover against surety on claim and delivery bond *held* upon bond rather than on judgment rendered therein.

4. Replevin ⇐119.

Return was "adjudged" and sum "recovered" within statute authorizing recovery on

claim and delivery bond at time judgment was entered in trial court (Code Civ. Proc. § 512).

[Ed. Note.—For other definitions of "Adjudge" and "Recover; Recovery," see Words and Phrases.]

5. Replevin ⇐119.

Liability accrued upon claim and delivery bond immediately upon entry of judgment in trial court (Code Civ. Proc. § 512).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Alda M. Ferris and another against Independence Indemnity Company. Judgment for plaintiffs, and defendant appeals, P. E. McCaffrey being substituted as party plaintiff, in the place and stead of plaintiff named pending appeal.

Affirmed.

Stearns, Luce & Forward, of San Diego, for appellant.

Sawyer & Cluff, of Los Angeles, and Ward, Ward & Ward, of San Diego, for respondents.

SCOVEL, Justice pro tem.

Prior to the filing of the complaint involved in this appeal, the United States of Mexico had filed an action in claim and delivery in the superior court of San Diego county against Peter Rask seeking recovery of a patrol boat known as the Tecate. In that action Rask answered setting up a lien for repairs on the board. Upon filing the complaint, the United States of Mexico filed with the sheriff of San Diego county a claim and delivery bond executed by the Independence Indemnity Company, defendant here, conditioned for the prosecution of the action, return of the boat if return should be adjudged, and the payment of all moneys recovered in the action, whereupon the boat was delivered to the United States of Mexico. At the trial judgment was entered in the superior court in favor of Peter Rask wherein it was found he was entitled to the sum of $12,961.61 for the repairs on the boat and to a lien thereon by virtue thereof, together with $463.62 damages and costs in the sum of $65; and that by virtue of said lien he was entitled to possession of the boat. It was therefore ordered that the United States of Mexico return the boat to Peter Rask, or, in case return could not be had, pay him the sums mentioned. The judgment was signed on May 10, 1930, and filed on May 12, 1930. A few days later and prior to any appeal, the present action was filed by plaintiffs herein, Alda M. Ferris claiming a partial assignment of the judgment, alleging the boat had not been returned and asking judgment against defendant as surety on the claim and delivery bond, for the amount of the judgment above.

After the filing of this action an appeal was perfected by the United States of Mexico, plaintiff in the first action, no stay bond, however, being filed. The Independence Indemnity Company answered in the present suit alleging that the action was premature by reason of the pending appeal in the case of United States of Mexico v. Peter Rask (Cal. App.) 4 P.(2d) 981, and asserting that the court was without jurisdiction in that action to render a judgment against a foreign power or to adjudicate a maritime lien. The action came on for trial, and in support of their complaint plaintiffs offered in evidence the judgment roll in the case of United States of Mexico v. Rask. Defendant objected on the ground that the judgment was not final and on the further ground that it was void as without jurisdiction of the court to render. The objection was overruled, and both sides rested. Judgment was entered in favor of plaintiffs From this judgment defendant appeals. Pending the appeal, P. E. McCaffrey was substituted as party plaintiff and respondent in the place and stead of Alda M. Ferris.

Appellant makes but one point on the appeal, that the trial court erred in admitting the judgment roll in the case of United States of Mexico v. Rask, first, because the judgment therein was not final, and, second, because the court was without jurisdiction to render the same. Before the submission of this appeal, the appeal in the case United States of Mexico v. Rask was determined by this court, 4 P.(2d) 981, wherein it was decided that the court had jurisdiction to render the judgment. The decision disposes of that portion of this appeal.

[1, 2] There remains for determination the question as to the admissibility of the judgment roll pending the appeal from the judgment. Both appellant and respondents concede the general rule to be that a judgment does not become final until it has been finally determined on appeal and that a right of action upon a judgment does not mature until the judgment becomes final.

Respondents assert that the present action is not upon a judgment but upon an independent and collateral contract executed pursuant to statutory authority, the liability thereon being established by the terms of the contract and the statute and not dependent upon the finality of the judgment. The bond is in the usual form, given pursuant to section 512 of the Code of Civil Procedure and conditioned as therein prescribed "for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff." From this it is argued that liability under the bond attaches when a judgment is recovered and payment thereof not made whether the judgment be appealed

from or not. Appellant asserts, however, that a return is not "adjudged" or a judgment "recovered" within the meaning of the bond, until the fact is determined in a final judgment.

[3] We are of the opinion that the present action is not upon the judgment but upon the bond (Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, at page 745, 91 P. 416), and that therefore resort must be had to the statute and the bond for a determination of the meaning of the words "adjudged" and "recovered."

[4, 5] It will be remembered that Peter Rask was claiming a lien on the boat for repairs, and was holding possession to secure the lien and satisfy the same through execution or order of sale under any judgment establishing his right thereto. Upon the recovery of any judgment he might immediately cause the property to be sold and satisfy his claim. Under such circumstances the statute provides for a bond conditioned for a return of the property and the payment of any judgment recovered. And knowing that he could thus immediately satisfy any judgment obtained, the bond herein was executed replacing the security held by defendant. Bailey v. Ætna Indemnity Co., supra. We do not believe that the statute authorizing the bond contemplated depriving the defendant of any legal remedy he might have, nor that such was the intention of the parties in executing the bond. Rather was it a statutory alternative given to the plaintiff whereby he might elect to substitute other security for that held by the defendant, guaranteeing to him that should he be successful his legal remedies should not be impaired. So construed, a return was "adjudged" and a sum "recovered" within the intendment of the statute and the bond when a judgment to such effect was entered in the trial court that was enforceable against the plaintiff. And as above set forth, the judgment being enforceable immediately upon its entry in the trial court, it follows that an immediate liability on the bond accrued.

Our research has discovered but one decision wherein the matter has been considered. In Bierce v. Waterhouse, 219 U. S. 320, 31 S. Ct. 241, 55 L. Ed. 237, it is held that an action upon a redelivery bond in replevin is not premature where commenced pending appeal. It appeared there that one Bierce filed a replevin suit against one Hutchings in the Circuit Court of Hawaii. In order to retain possession of the property sought to be replevined, Hutchings executed a redelivery bond conditioned for a delivery of the property if delivery should be "adjudged" and payment of such sum as might be "recovered." Upon the trial, judgment in favor of Bierce was entered for a return of the property sought, or in default of return that the defendants pay the value of the property. The judgment was appealed. Under the Revised Laws of Hawaii, 1905, §§ 1861, 1864, 1865, the enforcement of a judgment is stayed by an appeal, but it is provided that the court may, pending an appeal, require an additional bond executed, in the nature of our appeal bond, guaranteeing satisfaction of the judgment. If such order be made, execution may issue upon the judgment unless the bond is filed. Pending appeal Bierce obtained an order for Hutchings to give such bond. This he failed to do. Execution thereupon issued and was returned unsatisfied. Thereafter, and while the appeal was still pending, action was brought upon the original redelivery bond for the value of the property. It was claimed that the action on the bond was premature because started during the pendency of the appeal in the replevin suit. The court held that the appeal did not annul the judgment, and, since Hutchings failed to execute the second bond, an immediate suit upon the redelivery bond was authorized. It would follow that, in the absence of a stay bond on appeal, a cause of action in favor of a defendant upon a delivery bond would accrue immediately upon the entry of judgment in his favor in the trial court.

Appellant cites Cook v. Ceas, 143 Cal. 221, 77 P. 65, in support of its position. It is there held that liability upon a guardian's bond after an order settling the guardian's account does not accrue until the 60-day period for perfecting an appeal therefrom has expired. The guardian's bond, however, is not given in lieu of other security, but merely to guarantee performance by the guardian of his trust. No writ of execution may be issued upon a decree settling the account. Estate of Kennedy, 129 Cal. 384, 62 P. 64; Ex parte Smith, 53 Cal. 204. No action may be taken against the guardian on the decree since the settlement of the account is pending until the time to appeal has expired. Section 1049, Code Civ. Proc. Any person affected by the decree is therefore without a remedy pending such time. The surety upon the guardian's bond could be under no greater liability than his principal. It follows, of course, that no action lies against the surety on his bond until the decree becomes final as to the guardian. The distinction between the cited case and the case at bar is apparent.

We are, therefore, of the opinion that the plaintiffs' cause of action against the defendant on its bond arose immediately upon the entry of the judgment in his favor in the claim and delivery action, and that, therefore, the judgment roll in such action was properly admitted in proof of plaintiffs' claim.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

124 Cal.App. 252

BRUNETTO v. SPEDIACCI et al.

Civ. 8040.

District Court of Appeal, First District, Division 2, California.

June 11, 1932.

Rehearing Denied July 11, 1932. Hearing Denied by Supreme Court Aug. 9, 1932.

1. Automobiles ⇐244(36).

In action for injuries from collision of truck with automobile which had collided with plaintiff's truck left on highway after collision with sedan, evidence sustained finding that sedan driver's negligence proximately caused injury.

Facts disclosed that a sedan collided with plaintiff's truck; that while plaintiff and the sedan driver were still discussing the accident another car collided with plaintiff's truck then parked on highway; that shortly thereafter another truck collided with the second automobile, driving the front end of it under plaintiff's truck, which collision injured the plaintiff, who was at that time about to crank his truck.

2. Automobiles ⇐242(1).

In action arising from automobile collisions, defendant alleging plaintiff's negligence in not equipping plaintiff's truck with clearance lights had burden of proving allegation (St. 1929, p. 532, § 100 (d), amending St. 1923, p. 546).

3. Automobiles ⇐245(83).

In action for injuries from collision with automobile which had collided with plaintiff's truck stopped on highway after collision with sedan, whether it was "practicable" for plaintiff to park off highway *held* for jury (St. 1923, p. 561, § 136).

4. Negligence ⇐89(1).

In action for injuries from collision of truck with automobile which had collided with plaintiff's truck parked on highway after collision with sedan, reply that plaintiff was not bound by truck driver's negligence *held* sufficient.

5. Trial ⇐295(1).

Instructions must be read together.

6. Appeal and error ⇐1064(1).

In action for injuries resulting from series of collisions with plaintiff's truck, instruction that jury might hold all defendants liable *held* not prejudicial to only defendant held liable.

7. Appeal and error ⇐880(2).

Defendant, found liable, could not on appeal urge that instruction given at acquitted codefendant's request was erroneous, where jury was entitled to render verdict against one or all defendants.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by P. Brunetto against E. Spediacci, L. H. Fitzsimmons, and others. From the judgment for plaintiff, defendant Fitzsimmons appeals.

Affirmed.

Hearing denied by Supreme Court; TYLER, J., dissenting.

Myrick & Deering and Scott, of San Francisco, for appellant.

Dreher & McClellan, of San Francisco, for respondent.

STURTEVANT, J.

As a result of a collision of automobiles the plaintiff was injured and he commenced this action to recover damages. The jury returned a verdict in favor of the plaintiff and from the judgment entered thereon the defendant L. H. Fitzsimmons has appealed and has brought up a bill of exceptions.

At about 4 a. m. on the morning of January 9, 1929, the plaintiff and his partner, E. Tabacco, were driving their truck loaded with vegetables on the highway known as El Camino Real northerly toward San Francisco. The defendant L. H. Fitzsimmons was driving a Studebaker sedan southerly toward San Jose. At a point near Tanforan the defendant drove so far to the left-hand side of the road that his car brushed the truck on its left-hand side. Both vehicles were stopped and at that time there was a distance of from 5 to 7 feet between the rear ends. The occupants of both vehicles alighted and engaged in words. Before the controversy was settled a man by the name of Basso approached from the south driving an Essex car and collided with plaintiff's truck. The impact was slight. The cars were left in that position. Shortly thereafter a truck driven by the defendant Spediacci approached from the south and collided with the Essex. It did so with such force as to drive the front end of the Essex under the truck. At the moment of the last collision the plaintiff was on the ground in front of his truck for the purpose of cranking it. When the collision last mentioned occurred the force was such as to drive the Essex and the plaintiff's truck forward and the plaintiff was knocked down by the front end of his own truck and suffered the injuries above mentioned. Before the cars were separated a Ford car approached from the south and hit the rear end of Spediacci's truck. The morning was dark and a heavy fog prevailed. At the place of the accident the highway is divided into four lanes. There was evidence that the plaintiff's truck was in the right-hand lane and that on the right-hand side of the truck, about 2 feet in distance, was a ditch. The Studebaker car after brushing the plaintiff's truck came to a stop as above stated about 5 or 7 feet south of the rear end of the plaintiff's truck.

At the time that the Spediacci truck approached there was evidence that the Studebaker still stood in that position. Mr. Spediacci testified that the headlights on the Studebaker caused him to think that a head-on collision was possible and therefore he attempted to drive to the right and, in doing so, he hit the Essex car because he was blinded with the headlights on the Studebaker. In this connection it may be said that the evidence was distinctly conflicting. Mr. Fitzsimmons testified that he had driven the Studebaker at once to the western side of the road and that it stood parked with its right-hand wheels in a ditch. The time elapsing between the moment that the Studebaker car and the plaintiff's truck sideswiped each other and the time that the plaintiff was knocked down was variously stated by different witnesses. Mr. Fitzsimmons estimated the length of time as being fifteen minutes. Other witnesses estimated the time as much shorter. Neither plaintiff's truck nor the Studebaker car suffered anything but minor injuries. The motive operation of neither was injured.

[1] 1. The defendant contends that the injury sustained by plaintiff was not the proximate result of any negligence on his part. In this connection he quotes evidence to the effect that at a place 200 feet north the plaintiff could have driven his car out of the highway and parked it. He quotes evidence to the effect that there was no ditch on the right-hand side of the plaintiff's car. He claims that the plaintiff's injury was brought about by reason of the fact that the plaintiff allowed his car to remain in the highway. The evidence quoted does not tend to prove an independent intervening cause. It was pertinent to the issue of contributory negligence and below we have given it due consideration. The defendant concedes that the trial court properly instructed the jury on this interesting subject and both parties have quoted the rule as stated in Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. In that case, at page 503 of 158 Cal., 111 P. 534, 536, speaking of the legal concept of the proximate cause, the court said: "It is based on the principle that consequences which follow from the original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate and for these the original wrongdoer is responsible." The rule of law to be followed is therefore not doubtful. If the jury believed the testimony given by the witnesses called by the plaintiff, we think it is clear that it did not err in finding that there was no independent intervening cause.

[2] 2. In his second point the defendant asserts that the plaintiff was guilty of negligence in failing to have his truck equipped with clearance lights at the rear. In this connection he quotes the record showing that plaintiff's truck was at least 84 inches in width, that on the truck there was one taillight and, as he claims, no clearance light. The defendant then cites subdivision (d), section 100, of the California Vehicle Act, as amended by St. 1929, p. 532. By the terms of the statute the rear light on the truck should have been one "displaying a green or red light visible under like conditions from a distance of five hundred feet to the rear of the vehicle." There was evidence that there was a light at the rear end, but there was no evidence showing its color or how far the light was visible. As the burden of proof on this issue rested with the defendant, the point made by him may not be sustained.

[3] 3. It is next claimed by the defendant that the plaintiff was guilty of negligence in permitting his truck to stand upon the public highway for several minutes, variously estimated at from 5 to 15, and until two collisions had occurred. He claims that the plaintiff's act was in violation of section 136 of the California Vehicle Act (St. 1923, p. 561). The portion of that section relied on is as follows: "No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway, *outside of a business or residence district when it is practicable* to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway. * * *" (Italics ours.) There is no evidence that the place where the accident happened is "outside of a business or residence district." The evidence was conflicting as to whether under the circumstances of this particular case it was "practicable" to park the loaded truck off the main traveled portion of the highway. The witnesses for the plaintiff testified that, on the immediate right-hand side of plaintiff's truck, there was a space of two feet which consisted of mud; and that immediately to the right of the mud was a ditch. True it is there was some evidence that at a point two hundred feet north was parking room on the right-hand side; however, in view of the other facts of the case, it was clearly a question for the jury to determine whether it was practicable, at the particular time and place, to park the truck off of the highway.

[4] 4. The defendant claims that Mr. Spediacci was negligent. The plaintiff replies that even though Mr. Spediacci was negligent the plaintiff is not bound thereby. Crabbe v. Rhoades, 101 Cal. App. 503, 282 P. 10. The reply is entirely sufficient.

[5] 5. The defendant complains of instructions Nos. 6, 7, and 13, which were given at the request of the plaintiff. Having quoted them, he says: "With respect to the foregoing, these instructions under the facts of this case could only have been interpreted by the

jury as meaning that if they found three or four different tort-feasors all guilty of negligence, even though the successive acts of negligence were separated one from the other in time and independent of each other nevertheless they were at liberty to find a verdict against all of the tort-feasors. This does violence to the principle of law exonerating the original tort-feasor where the injury arose by reason of an efficient intervening cause." The attack may not be sustained. It is settled law that all of the instructions are to be read together. Proximate cause was clearly and correctly defined in instruction No. 6. The proximate cause of an injury was clearly and correctly defined, in instruction No. 7, as excluding "an efficient intervening cause." Instruction No. 13 was addressed to the liability of joint tort-feasors. It contained nothing weakening the rules which had been correctly set forth in instructions Nos. 6 and 7. It follows that the instructions contain nothing which would have warranted the jurors in assuming that any defendant would be liable for an injury produced by "an efficient intervening cause" which he had not put in motion.

[6] 6. Acting upon the request of the plaintiff, the trial court instructed the jury as follows: "If you find that any defendant in this action advances a theory which would exonerate himself and hold the other defendants or any other defendant liable I charge you that you are not required to choose between the different theories but you may, if the evidence warrants it, adopt a theory which holds all defendants liable." The defendant asserts that the instruction was misleading and utterly without justification. If the jury had found all of the defendants liable the question presented might be material, but the verdict was against defendant Fitzsimmons only. A bare reading of the instruction shows that it could not have affected the verdict because the jury did not include in its verdict other defendants but omitted them. By its terms the jurors were not allowed to act on any "fantastic theory," but they were authorized to hold any defendant liable "if the evidence warrants it." No other objection to the instruction is assigned and we see none.

[7] 7. Finally, it is contended by the defendant that instruction No. 24, which was given at the request of defendant Spediacci, was objectionable. That instruction is as follows: "In a case where the alleged negligent act of the driver of an automobile consists of an omission of duty suddenly and unexpectedly arising, it is incumbent upon the plaintiff to show that the circumstances were such that the driver of the automobile had an opportunity to become conscious of the facts giving rise to the duty and a reasonable opportunity to perform such before he can be held liable on the grounds of negligence." The defendant argues that the instruction applies the doctrine of sudden peril without the well-defined limitation that the peril should not be created by the person relying on the doctrine. We think that the objection is without merit. If the plaintiff were appealing he might present the point; but a codefendant is in no position to urge it. The fact that one defendant was acquitted of blame does not help a codefendant. The jury was entitled to bring in a verdict against one or all of the defendants. Goehring v. Rogers, 67 Cal. App. 253, 259, 227 P. 687.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 169

FOLKINS et al. v. JOHNSTON.

Civ. 4379.

District Court of Appeal, Third District, California.

June 8, 1932.

Rehearing Denied July 8, 1932. Hearing Denied by Supreme Court Aug. 4, 1932.

1. Highways ⇐194.

In statute providing department of roads or its contractor may erect suitable barriers where highway is under construction, word "may" is construed as "must" (Pen. Code, § 588b).

[Ed. Note.—For other definitions of "May (In Statutes as Permissive or Mandatory)," see Words and Phrases.]

2. Highways ⇐200.

On contractor rests primarily the duty, absent statute, of exercising reasonable care for public's safety during construction of highways.

3. Highways ⇐194.

Both contractor and supervising engineer owed duty to public to warn travelers of existing hazard during construction of highway (Pen. Code, § 588b).

4. Automobiles ⇐290.

Motorist entering unfinished part of highway, where it appeared completed, and striking pile of gravel, *held* not trespasser as regards contractor's duty towards travelers.

5. Automobiles ⇐308(11).

Contributory negligence of automobile driver running into gravel on unfinished portion of highway after being over road once before *held* for trier of facts.

6. Automobiles ⇐308(11).

Contributory negligence of automobile driver running into pile of gravel, although

looking ahead with lights on, *held* for trier of facts.

Appeal from Superior Court, Del Norte County; Harry W. Falk, Judge.

Action by M. Ruth Folkins and husband against J. E. Johnston, sometimes called the Johnston Construction Company. From a judgment for plaintiffs, defendant appeals.

Affirmed.

A. P. Hayne and Nutter & Rutherford, all of Stockton, for appellant.

Puter & Quinn, of Eureka, for respondents.

Mr. Presiding Justice PRESTON, delivered the opinion of the court.

This is an appeal by defendant from a judgment rendered in plaintiffs' favor in a personal injury case.

The claimed negligence of defendant from and through which the injuries were incurred is specifically alleged in the complaint of plaintiffs, a summary of which is as follows:

That defendant was engaged upon a contract for the construction of a portion of the state highway in Del Norte county, which said road or highway followed at some places the old county road and at other points crossed or intersected the county road; that part of the said new road was completed and was being used by the traveling public, which said part was to the extent of three miles, the remaining portion, though not completed and open, had been graded and all excavation work finished; that in traveling northward it was necessary to leave the completed portion of the new road and follow the old road and at the point or place where the turn was made from the new highway back to the old there was a sharp curve or turn which was indistinct and not readily seen or noticeable by one driving northward on the completed portion, especially at night; that said turn was not noticeable by reason of brush and trees at and in the vicinity of said turn; that the situation and physical conditions at said turn were such that ordinary care and prudence required a light or other signal to warn drivers of motor vehicles that there was a turn at said place; that on March 24, 1929, the defendant at a distance of 55 feet, more or less, westerly from said turn had piled gravel or crushed rock in two separate piles and on the northerly side of the said road (meaning the new highway), and ordinary care and prudence required a light or other signal of warning to indicate the presence of said piles; that such warnings were necessary at night and particularly necessary on the night of March 24, 1929, when the shadows were such as to obscure the presence of said turn and gravel piles; and that said defendant on said March 24, 1929, carelessly and negligently failed to install any light or signal or warning signs at said turn to warn travelers or drivers of motor vehicles of said turn or of the presence of the gravel piles and at all times the said defendant was in control and possession of said gravel or crushed rock and had control and possession of the state highway westerly from the said turn.

The complaint then alleges the injuries to plaintiffs by reason of running onto the said highway and into the gravel piles, with appropriate allegations of damage resulting.

The court below, sitting without a jury, found that all of the allegations of the said complaint were true and supported by substantial evidence save and except the allegations of damage and on these the court found as hereinabove indicated.

Appellant relies upon four specific grounds for reversal of the judgment, and these will be taken up in the order presented.

[1-3] 1. It is claimed that the duty of maintaining the barrier and such warnings as might be deemed necessary and prudent was a duty belonging to the resident engineer of the department of public works of the state of California, under whose jurisdiction and supervision the work was being done. Section 588b of the Penal Code provides that while any portion of the highway is under repair or construction the department of roads, its officers or appropriate employees, or its contractor under authority from such department may erect suitable barriers and place lights, etc. Adopting appellant's theory the word "may" will be construed as "must."

This, however, does not determine the contention. It may be true that the resident engineer was under a duty to see that all danger spots on the highway were sufficiently guarded or noticed and still the contractor or other person actually causing or constructing the hazards would not be free from care and caution. Appellant cites no authority other than his own general argument. The fact is undisputed that appellant was an independent contractor, the manner and means of performing his contract being subject to his own discretion and under his immediate control. He is bound by the general rule limiting the extent of enjoyment of property and privilege to the extent that it does not become harmful to the rights of others. Upon the contractor rests primarily the duty, in the absence of the cited statute, of exercising reasonable care and caution for the safety of the general public or that portion thereof who might, in the usual course of things, be subjected to any hazard established.

If and when the contractor created a situation of danger likely to result in injury if not sufficiently warned against, it would seem an abandonment of doctrine to hold that he was absolved from all further responsibility if some third party neglected to give warn-

ing of the danger, conceding the duty of warning to rest with the latter.

We hold that both the contractor and the supervising engineer owed a duty to the public in warning travelers of the likelihood of injury and of the existing hazard, and if neither discharged that duty then both would be liable for the injuries resulting from such breach.

[4] 2. The next contention of appellant is that defendant by reason of placing a pile of gravel 55 feet off the road had no duty towards travelers on the road who could not reach the gravel without trespassing. The general rule regarding trespassers is cited to support this contention. The rule is not applicable here. Conceding that under ordinary conditions plaintiffs might be classed as trespassers upon that part of the highway remaining unfinished, the fact remains that they were lawfully and of right upon the open or traveled portion of the road. The gist of the action is that by reason of the negligence of defendant plaintiffs were lulled into a security in entering the unfinished part of the road on the appearance of the same being completed. Admitting, for this portion of the argument, the negligence alleged, no defense of trespass can prevail.

3. Appellant then argues that in any event the defendant was not an insurer that the barrier would remain up at all times, but if it was knocked down by some third person as here appears, he was only obliged to use reasonable diligence to replace it. Here we pass immediately into the domain of disputed fact. We are not inclined to detail the evidence in full, though we have gone carefully over the record. There is a conflict as to whether or not a proper barrier, shutting off the unfinished portion of the road, was ever in place on the day in question. In this state of the record no further comment need be made nor is further discussion on this branch of the case necessary.

[5, 6] 4. The last contention of appellant is that plaintiffs were guilty of contributory negligence as a matter of law. This claim rests upon the assertion that the driver of plaintiffs' car was the agent of plaintiffs; that said agent knew of the existence of the impassable roadway approximately two hours before the accident; and was looking ahead with his lights on, yet could not see a gravel pile eight feet high until the moment of the impact.

The argument of appellant is couched in this language: There are two points under this discussion of contributory negligence. The first is that the driver, two hours before the accident, had noticed the particular turn and had further noticed that the road was torn up and impassable at that point. The second consideration is that the lights of the car were in good working order, with the driver looking straight ahead, and yet he did not see an 8-foot gravel pile or a 55-foot strip of rough plowed ground intervening between the gravel pile and the paved road until the moment of impact.

This is an argument that might have force in the trial court, before the findings were made, but as against a supported finding again becomes merely argument.

The rule of momentary forgetfulness of known danger has been frequently applied in this state, but the basis thereof is scienter. It is admitted that the driver of plaintiffs' car had passed over the section involved at an earlier hour, but his approach was from an entirely different direction. The driver had been over the road but once and but a few days resident in the section. All that could be chargeable to him was that he knew that somewhere on the road was a short detour, but he is not chargeable with the exact location thereof. It would indeed be a strange doctrine to announce that one passing over a highway at night is independently on his own liability as to the condition of the highway simply for the reason that he has traversed the highway once before, and we have been unable to discover any authority, in this state or elsewhere, which establishes such a principle. Had the danger been patent, the situation might be different. But in the instant case there was nothing to indicate the detour, the continuation of the traveled portion looked similar to that portion already traversed. A slight grade was present and the general shade or color of the surroundings merged into one aspect. In addition there were trees and shadows, all combining to mislead and confuse the traveler.

At the request and with the consent of counsel the trial judge made a personal inspection of the scene and evidently answered for himself the arguments made.

As to whether or not an object is clearly discernible at night is always a question of fact. It is a matter of commonplace that lights produce shadows and that the area without the range of lighting becomes apparently of increased density.

Likewise it is true that a moving object, such as an automobile, lighting the way in its advance, does merge the landscape with little differentiation of color and for a reviewing court to hold as a matter of law that a pile of gravel, of approximately the same color as the highway, under the conditions here present would stand out distinctly in the path of a moving lighted car would be to assume the determination of a disputed fact as against the judgment.

All of the contentions made upon the subject of lights and the inferences to be drawn from the fact that lights were working find answer in the following cases: Sawdey v. Producers' Milk Co., 107 Cal. App. 472, 290 P.

684; Schurman v. Los Angeles Creamery Co., 81 Cal. App. 758, 254 P. 681.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

124 Cal.App. 247

OBERWISE v. POULOS et al.

Civ. 8302.

District Court of Appeal, First District, Division 1, California.

June 11, 1932.

1. Covenants ⇐6.

Securing signatures of specified number of property owners *held* condition precedent to covenants in respect to alienation of property.

Agreement relating to restraint of alienation of property to persons other than those of Caucasian race provided that undersigned owners of real estate agreed to bind themselves to a specified date to restrictions therein, which obligations and agreements should be binding only upon securing of certain number of signatures and agreements thereto, thereby plainly contemplating that contract should be executed by property owners whose signatures were required as condition precedent to covenants coming into force.

2. Contracts ⇐147(1).

Contract must be construed in light of objects and purposes sought to be accomplished, and to effectuate those objects and purposes, if possible.

3. Contracts ⇐154.

Contract, if possible, must be given reasonable rather than unreasonable construction.

4. Joint tenancy ⇐12.
Tenancy in common ⇐51.

One joint tenant or tenant in common cannot bind cotenant by any contract which he may make relating to common property.

5. Tenancy in common ⇐41.

One cotenant cannot bind his cotenants by grant of easement over common property, though he may by lease or license grant to another right to enjoy common property in his stead.

6. Joint tenancy ⇐13.
Tenancy in common ⇐3.

Joint tenant may convey his interest to stranger, in which event grantee becomes tenant in common with other owner.

7. Joint tenancy ⇐12.
Tenancy in common ⇐51.

Agreement of one joint tenant or tenant in common not to permit persons not of Caucasian race to occupy joint or common land *held* not binding on noncontracting cotenant.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Joseph Oberwise against Joe Poulos and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Hugh E. Macbeth, of Los Angeles, for respondents.

DOOLING, Justice pro tem.

This is an appeal by plaintiff from a judgment denying him injunctive relief by enjoining the defendants Carey Smith and Lillie B. Smith, his wife, who are persons of negro blood, from occupying a certain lot of land of which they are the owners and which they acquired from the defendants Poulos. The action is based upon ten separate instruments, all of which are in identical language and read as follows:

"Covenants of Restriction

"This Agreement, made and entered into this ——— day of October, 1925.

"Witnesseth, that in consideration of the mutual covenants herein contained and for the benefit of the land and premises hereinafter described,

"We, the undersigned owners of real estate in the West Adams and Western Avenue Tract and the A. H. Carey's West 29th Street Tract, both situate in the City of Los Angeles, State of California, agree to bind ourselves until January first, 1950 to the following restrictions:

"That we will not sell, convey, assign, let or sub-let unto or permit the use or occupancy of, by any person or persons other than of the Caucasian race, any of our land or property in the above named tracts;

"That this restriction shall be incorporated in all deeds of transfer of said property and shall be binding upon each party hereto, their assignees, transferees and successors in interest of said property until January first, 1950, and

"It is further understood and agreed that the foregoing restrictions, obligations and agreements shall be binding only upon the securing of one hundred forty (140) signatures and agreements hereto, exclusive of the

lots or parcels of land fronting or facing on Western Avenue."

To no single instrument were there 140 signatures attached, but the aggregate number of signatures affixed to the ten separate instruments was found to be 172. The plaintiff was a signer of one instrument, and defendant Joe Poulos was a signer of another. The court found that the ten separate instruments did not in fact constitute a single contract. However, for the purposes of this opinion, we will concede, without deciding, that the ten separate instruments are to be given the same effect as if all of the signatures had been affixed to a single document.

The trial court found: "That the alleged restriction was attempted to be created or established under a condition precedent; that the condition precedent was the due and lawful signatures by the lawful owners of properties situated in said two tracts, to the number of one hundred forty such owners, all residents within or owning land lying within one or the other of said tracts; that 140 alleged owners did not duly and regularly sign the instruments alleged to create the restriction claimed; that 67 or more of the total number of signatures in and on said instruments failed either to identify the property or land alleged to be owned by said signers and to be bound by the restriction contained in said agreement, or that owners' names were signed by persons without owners' authority, or that persons signed their own names who had no interest in the property, and in many instances where property was held in joint tenancy all of the cotenants did not sign, or where property is held as community property by husband and wife only one of the spouses signed the purported agreement."

[1] In so far as the finding is that the securing of the signatures of 140 property owners in the two tracts in question was a condition precedent to the covenants coming into force, there can be no question of its correctness. The instruments themselves recite: "We *the undersigned owners of real estate* in the West Adams and Western Avenue Tract and the A. H. Carey's West 29th Street Tract * * * agree to bind ourselves." (Italics ours.) The contract too plainly contemplates that it is to be executed by property owners in the two tracts to admit of any doubt that the 140 signatures required as a condition precedent must be signatures of land owners in one or the other of the tracts named.

However, of the 67 signatures found insufficient by the court, 30 were cases where land within one of the tracts was held in joint tenancy and one or more of the joint tenants did not sign; 9 were cases where land within one of the tracts was held by tenancy in common and one or more of the tenants in common did not sign; and in one instance the land was community property and only the husband signed. Appellant contends that the court erred in excluding these 40 signatures. As to the other 27 of the 67 signatures excluded no point is made by appellant.

We need give no further attention to the single instance in which community property was involved, because even if the husband's signature was improperly excluded the agreement would still fall short of the 140 signatures required, unless the court erred in excluding the signatures of joint tenants and tenants in common in the 39 cases where all of the joint or common owners did not sign the agreement.

It was the theory of the trial court that the 140 "signatures and agreements" required by the contract meant 140 signatures and agreements which would result in the absolute exclusion from occupancy by persons not of the Caucasian race of the parcels of land owned by the signers. It is this construction of the contract which is most strenuously attacked by appellant.

It is conceded that the portion of the agreement which attempts to bind the signers not to sell, convey, assign, let, or sublet is invalid as a restraint against alienation, and the sole portion of the covenant sought to be enforced is the agreement "that we will not * * * permit the use or occupancy of, by any person or persons other than of the Caucasian race, any of our land or property in the above named tracts." The purpose of this agreement is obvious, to secure the lots of land in the tract against occupancy by persons other than Caucasians. The general purpose of the condition precedent is likewise obvious, the individual property owners did not want to bind themselves and their property by this restriction unless the signatures of sufficient land owners in the tracts were procured to make the restriction reasonably successful in excluding non-Caucasians from the tracts. Anything less than that would defeat the purpose of the proposed restriction. The signers were interested not in securing signatures, but in securing signatures that would effectively prevent persons other than Caucasians from occupying certain lots of land. With these facts in mind, can it be reasonably supposed that it was intended that the signature of one joint tenant or tenant in common, without the signature of his cotenant, would be sufficient to satisfy the requirements of the condition precedent?

[2, 3] A contract must be construed in the light of the objects and purposes sought to be accomplished, and to effectuate those objects and purposes if possible (6 Cal. Jur. p. 256), and it must likewise if possible be given a reasonable rather than an unreasonable construction (6 Cal. Jur., p. 271).

[4-6] One joint tenant or tenant in common cannot bind his cotenant by any contract which he may make relating to the common property. Sarina v. Pedrotti, 103 Cal. App. 203, 284 P. 472; 7 Cal. Jur. p. 358; 33 C. J. p. 913. So one cotenant cannot bind his cotenants by the grant of an easement over the common property (Pfeiffer v. Regents of University of California, 74 Cal. 156, 15 P. 622; East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999; Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal. App. 213, 194 P. 757; 7 R. C. L. p. 884), although he may by lease or license grant to another the right to enjoy the common property in his stead to the same extent that he is entitled to enjoy it by reason of his cotenancy (Waterford Irr. Dist. v. Turlock Irr. Dist., supra; Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 P. 45). A joint tenant may likewise convey his interest to a stranger, in which event the grantee becomes a tenant in common with the other owner. Tilden v. Tilden, 81 Cal. App. 535, 254 P. 310; Green v. Skinner, 185 Cal. 435, 197 P. 60; Pepin v. Stricklin (Cal. App.) 299 P. 557.

[7] In view of these rules it is clear that the agreement of one joint tenant or tenant in common not to permit a person who is not of the Caucasian race to occupy the joint or common land would not be binding upon the noncontracting cotenant. The noncontracting cotenant could still by lease or license permit a non-Caucasian to use and occupy the land, or by deed could convey his interest to a non-Caucasian and thus make him a tenant in common, with the full right of use and occupancy which every tenant in common has. It is true that the covenant of the joint tenant or tenant in common would bind him as to his undivided interest, but this would be of little value so long as his cotenant remained unbound.

In view of the plain purpose of the restrictive covenant to prevent the use and occupancy of the land in the tract by non-Caucasians and the equally plain purpose of the condition precedent that the signers were not to be bound unless enough agreements were secured to render the proposed restriction reasonably effective, we are satisfied that the construction placed upon the condition precedent by the trial court was the reasonable and proper one. It may be added that this construction comports with the rule laid down in Werner v. Graham, 181 Cal. 174, 181, 183 P. 945, 947, "that any provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land."

The judgment appealed from is accordingly affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 221

PEOPLE v. FERGUSON.*

Cr. 64.

District Court of Appeal, Fourth District, California.

June 9, 1932.

Rehearing Denied June 23, 1932. Hearing Denied by Supreme Court July 8, 1932.

1. Arson ⇐37(1).

Evidence *held* sufficient to support conviction for arson (Pen. Code, § 447a).

2. Indictment and information ⇐71.

Information *held* sufficiently definite to show that crime charged was arson (Pen. Code, § 447a).

The information specifically alleged that on certain day defendant willfully and maliciously set on fire and burned certain building described which was property of defendant and another.

3. Criminal law ⇐636(3).

Proceeding wherein prospective jurors were examined by court as to their general qualifications *held* not portion of trial which could not be had in defendant's absence (Pen. Code, § 1181, subd. 1).

4. Criminal law ⇐1141(2).

Assignment of error necessitates affirmative showing by appellant of commission of error.

5. Criminal law ⇐1166½(4).

Even if trial court's preliminary examination of prospective jurors as to their general qualifications took place without defendant's presence, and such proceedings formed part of trial, defendant *held* not entitled to reversal, in absence of showing that jurors selected were not competent (Pen. Code, § 1181, subd. 1).

6. Courts ⇐70.

Determination of chairman of judicial council in assigning judge to another county is conclusive, in absence of clear showing of abuse of discretion (Const. art. 6, § 1a).

7. Courts ⇐70.

That there were days during defendant's trial before judge assigned from another county on which no cases were tried in one of three departments of superior court *held* not to show that calendar of court was not congested (Const. art. 6, § 1a).

8. Courts ⇐62.

Statute regarding court of extra sessions *held* impliedly repealed by constitutional amendment investing chairman of judicial council with power to assign judge to another court (Code Civ. Proc. § 67b; Const. art. 6, § 1a).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied 12 P.(2d) 969.

9. Courts ⇐70.

Court held by judge sitting pursuant to order of chairman of judicial council assigning judge to such court for period commencing January 2d, and including December 31, 1931, *held* to have jurisdiction of defendant and prosecution for arson (Const. art. 6, § 1a).

10. Criminal law ⇐1166(1).

That order of assignment of judge was not incorporated in minutes of court *held* not defect which warranted reversal of judgment (Const. art. 6, § 1a).

Appeal from Superior Court, San Bernardino County; G. K. Scovel, Judge.

Lawrence S. Ferguson was convicted of arson, and he appeals.

Affirmed.

Joseph Seymour, of Riverside, and R. E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

JENNINGS, J.

The defendant was convicted of the crime of arson, and was sentenced to imprisonment in the state prison. From the judgment of conviction and from the orders denying his motion for a new trial, and the motion in arrest of judgment, he has prosecuted this appeal.

Prior to the occurrence of the fire which caused the issuance of the information herein, defendant and his wife resided in a one-story frame building located at No. 20 San Gorgonio drive, in the city of Redlands. San Gorgonio drive is a residential street in said city, and on properties fronting upon said street many buildings used for residence purposes have been erected. Shortly before 8 p. m. of July 3, 1931, a group of boys discovered fire in the residence of defendant. An alarm was given, and, when the city fire department arrived on the scene, the attic of the house was burning, and flames were emerging from the gables at each end of the building. After the fire was under control, an inspection of the premises revealed the presence of a somewhat elaborate arrangement manifestly designed for the purpose of setting fire to the building. Several bathing caps, each containing approximately one pint of gasoline, were suspended from boards placed against rafters and ceiling joists. Connecting the various bathing caps were trailers of newspapers that were flattened and spread across the joists. On the top shelf in a linen closet a jug containing approximately a quart of some fluid was discovered. The fluid was tested and gave off a flash similar to gasoline. Directly over this jug the plaster had been removed from the ceiling. Other evidence indicating that the fire was of incendiary origin was discovered. It appeared that defendant, accompanied by the members of his family, had left his home at some time prior to the discovery of the fire, and had gone to the mountains nearby to spend the week-end. The evidence as to the time of defendant's departure from the house was conflicting. The evidence produced on defendant's behalf indicated that he had left the house about 6 p. m. The evidence produced by the prosecution placed the time of his departure between 7 p. m. and 7:30 p. m. The testimony of an insurance agent showed that the defendant carried insurance on the house and contents in the amount of $6,000. The testimony of a contractor and appraiser was introduced showing that the reproduction value of the house on July 15 or 16, 1931, was $4,222.90. Another witness for the prosecution testified that the defendant had expressed a strong desire to leave the city because he felt that the people who lived there had not assisted him in his business and for the further reason that they were too narrow.

[1] In their opening brief, counsel for defendant state that in their opinion the evidence is not sufficient to support the verdict of conviction; that it showed merely opportunity to commit the offense, and did not satisfactorily connect the defendant with its commission. From the brief résumé of the evidence hereinabove set forth, it is obvious that the evidence, although mainly circumstantial, as is generally true in cases of this character, was ample to sustain the verdict.

[2] The contention next advanced by appellant is that it cannot be ascertained from the information nor from the judgment whether appellant was tried and convicted of the offense of arson as defined under the provisions of section 447a of the Penal Code, or whether he was tried and convicted of some other like offense prohibited by another section of the Penal Code. It is pointed out that section 448a prohibits the willful and malicious burning of certain described property, and provides a different penalty upon conviction than that provided by section 447a. It is also urged that sections 450a, 451a, and 458 of the same Code denounce certain other offenses of like character, and that the punishment provided in each of these sections is different from that which is provided by section 447a. Hence it is argued that appellant, having been sentenced to the term of imprisonment "provided by law," is uncertain

other like offense prohibited by another section of the Penal Code. It is pointed out that section 448a prohibits the willful and malicious burning of certain described property, and provides a different penalty upon conviction than that provided by section 447a. It is also urged that sections 450a, 451a, and 458 of the same Code denounce certain other offenses of like character, and that the punishment provided in each of these sections is different from that which is provided by section 447a. Hence it is argued that appellant, having been sentenced to the term of imprisonment "provided by law," is uncertain whether the punishment meted out to him was in accordance with the provisions of section 447a or whether it was prescribed by virtue of the provisions of one of the other sections to which reference is made. This point was made by demurrer to the information which was overruled, and the court's action in this regard is assigned as error. The contention is entirely devoid of merit. The information charges appellant with the crime of arson. It specifically alleges that on the date named he willfully and maliciously set on fire and burned a certain building described as a residence and dwelling house located at No. 20 San Gorgonio street in the city of Redlands, which was the property of appellant and Margaret Ferguson, who is shown by the evidence to have been his wife. The language of the information thus follows closely the language of section 447a of the Penal Code, and there can be no semblance of serious doubt that appellant was charged, tried, convicted, and sentenced under the provisions of this section of the Code.

[3] It is next urged that a portion of the trial was had in the absence of appellant. The portion of the trial which it is said was had in the absence of appellant consisted of the appearance of the entire venire of prospective jurors whose names had theretofore been drawn, and who had been summoned by the court for preliminary examination as to their qualifications to serve as trial jurors in the trial of cases then pending before the Superior Court of San Bernardino county. The contention that the proceedings thus taken formed a part of the trial of appellant, and that subdivision 1 of section 1181, which states as a ground for a new trial the fact that a trial has been had in the absence of a defendant in a criminal action where the indictment is for a felony, is applicable, may not be sustained. No authority has been cited by counsel for appellant in support of the contention that the preliminary proceedings described form part of the trial. In the note in 70 A. L. R. 1074, it is said: "The law does not require that the defendant in a criminal action should be personally present in court when the venire is issued therefor, when such special venire is returned by the sheriff, or when the names of the jurors constituting such venire are called to ascertain whether or not they have been summoned or are in attendance upon the court, are disqualified, or subject to excuse; none of such proceedings being 'steps in' or 'stages of' the trial, within the meaning of the rule requiring the defendant's personal presence, but all being ministerial preliminaries merely, in which the defendant could have no voice or participation."

[4] The text finds support in the following decisions: Colson v. State, 51 Fla. 19, 40 So. 183; Ammons v. State, 65 Fla. 166, 61 So. 496. It is obvious that the proceedings wherein persons whose names had been drawn for jury duty appeared in response to the summons of the court and were examined by the court as to their general qualifications and for the further purpose of determining whether they were subject to excuse were merely ministerial preliminaries to the trial. The record shows that from the members of the panel who were not excused the jury was selected before whom the case was tried. No objection was made to the panel. No complaint was made at any time during the trial of any irregularity in the drawing of the panel or the selection of jurors. The objection that the appellant was not present when the panel appeared in court and its members were examined by the court touching their general qualifications to act as jurors was not specified as a ground for appellant's motion for a new trial. Nor was the objection that appellant was not present at the time referred to included among the various grounds specified by him in his motion for arrest of judgment. Finally, it is not made to appear by the record that appellant was not in fact present at the time the panel appeared and its members were examined as to their general qualifications. It is a cardinal rule that the assignment of error by an appellant necessitates an affirmative showing by him of the commission of the error, and that, in the absence of such showing, error will not be presumed, People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Russell, 156 Cal. 450, 105 P. 416; People v. Stennett, 51 Cal. App. 370, 197 P. 372. In this connection, appellant's counsel quotes the following language from the clerk's transcript: "Ten o'clock a list of trial jurors was called and found present except those excused at nine o'clock this date." It is then said that apparently some proceedings in the trial were had in the absence of appellant and without notice either to him or his counsel. All that does appear with certainty from the language quoted is that at 9 o'clock of the date on which the trial was begun some members of the panel were excused. The power of a court to excuse qualified jurors is undoubted. People v. Collins, 105 Cal. 504, 39 P. 16. In People v. Britt, 62 Cal. App. 674, 217 P. 767, 771, it was assigned as error that the trial court made an order ex-

People v. Lee, 17 Cal. 76. See, also, note People v. Barker, 1 Am. St. Rep. 519."

[5] There is here no complaint that the jurors who served were not competent, fair, and qualified to act. Therefore, assuming that the examination of members of the panel took place without the presence of appellant, and further indulging in what we believe is an incorrect assumption, viz., that such proceedings formed part of the trial, nevertheless, in the absence of a showing that the jurors who were selected to try the case were not competent, or fair, or qualified to act, appellant is not entitled to rely upon the claimed error as one which requires a reversal of the judgment.

The further contention is made that the trial court committed error in refusing to permit appellant to present the oral testimony of jurors before whom the case was tried in an effort to substantiate his claim that the verdict had been decided by means other than a fair expression of opinion on the part of the jurors. This was assigned by appellant as one of the grounds of his motion for a new trial. Upon the hearing of the motion, counsel for appellant requested permission of the court to have each member of the jury sworn as a witness and to examine each juror as to the method employed in arriving at a verdict for the purpose of showing that the verdict was one that was found without consideration of the evidence and was in fact a compromise verdict. In order that the point thus made might be preserved on appeal, permission was granted, and the foreman of the jury was sworn. Thereupon certain questions were propounded to the witness, the purpose of which was to elicit testimony which should show that the verdict was reached without consideration of the evidence and that it was in fact a compromise verdict. Objections to the questions thus propounded were sustained, the court holding that it was discretionary with the court whether or not oral testimony would be permitted to be received on the hearing of a motion for a new trial. It was stated that it would be considered that the remaining eleven members of the jury were sworn as witnesses and the same questions propounded to them as were propounded to the foreman, the same objections interposed, and the same ruling made in each instance. The argument of appellant's counsel in support of his contention that the court erred in the rulings thus made is to the following effect: It is conceded that subdivision 2 of section 657, Code of Civil Procedure, provides that, whenever any one or more jurors have been induced to assent to a verdict by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors, and that the decisions have consistently declared that the affidavit of a juror cannot be received to impeach the verdict except where it is the result of a resort to the determination of chance. People v. Azoff, 105 Cal. 632, 39 P. 59; People v. Soap, 127 Cal. 409, 411, 59 P. 771; People v. Kromphold, 172 Cal. 512, 157 P. 599. But it is pointed out that subdivision 4 of section 1181 of the Penal Code provides that a new trial may be granted "when the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors." Since the ground that the verdict was reached by means other than a fair expression of opinion on the part of jurors is specifically set forth in section 1181 as a distinct reason for the granting of a new trial, and since, as above noted, the rule has been declared that only in cases where the verdict is attacked as being the result of a resort to the determination of chance are affidavits of jurors receivable for the purpose of impeaching the verdict, it is said that it necessarily follows that the impeachment of the verdict on the ground that it was reached by means other than a fair expression of opinion on the part of jurors can be accomplished only by the production of the oral testimony of the jurors. If this is not the case, it is said that the second ground provided in subdivision 4 of section 1181 is rendered unavailable.

The case of People v. Tucker, 117 Cal. 229, 49 P. 134, presented a situation which was strikingly similar to that which is here presented. In the case cited, the defendant proposed to establish by oral evidence the fact that one of the jurors was intoxicated during the trial as a ground for the granting of a new trial. It was stated that the defendant was unable to procure the affidavits of witnesses, for which reason it was necessary to have resort to oral testimony. The trial court refused to permit the offered testimony holding that the showing should be made by affidavit and not by oral evidence. On appeal, the trial court's ruling was sustained on the ground that, conceding that the usual course of proceeding by affidavits was not exclusive, nevertheless the question was one resting entirely in the discretion of the trial court, a matter in which the trial court is allowed the widest latitude of decision. The same question was before the court in People v. Sullivan, 129 Cal. 557, 62 P. 101. Here, again, it was sought to establish the fact of a juror's intoxication as a ground for a new trial, and oral testimony was offered to support it. The oral evidence was rejected, but the defendant was able to procure affidavits. On appeal, it was held that the evidence as to the intoxication of the juror was conflicting, consequently the court's finding that the juror was not incapacitated was not disturbed. In discussing the contention of the defendant that testimony by affidavit is less effective than oral testimony, the Supreme

Court held that it was not necessary to decide whether the refusal of the trial court to hear oral testimony when it appeared that affidavits of witnesses could not be procured amounted to an abuse of discretion. It was said that it is, perhaps, true, as decided in People v. Tucker, supra, that it is within the trial court's discretion to require all evidence in support of a motion for a new trial to be presented in the form of affidavits (or depositions). Under the authority of People v. Tucker, supra, it would appear that it was within the discretion of the trial court whether or not it would permit oral evidence to be received to support the claim that the verdict was reached by means other than a fair expression of opinion on the part of the jurors. In the absence of a plain showing that there was an abuse of the wide discretion vested in the court, its refusal of the proffered oral evidence will not be disturbed. Since there is no such showing, the court's ruling in this regard is sustained.

[6-10] Appellant's final contention is that the court before whom he was tried and convicted was not a regularly constituted court, and was therefore lacking in jurisdiction over appellant and of the proceedings which resulted in the judgment of conviction. It is urged that appellant was tried in department No. 3 of the Superior Court of San Bernardino county, in which Judge Scovel, a judge of the Superior Court of Orange county, was then presiding; that there was an order made by the chairman of the judicial council of the state of California on January 2, 1931, assigning Judge Scovel to sit as a judge of the Superior Court of San Bernardino county for the period commencing January 2d, and including December 31, 1931, but that this order was not spread upon the minutes of the court, nor was it filed nor does it appear in the record. Upon oral argument of this appeal, it was stipulated that the order of assignment was filed in the office of the county clerk of San Bernardino county. It was not stipulated that this order of assignment was entered in the minutes of the court. It thus appears that the order of assignment was duly made by the chairman of the judicial council of the state of California. The assignment was made pursuant to the provisions of section 1a of article 6 of the Constitution, wherein it is provided that the chairman of the judicial council "shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred." The assignment made by the chairman of the judicial council is attacked because it is said the record fails to show that the calendar of the Superior Court of San Bernardino county was congested at the time the trial of appellant occurred or that any judge of the Superior Court of San Bernardino county was disqualified or that a vacancy in the office of judge of the Superior Court of San Bernardino county had occurred. In this connection, it is pointed out that there are three regular departments of the Superior Court of San Bernardino county presided over by judges duly elected and qualified, and that during the time when appellant's trial was being held the minutes of the various departments which have been included in the record on appeal show that there were certain days on which no cases were tried in one or more of the regular departments. Therefore it is urged that the record contains positive showing that there was no such congestion in the calendar of the Superior Court of San Bernardino county to justify the making of the order of assignment particularly on January 2, 1931, when it is said that the chairman of the judicial council could hardly have been able to foresee that the calendar of the Superior Court of San Bernardino county would become congested at any particular time during the year 1931. One of the principal purposes of the constitutional amendment by virtue of whose provisions the assignment here attacked was made is to invest the Chief Justice of the Supreme Court of California, acting ex officio as chairman of the judicial council, with certain powers and functions through the exercise of which he is to seek to expedite judicial business and equalize the work of the judges. Fay v. District Court of Appeal, 200 Cal. 522, 537, 254 P. 896. The obvious design of the amendment is to unify the judicial system of the state and to that end to allow supervision over the action of the judges thereof by the chairman of the judicial council to the extent that any judge of a given jurisdiction may be assigned to another court of like or higher jurisdiction where the public welfare may be deemed to require it. Edler v. Hollopeter (Cal. Sup.) 6 P.(2d) 245.

In order that the manifest purpose of the amendment shall be effectuated, it is clear that discretion of the broadest character is conferred upon the chairman of the judicial council, and his determination is conclusive, in the absence of clear and unequivocal showing of abuse of discretion. No such showing has been here made by appellant. The fact that during the time appellant's trial was in progress there were days on which no cases were on trial in one of the three departments of the Superior Court of San Bernardino county is not sufficient to show that the calendar of the court was not congested. For all that appears, cases set for trial may not have consumed the time allotted for them or

postponements of trial may have been found necessary in cases set down for hearing. The making of the so-called "blanket order" on January 2, 1931, assigning Judge Scovel to sit in the Superior Court of San Bernardino county during the year 1931, was in conformity with a policy well understood by bench and bar in California, and its manifest object is to expedite judicial business and to promote the convenience of litigants and their legal representatives in the courts. It is also urged that the court in which appellant was tried and suffered conviction must have been a court of extra sessions, since the record shows that the judge who was regularly elected to preside in department No. 3 of the Superior Court did so preside during most of the time when appellant's trial was in progress. But it is pointed out that, under the provisions of section 67b, Code of Civil Procedure, a court of extra sessions may be held only after the judge or a majority of the judges of the Superior Court of a county have decided that the public interests justify or require the holding of such a court and have appointed a time when and a place where it shall be held. It is said that the record fails to disclose that a majority of the judges of the Superior Court of San Bernardino county made such decision or appointment of time and place, and that therefore the court in which appellant was tried and convicted was not a legally constituted court. The contention thus advanced may not prevail. The former plan of judicial assignments has been entirely superseded by the judicial council plan. Martello v. Superior Court, 202 Cal. 400, 261 P. 476. Although section 67b, Code of Civil Procedure, has never been expressly repealed by the Legislature, it was impliedly repealed by the constitutional amendment adopted on November 2, 1926 (article 6, § 1a). The reasoning of the court in Martello v. Superior Court, supra, is directly applicable to appellant's contention relative to the trial having taken place in a court of extra sessions and furnishes a sufficient answer thereto. The procedure followed was in accordance with the terms of the constitutional provision, supra, and appellant's claim that the court was lacking in jurisdiction is devoid of merit. People v. Hickman, 204 Cal. 470, 480, 268 P. 909, 270 P. 1117. To appellant's objection that the order of assignment was not incorporated in the minutes of the court it is apparent that the duty thus enjoined was purely ministerial, possessing no attribute of a judicial character. The failure to perform a purely ministerial act is manifestly not a defect which warrants reversal of the judgment.

The judgment and orders from which this appeal has been taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

124 Cal.App. 238

In re JANOTA'S ESTATE.

GOLDBERG v. JANOTA.

Civ. 8435.

District Court of Appeal, Second District, Division 1, California.

June 10, 1932.

Appeal and error ⇐655(2).

"Decree interpreting will" *held* order made in probate proceeding which became effective when signed and filed, hence, notice of order being duly served on appellant on day of filing, bill of exceptions served more than 20 days thereafter was stricken (Code Civ. Proc. §§ 650, 1060; Probate Code, §§ 1220, 1221).

Although petition was described as a petition "for declaratory relief" under Code Civ. Proc. § 1060, its contents showed that it was not filed as a separate action, but as a petition incidental to the administration of an estate, and it appeared to have been so treated by the parties and by the court, so that the "decree interpreting will" was in effect an order made in a probate proceeding, which under Probate Code §§ 1220, 1221, became effective when signed and filed, so that, written notice of the order having been served on appellant on the same day, the 20 days' time allowed by Code Civ. Proc. § 650, for preparing and serving a proposed bill of exceptions, began to run.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the matter of the estate of Frank Janota, deceased. Petition by Sarah Goldberg for a declaratory order interpreting will, etc., opposed by Katrina Janota. Order for petitioner, and opponent appeals. On motion to strike from the files opponent's bill of exceptions and to dismiss the appeal.

Motion granted, and appeal dismissed.

Joel Terrell and Howard Prowse, both of Los Angeles, for appellant.

Harry Sherr, of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

CONREY, P. J.

Frank Janota, a resident of the county of Los Angeles, died leaving an estate consisting of real property in said county. Thereafter Frank Bryson, public administrator, was appointed administrator with the will annexed, and on December 18, 1930, letters were issued and he duly qualified as such administrator. On June 2, 1931, Sarah Goldberg filed, as a document entitled "In the Matter of the Estate of" said decedent, a "petition for declaratory relief," asking for interpretation of the will in terms favorable to herself. This petition was opposed by respondent Katrina Janota, mother of the decedent. Thereafter, on the 8th day of July, 1931, findings of fact and conclusions of law determining the controversy were signed and filed by the judge. On the following day, July 9th, a decree in favor of Mrs. Goldberg in accordance with said findings and conclusions was signed by the judge and filed in the office of the clerk of said Superior Court. Said decree was not entered at length in the record of judgments of said court until October 6, 1931. On August 28, 1931, Mrs. Janota appealed from the decree. Afterwards a bill of exceptions was approved by the judge and filed. The record filed in this court consists of the notice of appeal and said bill of exceptions.

There has been submitted herein a motion of respondent for an order striking from the files the said bill of exceptions, and dismissing the appeal. The motion is based upon the ground that the bill of exceptions was not prepared, served, or filed within the time allowed for that purpose under the provisions of sections 649 and 650 of the Code of Civil Procedure.

We need consider only section 650. It is there provided that, "where a trial shall have been had on a question of fact, and a party desires to have exceptions taken at such trial settled in a bill of exceptions, he may, at any time thereafter, and within twenty (20) days after service upon him of written notice of entry of the judgment, * * * or such further time as the court in which the action is pending or a judge thereof, may allow, prepare the draft of a bill and serve the same, or a copy thereof, upon the adverse party." By section 1704 of the Code of Civil Procedure, relating to orders and decrees in probate proceedings, it was provided in part as follows: "All orders and decrees of the court or judge must be entered at length in the minute book of the court, or must be signed by the judge and filed; but decrees of distribution must always be so entered at length." The section as thus written was in force until August 14, 1931, when it was superseded by sections 1220 and 1221 of the Probate Code. The terms of said sections of the new statute are, however, substantially the same as said section 1704, Code of Civil Procedure.

In the light of the foregoing statutory rules, we are of the opinion that the bill of exceptions was presented too late, and that the trial judge was without authority to approve the same. Although the petition filed in the Superior Court by respondent Goldberg was therein described as a petition "for declaratory relief under sec. 1060, C. C. P., of California," the contents of the petition show that it was filed, not as a separate action, but as a petition incidental to the administration of the estate, and it appears to have been so treated by the parties and by the court. In substance, the findings and order or decree constituted a determination that, in accordance with the will, Mrs. Goldberg would be entitled to stand as the sole legatee or devisee of the residue of the estate. Since, as we have here determined, the "decree interpreting will" was an order made in a probate proceeding, it follows that the order became effective on July 9th, when signed and filed. Such signing and filing in accordance with section 1704, Code of Civil Procedure, was the full equivalent of the ordinary entry of a decree or judgment. But it is further shown by the amended bill of exceptions itself that written notice of said decree was duly served upon appellant on the same day when the decree was signed and filed. Thereupon the 20 days' time allowed for preparing and serving a proposed bill of exceptions began to run. There were no proceedings on motion for new trial and no time extensions beyond the 20 days beginning July 9th. The notice of appeal itself, filed August 28, 1931, is directed to a decree "rendered, filed and entered in the above numbered and entitled action, on or about the 9th day of July, 1931." Nevertheless, appellant did not serve or submit for approval any proposed bill of exceptions until the 10th day of October. The defendant made timely objection, and has never waived her objection that said bill of exceptions was not prepared, served, or filed within the time allowed by law.

The parties have stipulated that this motion to strike the bill and to dismiss the appeal, as well as the appeal on the merits, may be submitted upon the briefs. Assuming that we are correct in holding that the bill of exceptions must be disregarded and dismissed, there will remain in the record nothing upon which to found any argument in support of the appeal.

For the foregoing reasons, the motion to strike the bill of exceptions is granted, and the appeal is dismissed.

We concur: HOUSER, J.; YORK, J.

124 Cal.App. 207

CARLSON v. CARLSON.

Civ. 4541.

District Court of Appeal, Third District. California.

June 9, 1932.

1. Records ⇐9(3).

Purpose of Torrens Land Title Act and similar legislation is to protect those dealing with realty, title to which has been certified thereunder (Land Title Law [Deering's Gen. Laws 1923, Act 8589], §§ 45, 48).

2. Records ⇐9(13¼).

Though Torrens Land Title Act provides that transfers not filed with registrar may be defeated, it does not make unregistered transfer ineffective (Land Title Law [Deering's Gen. Laws 1923, Act 8589], §§ 45, 48).

3. Records ⇐9(13).

Person taking title on strength of Torrens Land Title Act certificate is protected against adverse claims only in event of bona fides (Land Title Law [Deering's Gen. Laws 1923, Act 8589], §§ 45, 48).

4. Records ⇐9(13¼).

As between grantee of realty and executor of grantor who kept registered title, entire estate vested in grantee, though she did not comply with Torrens Act pertaining to manner in which property held under such act may be transferred (Land Title Law [Deering's Gen. Laws 1923, Act 8589], §§ 45, 48).

5. Descent and distribution ⇐74.

Heirs occupy place of ancestor as regards taking interest in ancestor's property.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Sarah A. Carlson, formerly Sarah A. Reasoner, against Charles P. Carlson, as executor of the last will and testament of Andrew Carlson, deceased. From the judgment for plaintiff, defendant appeals.

Affirmed.

Griffith Jones, of Los Angeles, for appellant.

J. H. Ardis and W. S. Knott, both of Los Angeles, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

The action is to determine conflicting claims to certain real property located in the county of Los Angeles, Cal.

The plaintiff is the widow of Andrew Carlson, and the defendant is the executor of the last will and testament of the said Andrew Carlson, deceased prior to the time of the commencement of the action.

In the main, the facts are stipulated and may be here detailed. On the 7th day of January, 1920, Andrew Carlson was the owner of the real property here involved. At or about that time he proposed marriage to the plaintiff, then known by the name of Sarah A. Reasoner. It seems that, in her consideration of the proposal, she then being of the mature age of seventy-two, the thought of future security against age and want entered into her mind. She told Carlson that before she would agree to a marriage there must be some provision made for her. Accordingly, Carlson consented to making a transfer to her of the property. They consulted a lawyer on the subject, and first was discussed the plan of making a will. Plaintiff demurred to this, stating that she wanted the affair fixed up once and for all and with no fear of future disturbance or litigation. The lawyer advised a straight deed as being the simplest and most effective method of vesting plaintiff with the full title. This being satisfactory to all concerned, the lawyer, at the request of Carlson, prepared the deed, which was then executed by Carlson and duly acknowledged. It was then delivered to plaintiff, who, being not familiar with the procedure usual to such transactions, inquired as to what she should do with the instrument. Carlson and the lawyer both advised her that she should have the deed recorded. This was done, and after recordation the deed was returned to her.

On the day succeeding the delivery of the deed, the couple were married and lived happily thereafter up to the date of the death of said Andrew Carlson, making their home on the property deeded to the wife.

Andrew Carlson left a will which was admitted to probate, and the defendant and appellant was duly appointed executor of said will and of the estate of the decedent.

The claim of defendant is that at the time of his death the said Andrew Carlson was the owner of the property, and that the same immediately vested in the heirs of decedent and in the said executor for purposes of administration.

The basis of this claim may now be considered. Quoting from the brief of appellant: "The court will recall that it was stipulated to be a fact that Sarah A. Carlson, plaintiff herein, received the deed from Andrew Carlson on the 7th day of January 1920, at which time Andrew Carlson was the registered owner of said land under the Torrens Title Act (Deering's Gen. Laws 1923, Act 8589). She recorded the deed but did not file the same with the registrar, nor did she comply with any of the terms of the Torrens Act pertaining to the manner in which property held under the Torrens Title Act may be transferred." This

constituted practically the whole of appellant's claim.

The factual basis may be conceded. It is true that Andrew Carlson had caused a decree to be entered under the so-called Torrens Act, and a certificate of title was issued thereunder showing the title in fee to be in the said Andrew Carlson. It is further true that at the time of the death of the said Andrew Carlson there had been no change made in the office of the registrar and the certificate issued to the said Carlson had not been canceled.

[1, 2] We deem it unnecessary to review the provisions of the so-called Torrens Act or to analyze and compare the decisions construing the same. The purpose of the act and of legislation similar thereto is to provide security of title and protect those dealing with real property the title to which has been certified thereunder. We may take it for granted, without further inquiry, that the effect of the certificate of title issued to Carlson was to vest in him the title to the land, free from all lien or incumbrance. There is nothing in the act that restricts the right of alienation. The act does provide that transfers not filed with the registrar may be defeated, but in nowise attempts to make any unregistered transfer as of no effect.

[3] Any person taking a title on the strength of the Torrens Act certificate is protected against adverse claims only in the event of bona fides. This is determined and the entire subject analytically discussed in Follette v. Pacific L. & P. Co., 189 Cal. 193, 208 P. 295, 23 A. L. R. 965.

[4] It is manifest, in the instant case, that Andrew Carlson had no claim or interest in the property at the time of his death by reason of the conveyance to plaintiff. True, he may have had the record title, but, whatever the state of the title as between him and his grantee, the entire estate was vested in the latter.

It seems too elementary to require citation that Andrew Carlson during his lifetime could not have asserted title against his admitted grantee of the fee solely on the grounds that the latter had not procured her deed to be registered. His heirs take no more than he had. They are not purchasers for value, in good faith and without notice.

[5] Heirs occupy the place of their ancestor. They take precisely the same interest in the property which he had at the time of his death, and have no greater or better claim than he had. They hold the property inherited from him precisely as he held it, subject to the same conditions and equities that attached to it in his hands. R. C. L. vol. 9, p. 87; Cal. Jur. vol. 9, p. 472.

It would be a strange doctrine to hold that all of the acts of any person become null and void immediately upon his death and to test the sufficiency of any transfer by the naked record.

It may be stated, in passing merely, that there is no showing here of any indebtedness of the estate or that the property or the proceeds thereof are necessary for purposes of administration.

There is another feature of the case to be noted. Subsequent to the death of Andrew Carlson, and prior to judgment herein, the plaintiff did cause her deed to be registered with the registrar under the Torrens Act, and did receive from him a certificate showing the title to be vested in her. Appellants claim that this had no effect whatsoever upon the title to the property, for the reason that the title had already vested in the heirs, and the act of the registrar in issuing a certificate to Sarah Carlson was therefore void.

Section 48 of the act therein called Land Title Act, and, being numbered Act 8589, provides for cases for transfer, and reads: "And upon filing such deed or other instrument in the registrar's office, and surrendering to the registrar the duplicate certificate of title, the transfer shall be complete and the title so transferred shall vest in the transferee."

This has been done by plaintiff, and we look in vain for any provision of the act limiting the time within which such proceeding must take place.

Further, inasmuch as appellant lays great stress upon the exact letter of the law, regardless of the spirit or intent thereof, it might be fitting to note that no place in the record before us do we have any record of the proceedings under the Land Title Act. The certificate is not before us nor is there anywhere printed in the brief of appellant any of the evidence adduced at the trial nor is the transcript in any way referred to for our guidance.

Appellant lastly urges the bar of the statute of limitations. Section 45 of the act referred to provides that no action shall be brought adversely to the title or interest certified in the first certificate bringing the land under the operation of the act after one year following the first registration. A complete answer to this contention is the fact that the present action is not adverse to the title certified. It is a claim under the said title and in strict reliance thereon.

The judgment is affirmed.

We concur: PLUMMER, J., R. L. THOMPSON, J.

124 Cal.App. 233

WEAVER et al. v. SHELL OIL CO. OF CALIFORNIA et al.

Civ. 8431.

District Court of Appeal, First District, Division 1, California.

June 10, 1932.

Rehearing Denied July 9, 1932. Hearing Denied by Supreme Court Aug. 8, 1932.

1. Appeal and error ⇐607(1).

Six months within which trial court retains jurisdiction to relieve default in requesting transcript *held* not to commence until some action based on default is taken (Code Civ. Proc. §§ 473, 953a).

2. Appeal and error ⇐607(1).

Trial judge, notwithstanding plaintiff's failure to timely request transcript *held* to have retained jurisdiction to settle transcript, where defendants actively participated without objection (Code Civ. Proc. §§ 473, 953a).

3. Appeal and error ⇐607(1).

Failure to request transcript within specified time is not jurisdictional, nor ground for dismissal of appeal (Code Civ. Proc. § 953a).

4. Appeal and error ⇐607(1).

Trial judge's certification of transcript is, in effect, equivalent of relieving appellant from default in failure to timely request transcript (Code Civ. Proc. §§ 473, 953a).

5. Appeal and error ⇐800.

Transcript duly certified and on file at time of motion to dismiss appeal *held* available as record on appeal, notwithstanding request therefor was defective (Code Civ. Proc. § 953a).

Appeal from Superior Court, City and County of San Francisco; Franklin A Griffin, Judge.

Action by Alice Weaver and others against the Shell Oil Company of California and others. From an order granting a new trial after a verdict in favor of the plaintiffs, the plaintiffs appeal. On defendants' motion to affirm the order or to dismiss the appeal.

Motion denied.

Hearing denied by Supreme Court; WASTE, C. J., dissenting.

Vincent W. Hallinan, of San Francisco, James H. Gillard, of Oakland, and C. K. Bonestell, of San Francisco, for appellants.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondents.

KNIGHT, Acting P. J.

Judgment for damages based on verdict by a jury was entered in favor of the plaintiffs in the above-entitled cause, and the court granted a new trial. Plaintiffs appealed, and defendants now move to affirm the order granting the new trial or to dismiss the appeal upon the ground that there is no record upon which the appeal may be legally heard and determined. A typewritten transcript purporting to have been settled, approved, and certified by the trial judge in conformity with the provisions of section 953a of the Code of Civil Procedure was filed in the reviewing court approximately two months prior to the service of notice of the present motion, but defendants contend that the trial judge was without jurisdiction to approve or certify the same, and that therefore said transcript is unavailing for any purpose on the appeal.

[1, 2] Said section 953a, under the authority of which plaintiffs elected to present the appeal, declares that the request to prepare the transcript must be filed with the clerk of the trial court within ten days after service of notice of entry of the order from which the appeal is taken. In the present case such notice was served on June 3, 1930, but the request was not filed until August 12, 1930, more than two months after the service of the notice; and the transcript was not certified until February 23, 1932, about eighteen months after the request was filed. Defendants contend, therefore, that, on account of plaintiffs having defaulted in failing to file timely request to prepare the transcript, "the trial judge was without jurisdiction to certify the transcript after the expiration of six months from the time of said default." This contention is based upon the assumption, however, that the six-month period fixed by section 473 of the Code of Civil Procedure within which the trial judge retained jurisdiction to relieve plaintiffs from their default began to run from the date on which plaintiffs should have filed the request for the transcript; and such is not the law, for it is well established that in proceedings of this kind the time does not begin to run until some proceeding or action is taken by the adverse party based upon the default, or some order of the court is made as a result thereof (Weyse v. Biedebach, 86 Cal. App. 728, 261 P. 1096; Hannon v. Goucher, 113 Cal. App. 539, 298 P. 528, 529; Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911; Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332; Banta v. Siller, 121 Cal. 414, 53 P. 935); and in the present case no such action was ever taken by defendants or the court. No application was ever made by defendants to the trial court to terminate the proceedings for the preparation of the transcript, nor did they make any objection at any time to the settlement, approval, or certification thereof. On the contrary, as the record discloses, on November 2, 1931, which was more than fifteen months after the date on which plaintiffs should have filed the request, and more than ten months subsequent to the date on which defendants claim the trial judge lost jurisdiction of the

matter, defendants actively participated in the preparation and settlement of the transcript by filing in the trial court a request for insertion in the transcript of numerous papers, files, documents, records, and proceedings, among them being all proceedings in connection with the impanelment of the jury; all proceedings taken in connection with the motion for a new trial, including defendants' notice of motion therefor and the affidavit of defendants' attorney used thereon; all instructions given, and notations showing at whose request the respective instructions were given; the instructions requested by defendants and refused by the court; the affidavit of plaintiffs' attorney; and all omitted proceedings in connection with the trial. And on November 4, 1931, the trial court made its order that defendants' request be granted. It thus clearly appears that even up to the time the transcript was presented to the trial judge for approval and certification, nothing was ever done to set in operation the running of the six-month period fixed by section 473; and, that being so, under the rule of the cases above cited, he retained full jurisdiction at all times to settle, approve, and certify the same.

In support of their position defendants rely mainly upon In re Barney, 191 Cal. 18, 214 P. 853, but an examination of the decision therein discloses that the determinative question here involved, namely, as to when the six-month period fixed by said section 473 of the Code of Civil Procedure begins to run, was not raised or considered. At least the decision makes no mention thereof, nor does it refer to any of the earlier cases upon the subject; and all the later cases hold definitely and without qualification, in conformity with the earlier ones, that the time "does not begin to run until some proceeding or action is taken by the adverse party based upon the default." See Hannon v. Goucher, supra. For the reasons stated, the decision in the Barney Case is not controlling here.

[3-5] It is equally well settled that failure to file the request for the preparation of the transcript within the statutory time is not jurisdictional to the appeal, nor does it constitute ground for dismissal thereof (Lynch v. Coe, 203 Cal. 422, 264 P. 747; Rubin v. Platt Music Co., 79 Cal. App. 756, 251 P. 243; Tasker v. Warmer, 202 Cal. 445, 261 P. 474), and that no formal application for relief from such default is necessary, the act of certification of the record by the trial judge being in effect the equivalent of relief from default under section 473 of the Code of Civil Procedure (Keys v. Mother Lode Extension Mines, 212 Cal. 612, 299 P. 524). It follows that, since the transcript certified in due form by the trial judge was on file herein at the time the present motion was noticed and heard, it is available as the record on appeal, even though the request for the preparation thereof was defective, and even though no formal application was made by plaintiffs to be relieved of their default prior to the certification thereof.

The motion is denied.

I concur: STURTEVANT, J.

124 Cal.App. 241

PEOPLE v. BRYANT.

Cr. 2185.

District Court of Appeal, Second District, Division 1, California.

June 10, 1932.

1. Criminal law ⇐894.

Pronouncing judgment more than 25 days after entering verdict *held* not error, where defendant did not object to such entry of judgment (Pen. Code, §§ 1191, 1202).

2. Criminal law ⇐543(2).

Admission of testimony in larceny prosecution given at preliminary hearing *held* not error, in view of showing witness was not within state and could not attend trial (Pen. Code, § 686).

3. Criminal law ⇐958(1).

Affidavits for new trial for newly discovered evidence stating pertinent matters therein on information and belief *held* insufficient grounds for new trial (Pen. Code, § 1181, subd. 7).

4. Larceny ⇐65.

Evidence *held* sufficient to sustain conviction of grand larceny.

Defendant was convicted of a theft described in the information as a taking willfully, etc., of money of the personal property of certain named person, and facts disclosed that such named person was the owner of an automobile, which defendant agreed to purchase, and that defendant induced owner to deliver to him a bill of sale of the automobile so that he could negotiate a loan for the balance of the purchase price he could not raise himself, and that defendant secured check from loan company, and then went with owner to a bank where defendant claimed he would secure a cashier's check to cover entire purchase price, but instead disappeared and was not seen by owner until his arrest.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Robert Bryant was convicted of grand larceny, and he appeals.

Affirmed.

John J. Hamilton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J.

[1] The defendant was convicted of the crime of grand larceny. He appeals from the judgment and from an order denying his motion for a new trial. The first point suggested in support of the appeal is that, by reason of lapse of time (more than twenty-five days) between the date of the verdict and the time of pronouncement of judgment, the court erred in pronouncing judgment over the objection of the defendant that the elapsed time exceeded that which under the conditions of this case was permitted under sections 1191 and 1202 of the Penal Code. The verdict was returned and entered on the 2d day of December, 1931. Judgment was pronounced on January 8, 1932, immediately following the denial of a motion for a new trial and the denial of an application for probation. The claim now made by appellant that on January 8th he moved for a new trial and objected to the pronouncement of sentence, on the grounds mentioned in section 1202 of the Penal Code, does not appear to be sustained by anything contained in the record. Therefore the point is not available to appellant at this time, and the court did not err in pronouncing judgment at the time above stated. People v. Okomoto, 26 Cal. App. 568, 573, 147 P. 598; People v. Manes, 104 Cal. App. 493, 497, 285 P. 1073; People v. Van Moltke (Cal. App.) 5 P.(2d) 917.

[2] Next, it is contended that the court erred in permitting the testimony of Mrs. Luna, as recorded in the transcript of the preliminary hearing, to be read to the jury and admitted into evidence over the objections of counsel. On October 19th the case was set to be tried on November 30th. On November 9th an amended information was filed, a new plea entered, and the case again set for November 30th, at which date and two days following the case was tried. Before the admission in evidence of the testimony which Mrs. Luna had given before the committing magistrate, it was shown by competent evidence that Mrs. Luna had gone from the state of California to the state of Texas about six weeks before the time of this trial, and that she had not returned to this state; it was further shown that on November 24th, in response to a telegram and letter from the district attorney, Mrs. Luna sent to the district attorney a letter in which she said, in substance, that she would not be able to be present at the trial of this action, and that her physician advised her that her physical condition would not admit of the trip. The letter and the telegram from Mrs. Luna were received in evidence without objection by defendant. The court did not err in overruling the objection or in receiving in evidence the testimony given by Mrs. Luna at the preliminary examination. Pen. Code, § 686; People v. Thomas, 100 Cal. App. 82, 279 P. 826; People v. Crandall, 100 Cal. App. 785, 281 P. 81.

[3] It is next contended that court erred in refusing to grant a new trial on the ground of newly discovered evidence, the nature of which was shown by affidavits filed in support of the motion. There is no merit in this point. Aside from the manifest weakness of the affidavits themselves, it is sufficient to note that the pertinent matters therein contained were stated on information and belief. To say the least, such affidavits are not sufficient to compel the granting of a new trial. Pen. Code, § 1181, subd. 7; People v. Feld, 149 Cal. 464, 478, 86 P. 1100.

[4] Next, it is claimed that the court erred in refusing to grant the defendant a new trial on the ground that the verdict was contrary to the evidence. In reading the argument contained in appellant's brief (page 75 et seq.), we do not find any clear or direct specification of any particular wherein the evidence fails to sustain the verdict. The theft of which the defendant was convicted was in the information described as a taking willfully, etc., of money "of the personal property of Mrs. Fanchon P. Luna." The defendant orally agreed to purchase from Mrs. Luna her automobile and to pay therefor $1,650. Representing to her that he had only $1,000 of money in hand, and that it would be necessary for him to mortgage the automobile for the remaining $650, he induced her to deliver to him a bill of sale of the car in order that he might go into a loan office and negotiate the $650 loan. This was done; Mrs. Luna and her sister remaining in the car, near said loan office. After thus obtaining from the loan company a check for $750, defendant got into the car and they drove to a place near a bank, where defendant said that he had his money on deposit. He left Mrs. Luna and her sister in the car, while he went into the bank where he had promised that he would obtain for Mrs. Luna a cashier's check for the $1,650 which she was to receive. Then he promptly disappeared. Mrs. Luna did not see the defendant again until after his arrest on the present charge. In a case of this kind "an erroneous allegation as to the person injured" is not

material. Pen. Code, § 956; People v. Larrabee, 113 Cal. App. 745, 299 P. 85; People v. Melson, 84 Cal. App. 10, 257 P. 555; People v. Mills B. Sing, 42 Cal. App. 385, 395, 183 P. 865.

Finally, there are two assignments of misconduct of the district attorney in making certain statements to the jury. Both of these items are too trivial to require discussion.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

CASSERLY v. CITY OF OAKLAND et al.

S. F. 14490.

Supreme Court of California.

June 14, 1932.

Rehearing Denied July 14, 1932.

1. Municipal corporations ⇐200.

Respecting question whether fireman contracting disease is killed within city charter granting widow's pension, length of time between injury and death is not controlling.

Length of time elapsing between injury and death is not controlling, provided that injuries received are proximate cause of death.

2. Municipal corporations ⇐200.

Words "injury" and "killed," within city charter granting pension to fireman's widow, include any injury or disease arising out of and in course of employment, which causes incapacity or death.

The words "injury" and "killed" are not limited in their interpretation to injuries caused by external violence, physical force, or as a result of accident in the sense that the words are commonly understood, but they are given a much broader and liberal meaning. The word "injury" has reference not to some break in some part of the body or some wound thereon, or the like, but rather to the consequence or disability that results therefrom.

[Ed. Note.—For other definitions of "Injury" and "Kill," see Words and Phrases.]

3. Municipal corporations ⇐200.

City charter granting pension to widow of fireman killed while performing duty should be liberally construed.

4. Municipal corporations ⇐200.

Fireman dying from broncho-pneumonia contracted in performing duty *held* "killed" within meaning of city charter granting widow's pension.

In Bank.

Petition by Nora Casserly for a writ of mandate against the City of Oakland and others to compel respondents to grant petitioner's application for a widow's pension.

Writ granted.

See also (Cal. App.) 4 P.(2d) 180.

Decoto & St. Sure, of Oakland, for petitioner.

C. Stanley Wood, City Atty., and John W. Collier, Dep. City Atty., both of Oakland, for respondents.

TYLER, Justice pro tem.

Petition for writ of mandate.

The applicant is the widow of one William Casserly, deceased. At the time of his death Casserly was a member of the Oakland fire department. His death was caused by broncho-pneumonia, which affliction was contracted in the performance of his duty as a fireman of such city on the 6th day of November, 1930, as the direct result of a fire drill participated in by him under orders from his superior officer. His death occurred on December 21st, following. Thereafter, petitioner herein duly filed an application before the board of trustees of the firemen's relief and pension fund of the city, praying that she be granted a pension in accordance with the provisions of section 104, subdivision (1) (a) of the charter of the city of Oakland. Section (1) of the charter reads as follows: "Sec. 104 (1) The Board of Trustees shall, out of the Firemen's Relief and Pension Fund, provide for the family of an officer, member or employee of the Department, who may be killed while in the performance of his duty as follows." Subdivision (a) of said section reads as follows: "(a) Should the decedent be married, his widow shall, as long as she shall remain unmarried, be paid a monthly pension equal to one half of the salary attached to the rank held by the decedent at the time of his death." After a hearing upon the application, the board found that Casserly had contracted the disease which caused his death as a direct result of the fire drill mentioned, but it concluded that he was not "killed" while in the performance of his duties, and the relief sought was denied.

[1-4] The sole question here presented is whether a fireman who contracts a disease in the performance of his duty, and whose death occurs within a short time thereafter as the direct result thereof, is "killed while in the performance of his duty" within the meaning of section 104, subdivision (1) of the charter of the city of Oakland. Preliminary to a discussion of this question, it may be stated that the length of time elapsing between injury and death is not controlling, provided the injuries as here received are the proximate cause of the death. Averdieck v. Barris, 87 Cal. App. 626, 262 P. 423. The words "injury" and "killed," as used in the charter, and similar provisions which provide for compensation in cases of this character are not limited in their interpretation to injuries caused by external violence, physical force, or as a result of accident in the sense that the words are commonly used and understood, but they are given a much broader and liberal meaning. So construed, they include any injury or disease arising out of and in the course of the employment, which causes incapacity or death. The word "injury" has reference not to some break in some part of the body or some wound thereon, or

the like, but rather to consequences or disability that result therefrom. Courts are practically unanimous in holding that the words should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized. Such legislation should be applied fairly and broadly, with a view to confer the benefits intended.

The courts of the various jurisdictions, in construing provisions of the character here involved, have held all character of diseases to be injuries where there is a causal connection between the work and the disease. These cases are extensively reviewed in San Francisco v. Industrial Accident Commission, 183 Cal. 273, 191 P. 26. It is there held that disease is included within the terms, where there exists the relation of cause and effect between the employment and the disease, as it is then a harmful effect upon the body. See, also, Johnson's Case, 217 Mass. 388, 104 N. E. 735, where it is held that, where one is employed as a lead grinder and becomes sick by the absorption of lead in his system, he suffers a personal injury. To the same effect is Hurle's Case, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, and Brightman's Case, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321. In United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276, an employee became overheated and wet with perspiration while in the performance of his duty. He took a chill which developed nephritis as a direct result therefrom, and the disease was held to be an injury in contemplation of the statute.

The same construction has been given to an accident insurance policy which insured against bodily injury sustained through accidental means. There the insured suffered an infection caused by contact with germs in the course of his employment. In holding this disease to be an injury, the court, in the course of its opinion, said: "From the standpoint of pure reason, whether bodily injury which produces a weakening or disintegration of the physical system is caused by flying germs or by flying shrapnel or by a poisoned arrow or by the sting of an insect is only a matter of degree as to the size or quality of the missile or instrumentality inflicting the injury." Moore v. Fidelity & Casualty Co., 203 Cal. 465, 471, 265 P. 207, 209, 56 A. L. R. 860.

The policy of this state is to construe provisions of the character here involved liberally, serving as they do a beneficial purpose. Klench v. Board of Pension Fund Commrs., 79 Cal. App. 171, 249 P. 46; Hurley v. Sykes, 69 Cal. App. 310, 231 P. 748. So construed, we are of the opinion that the injury suffered by Casserly comes within the purview of the act.

By charter provisions of the city and county of San Francisco, provision is made for the family of a member of the police department who may be killed or injured while in the performance of his duty. One Buckley, a member of the department, in climbing a flight of stairs where his services in the performance of his duty were required, suffered a heart spasm from which thereafter and in a few hours he died. His widow made application for the benefits provided for under the charter. Relief was denied her on the ground that he was not killed while in the performance of his duties. This court held that the order denying the applicant a pension was a clear abuse of discretion, as the cause of his death was an injury in his occupation. Buckley v. Roche (Cal. Sup.) 4 P.(2d) 929. The charter provision there construed is almost identical in terms with the charter provision here involved. The decision in that case is therefore here controlling. See, also, G. L. Eastman Co. v. Industrial Acc. Com., 186 Cal. 587, 200 P. 17; Knock v. Industrial Acc. Com., 200 Cal. 456, 253 P. 712; Fogarty v. Dept. of Indus. Relations, 206 Cal. 102, 273 P. 791. This conclusion is not only in keeping with the spirit but also with the letter of the charter provision in question.

From what we have said, it follows that petitioner is entitled to the relief demanded. It is therefore ordered that respondents grant and pay to petitioner the pension as prayed for in her application herein referred to.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

215 Cal. 634

STEIGER v. COLLINS, Registrar of Voters.

S. F. 14684.

Supreme Court of California.

June 21, 1932.

As Amended July 8, 1932.

1. Judges ⇐3.

Statute requiring that candidate for judge of superior court select which particular judgeship he is candidate for does not violate constitutional provision respecting superior court (Const. art. 6, § 6; St. 1927, p. 528, as amended by St. 1931, p. 210).

St. 1927, p. 528, as amended by St. 1931, p. 210, provides, in substance, that in elections of judges or justices of any court of record or other inferior courts it shall be deemed that there are as many separate judicial offices to be filled as there are judges of court to be elected, and that each of such separate offices shall be designated by distinguishing number not greater than total number of such judges or justices to be elected. Const. art. 6, § 6, provides

that there shall be in each of organized counties, or city and counties, a superior court, for each of which at least one judge shall be elected.

2. Judges ⇐3.

Statute requiring any candidate for judge of superior court to select which particular judgeship he is candidate for does not violate constitutional provision laying down rule for determining who is elected in cases where Constitution or statutes provide for electing two or more persons to single office (St. 1927, p. 528, as amended by St. 1931, p. 210; Const. art. 2, § 2¾).

In Bank.

Application for writ of mandate by George J. Steiger against C. J. Collins, as Registrar of the Voters of the City and County of San Francisco.

Writ denied.

Leo R. Friedman, of San Francisco (Robert E. Fitzgerald, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (Maurice E. Harrison, Max C. Sloss, Charles A. Shurtleff, Edward I. Barry, Lloyd W. Dinkelspiel, and John R. Golden, all of San Francisco, of counsel), for respondent.

Charles A. Beardsley and Thomas J. Ledwich, both of Oakland, amici curiæ for Alameda County Bar Ass'n.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, amici curiæ.

Kemper Campbell, Henry F. Prince, and Alex. W. Davis, all of Los Angeles, amici curiæ for Los Angeles County Bar Ass'n.

WASTE, C. J.

Petitioner, a potential candidate for election to the office of judge of the superior court of the state of California, in and for the city and county of San Francisco, seeks a writ of mandate to compel the respondent, as registrar of voters, to accept and file petitioner's declaration of candidacy, and to transmit the same to the secretary of state as required by the election laws. The respondent demurs to the petition. He refuses to receive and file the declaration of candidacy for the reason that petitioner has not specified in said declaration for which of the so-called number designated offices of superior judge he is a candidate.

The Constitution of California has provided, since 1908, that the Legislature shall enact laws providing for the direct nomination by the electors of candidates for public office. Article 2, § 2½. Pursuant to this mandate of the Constitution, the Legislature, in 1927, passed a statute (Stats. 1927, c. 316, p. 528 as amended in 1931, Stats. 1931, c. 150, p. 210) regulating "the method of, nominating, voting for and electing candidates for judicial offices at primary and general elections by giving each office a designating number for the purpose of elections where two or more judges or justices of any court of record are to be elected for the same term at the same election," which act reads as follows:

"Section 1. In any election hereafter held at which two or more judges or justices of any court of record, or of any justice of the peace court, or of any other inferior court now existing or which may hereafter be provided by law, are to be elected for the same term, and in the primary election preceding such election, it shall be deemed for all purposes of such election and primary election, and all stages and proceedings thereof, including the canvass of returns and the declaration of the result, that there are as many separate judicial offices to be filled as there are judges or justices of said court to be elected, each of said separate offices shall be designated by a distinguishing number not greater than the total number of such judges or justices to be elected for the same term at the same election.

"Such designation shall remain the same for all purposes of both primary and general election and shall be used on all nomination papers, certificate of nomination, ballots, certificate of election and on all election papers referring to such office.

"After election and the issuance of the certificates of election such designating number shall have no further significance.

"Sec. 2. Each candidate for judicial office for which two or more judges or justices are to be elected for the same term at the same election as herein provided, not more than ten days nor less than five days prior to the first day on which his nomination papers may be circulated and signed, shall file in the office in which his nomination papers are required to be filed, a written and signed declaration of his intention to become a candidate for such office and shall state in such declaration for which of the said number-designated offices of courts of record he intends to become a candidate.

"Sec. 3. Such offices shall be separately designated for such numbers upon all ballots and separately grouped and arranged thereon in numerical order. No person may be a candidate nor have his name printed upon any ballot as a candidate for any other of such number-designated offices than the one designated by him in his declaration of intention to become a candidate."

Respondent cites the provisions of this statute in justification of his refusal to accept and file the declaration of petitioner.

[1] Petitioner contends that the act is unconstitutional in that it attempts to change the provisions of the general primary law by dividing the superior court of any county or city and county into as many courts as there

are judges to be elected, and requires that any candidate for such office must select which particular judgeship he is a candidate for, instead of allowing him merely to run against all other contenders for the office of judge of the superior court. His contention rests wholly upon the provisions of the State Constitution (article 6, § 6) that "There shall be in each of the organized counties, or city and counties, of the state, a superior court, for each of which at least one judge shall be elected. * * *" Therefore, argues petitioner, there can be but one office of superior judge, and the act of 1927, supra, is unconstitutional, in that it makes for all purposes of general and primary election as many separate and distinct superior courts in a county or city and county as there are judges to be elected. He cites in support of his contention a decision of the Supreme Court of Ohio, State v. Bernon, 124 Ohio St. 294, 178 N. E. 267. We cannot approve the contention of petitioner or accept the opinion of the Ohio court. Each rests upon a confusion of the terms "judges" and "courts." Petitioner's entire argument on this point is based upon the theory that the superior court judges occupy a single office. The provision of the Constitution has nothing whatever to do with the question whether the judges constituting the superior court shall be deemed to hold one or several offices. A decision of the Supreme Court of Washington on the precise point is applicable here. In State v. Bartlett, 131 Wash. 546, 230 P. 636, the court was called upon to construe provisions in the Constitution of that state similar to the provisions of our own Constitution with reference to the superior court. The court held that the provisions should not be construed as a declaration that there was but one "office" of superior court judge in each county, and pointed out that "confusion should be avoided between 'judges' and 'courts.'" "The court is one entity," continues the decision, "of which there may be several judges, and, the Legislature having been given power [as in the case in California] to designate the number of judges constituting a court in each county, there seems no reason why the same body may not enact such reasonable procedure as it sees fit for the election of these several judges."

[2] Neither do we share with petitioner his view that the act of 1927, supra, conflicts with article 2, § 2¾, of the Constitution. There is nothing in that section, or any other section cited by him, that in any manner indicates an intention that all or any number of the judges of a single court must be regarded as occupying a single office. The section, as we view it, merely lays down a rule for determining, in the case of judicial, school, county, township, or other nonpartisan office, who is elected in those cases where the Constitution or statutes provide for electing two or more persons to a single office. But we find nothing in the language of the section that requires the election of two or more persons to a single office in the case of the election of judges of the superior court. As in the Washington case, the Constitution of this state directs the Legislature to enact laws providing for the direct nomination of candidates for public office by the electors. Article 2, § 2½, supra. The section relied on so strongly by petitioner (section 2¾), not requiring a different mode of nomination than that prescribed for judicial officers by the act of 1927, supra, and the plan therein appearing to us to be workable and not in any way unreasonable, the petition of petitioner must fail.

The position taken by the Supreme Court of Ohio in State v. Bernon, supra, is not, in our opinion, sufficient to warrant our declaring the statute of 1927 unconstitutional. Neither do we feel that the decisions of this state cited by petitioner on the point that there is but one superior court in each county or city and county go so far as to hold that it therefore follows that there is but one office of superior judge in such county, or city and county. A case just called to our attention which tends to uphold the constitutionality of the statute of 1927 here in question is Kerr v. Luttrell, 143 Okl. 275, 288 P. 938.

Further discussion of the points raised by petitioner seems to be unnecessary.

The demurrer of respondent is sustained, and the application for the writ of mandate is denied.

We concur: PRESTON, J.; SHENK, J.; LANGDON, J.; TYLER, Justice pro tem.; SEAWELL, J.; CURTIS, J.

215 Cal. 773

Francis D. ADAMS, Petitioner, v. William KERR, as Registrar of Voters of the County of Los Angeles, State of California, Respondent.

L. A. 13746.

Supreme Court of California.

June 21, 1932.

In Bank.

Application for writ of mandate prayed to be directed to respondent as Registrar of Voters of Los Angeles County to compel him to accept declaration of candidacy at large for office of judge of the superior court. Writ denied.

Francis D. Adams, of Hollywood, in pro. per.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

Kemper Campbell, Henry F. Prince, and Alex. W. Davis, all of Los Angeles, amici curiæ for Los Angeles County Bar Ass'n.

PER CURIAM.

Petitioner seeks the issuance of a writ of mandate directed to the respondent as registrar of voters of the county of Los Angeles, compelling him to accept and file petitioner's declaration of candidacy and other documents relating thereto, as required by the election laws. Respondent, in his answer to the petition, for the writ, alleges that petitioner has failed to specify the number designated office for which he seeks to become a candidate. Respondent therefore asserts that he is not required nor authorized to accept and file petitioner's declaration of candidacy.

The contentions advanced by petitioner are substantially the same as those advanced in the case of Steiger v. Collins (Cal. Sup.) 12 P.(2d) 426, opinion in which case has this day been handed down. On the authority of that decision, the application for a writ of mandate is denied.

215 Cal. 659

PRETZER v. PRETZER et al.

L. A. 12351.

Supreme Court of California.

June 23, 1932.

1. Divorce ⇐255.

Where divorce decree adjudged that realty was community property and gave each party one-half, court in wife's action to quiet title against husband and his grantee properly decreed that wife owned one-half rather than all of property.

2. Husband and wife ⇐267(7).

Deed to community property executed without wife's consent, although ineffective respecting wife's interest, is valid as to husband's interest.

3. Husband and wife ⇐264.

Finding that realty was community property *held* supported by evidence.

Finding in question was amply supported by positive testimony of wife as to source and amount of earnings of herself and her husband; that such earnings were used to purchase certain land and to build thereon a dwelling; and that no other money was used for that purpose.

In Bank.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Margaret Pretzer against Heinrich Pretzer and another. Judgment for plaintiff, and defendants appeal.

Trial court directed to modify its findings and judgment in accordance with the opinion.

Superseding opinion in (Cal. App.) 9 P.(2d) 522.

Irvine P. Aten, of Fresno, for appellants.

B. M. Benson, of Fresno, for respondent.

TYLER, Justice pro tem.

Action to cancel a deed and quiet title to certain real property. The action was instituted by Margaret Pretzer against Heinrich Pretzer, her former husband, and Peter Pretzer, her father-in-law. The deed sought to be canceled was executed July 15, 1926, by the husband to his father. Heinrich Pretzer and Margaret Pretzer were married in the year 1921, and they separated December 4, 1928. In 1929, plaintiff instituted an action for divorce against her husband. In such action she asked to be awarded the custody of a minor child, support for herself and such child, and also a division of the property consisting of the real estate here involved and some personal property, all of which was alleged to be the community property of the parties. After trial the court found in favor of plaintiff, granted her an interlocutory decree of divorce, gave her the custody of the minor child, with provision for its support, and decreed that the property was community in character and disposed of it between them. As to the real property here involved, the decree awarded an undivided one-half interest to each, and each was decreed to be the owner of such interest. The husband's interest was impressed with a lien to insure the payment of $25 per month for the care and support of the minor child. The interlocutory decree was rendered June 12, 1929, and it became final, no appeal having been taken therefrom.

The present action was commenced October 19, 1929. In the first cause of action, which is one to quiet title, it is alleged that Margaret Pretzer and Heinrich Pretzer are the owners of the property in question and it is sought to quiet their title against the estate or interest in the property asserted by Peter Pretzer under his deed. The second cause of action alleged that the property was acquired by Margaret and Heinrich Pretzer during coverture as community property; that the deed from Heinrich Pretzer to Peter Pretzer was made without the knowledge or consent of Margaret Pretzer, and without her joining therein, and without consideration therefor, and for the purpose of defrauding her out of her interest in the property. To this complaint the father and son filed a joint answer. Ownership in Margaret and Heinrich

was denied, and it was alleged that the property was originally the separate property of Heinrich, having been acquired by him during coverture by means of a gift of money from the father, who, it was alleged, owned the property by reason of the deed to him by Heinrich; that such deed conveyed the separate property of Heinrich to Peter and vested title in him. The answer practically amounted to a disclaimer in the property by Heinrich, and asserted title in Peter. The trial court found that Heinrich claimed no interest in the property; that it was originally acquired by Margaret and Heinrich from their joint earnings during coverture and not by means of a gift from father to son; that the deed was without consideration, fraudulent, and therefore void. The judgment canceled the deed and quieted title to the entire parcel in Margaret against both father and son.

[1, 2] Defendants appealed to this court from the judgment, and the case was transferred to the District Court of Appeal, Fourth District, for decision. The court properly modified the award and decreed plaintiff to be the owner of one-half of the property in lieu of all of it, but followed the decision of the trial court in holding the deed from Heinrich, the husband, to Peter, the father, void and ineffective for any purpose. In this the court committed error. A deed to community property, executed without the wife's consent, while ineffective as to her interest, is valid and binding as to the husband's one-half interest. Dargie v. Patterson, 176 Cal. 714, 169 P. 360; Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67. This being so, the grantee named in such a deed would acquire an interest in the property and the deed should not therefore be decreed to be wholly void and should not be canceled.

From what we have said, it follows that the portion of the judgment canceling the deed is erroneous, as is also the portion quieting respondent's title to all of the property as the wife was the owner of but an undivided one-half interest therein with simply a lien upon the other half to insure the award made in the divorce decree.

[3] Appellants also urge a reconsideration of the evidence relating to the character of the property involved; it being claimed that the finding in this respect is not supported by the evidence. Respondent testified positively to the source and amount of the earnings of both herself and her husband, and that these earnings were used to purchase the vacant lot in question and to build thereon the dwelling, and that no other money was used for this purpose. This evidence is amply sufficient to support the finding objected to.

From what we have said it follows that the judgment cannot stand. Accordingly, the trial court is directed to modify its findings and judgment in accordance with the views herein expressed, and enter judgment in conformity with such views.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

215 Cal. 698

TRUTALLI v. MERAVIGLIA.

S. F. 13933.

Supreme Court of California.

June 24, 1932.

Contracts ⇐140.

Parties who agree to unlawfully cohabit together may lawfully agree that man shall hold all property acquired by either for joint benefit.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Timothy I. Fitzpatrick, Judge.

Action to quiet title by Charles Trutalli against Rita Meraviglia, also known as Rita Trutalli, also known as Rita Graziani, who filed cross-complaint. From judgment for cross-complainant, plaintiff appeals.

Affirmed.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

Albert J. O'Brien, of San Francisco, for respondent.

CURTIS, J.

This appeal is taken upon the judgment roll alone. The action was brought by plaintiff to quiet his title to certain real property situated in the city and county of San Francisco. The defendant answered, and, in addition to her answer, filed a cross-complaint in which she claimed to be the owner of an undivided one-half of said real property, and also the owner of an undivided one-half of another parcel of land situated in the county of Santa Clara. Each of said two parcels of real property stood upon the public records in the name of the plaintiff who claimed to be the sole owner of the same. The court made findings of fact upon which judgment was entered in favor of the defendant upon her cross-complaint. Two of these findings are as follows:

"II.

"That in the year nineteen sixteen (1916) the plaintiff and defendant, without the performance of a marriage ceremony, agreed to become and live together and assume the mar-

ital relation between themselves and the world, as husband and wife; that thereupon said plaintiff and defendant did assume said marital relation openly, publicly and notoriously, and were known to the public in general, and their friends in particular, as husband and wife, living and cohabiting together as such, and so continued until the latter part of the year nineteen twenty-seven (1927); that during said time there were born to plaintiff and defendant, as the issue of said cohabitation, two (2) children, to-wit: Alma, a girl, of the age of twelve (12) years, and Disma, a girl, of the age of eleven (11) years.

"III.

"That it was mutually agreed by and between the plaintiff and defendant herein, upon the making and entering into of said agreement set forth in paragraph one (1) herein, that the defendant would perform all the necessary household services, and that all monies derived by either, or both, of said parties would be paid to the plaintiff to be invested by him for the benefit of both parties from time to time; and that all property, real and personal, acquired by said plaintiff should be held by him for the joint benefit of the said parties, each having an undivided one-half (½) interest therein."

The court further found: "Finding V. That as a result of the joint efforts of plaintiff and defendant, under and by virtue of said agreement, and while they were living and cohabiting together as husband and wife, the plaintiff purchased, with funds accumulated through the joint efforts of plaintiff and defendant," the real property described in said cross-complaint.

Plaintiff now seeks to set aside this judgment in favor of the defendant on the ground that the agreement under which said parties acquired said real property was based upon an immoral consideration, and is therefore unenforceable against either party thereto. We do not so understand the findings. The agreement to live together as husband and wife without the formality of a marriage ceremony is set forth in finding II, quoted above. The agreement to invest their separate earnings for their joint benefit, and that all property so acquired should be owned by them jointly, is set forth in finding III. While the court found that the parties agreed "upon the making and entering into" the agreement of cohabitation that they would invest their earnings in property to be held jointly by them, it did not find that this latter agreement was a part of, or that it was in any manner connected with, their agreement to unlawfully cohabit together. The two agreements, although made at the same time, are separate and distinct contracts, and neither is made dependent upon the other. Therefore it cannot be said that the consideration of the latter agreement was the unlawful cohabitation assented to in the agreement set forth in finding II. It clearly appears from finding III that the consideration of plaintiff's agreement to hold all property for their joint benefit, which was acquired by their joint efforts, was the agreement on defendant's part that all moneys earned by her should be paid to plaintiff and invested by him in property of which each party was to be the owner of an undivided half.

While we find no authority exactly in point, the case of McWhorter v. McWhorter, 99 Cal. App. 293, 278 P. 454, is somewhat similar to the present action. In that case the parties were shown to have lived together as husband and wife without having gone through a legal marriage ceremony. During their cohabitation, they acquired certain property as joint tenants. After the termination of said relationship, the plaintiff, who had lived with the defendant as the latter's wife, sought a partition of their property. It was sought by the defendant to defeat her claim on proof that plaintiff knowingly entered into the improper relationship with the defendant. While the court found against defendant in that contention, it was claimed on appeal that the finding of good faith on the part of the plaintiff was not supported by the evidence. In ruling upon this point the court said (page 294 of 99 Cal. App., 278 P. 454, 455): "The chief contention of the appellant is that the evidence fails to support the findings of the court to the effect that the plaintiff lived and cohabited with the defendant 'in good faith' believing that their relationship was equivalent to what has been termed a common-law marriage. * * * We are of the opinion that it is entirely immaterial, so far as the determination of this appeal is concerned, whether they lived together in good faith as husband and wife, or otherwise. The evidence is ample to support the finding that they acquired and held the property as joint tenants. * * * The validity of the marriage in no way affects the character of the property or the relative rights of ownership."

In the present action a somewhat similar situation is before us. The fact that the parties to this action at the time they agreed to invest their earnings in property to be held jointly between them were living together in an unlawful relation did not disqualify them from entering into a lawful agreement with each other, so long as such immoral relation was not made a consideration of their agreement. As we have seen, the findings of the court are not susceptible of such a construction.

The authorities cited by plaintiff and relied upon by him in support of his contention that the agreement upon which the defendant relies was based upon an immoral consideration are not applicable to the facts in the present action. They simply hold, as stated by the plaintiff in his brief, "that agreeing to live

and cohabit together as man and wife, without the performance of a marriage ceremony constitutes an illegal and immoral consideration for the basis of a contract, and is, therefore, a void consideration." There is no question but that this statement of law is correct, but, as we have shown, the facts as found by the court in this action do not bring this case within the principles of law there enunciated.

We do not think it necessary to discuss other points made by the appealing plaintiff. We have examined them with considerable care, and find no merit in any of them. A discussion of them in detail would be of no advantage to any one.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; TYLER, J. pro tem.

215 Cal. 702

STEVENS v. STEVENS (BURTON, Intervener).

L. A. 12414.

Supreme Court of California.

June 24, 1932.

1. Divorce ⇐228.

Interlocutory decree of divorce in so far as providing for payments directly to attorneys was in excess of jurisdiction.

2. Divorce ⇐150(2).

Findings in divorce action that certain specified allegations of complaint were true, and that certain allegations in cross-complaint were not true, warranted decree (Civ. Code, § 122).

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Divorce action by W. O. Stevens against Ethel Fay Stevens, wherein Clara Burton intervened. From an interlocutory decree of divorce in favor of plaintiff, defendant appeals.

Modified, and, as modified, affirmed.

Margaret B. Connell and M. H. Broyles, both of Los Angeles, for appellant.

Hugh E. Macbeth, of Los Angeles, for respondent.

PER CURIAM.

The defendant wife appeals from an interlocutory decree of divorce entered in favor of the plaintiff husband. The appeal is presented on a clerk's transcript. In addition to asking for a dissolution of the marital bonds, the complaint prayed for the custody of one of the two minor children of the parties and for an equitable division of the community property. The defendant answered and filed an amended cross-complaint also praying for a judgment of divorce on the ground of cruelty, custody of the minor children, permanent alimony, an equitable division of the community property, and for counsel fees and costs. A complaint in intervention was filed by Clara Burton wherein she alleged that certain moneys on deposit in designated branch banks in Los Angeles county and standing in the name of the appellant, as trustee, or in the name of Ethel Fay Page, which deposits were being held under a restraining order of the court below, were in fact, her moneys. The court appointed a receiver. No respondent's brief has been filed.

The action came on for trial upon the issues raised by the several pleadings referred to. The court below found the allegations of extreme cruelty of respondent's complaint to be true, and decreed a divorce in his favor. It was adjudged that appellant take nothing by her cross-complaint. It was also decreed that the intervener take nothing. The intervener has not appealed.

The court further found that the aforesaid deposits were the community property of the spouses. Said deposits were therefore ordered turned over to the receiver as community property. In its decree the court directed that the community personal property, other than the bank deposits referred to, be divided between the spouses, and that the receiver sell the real property and dispose of the proceeds in accordance with its decree.

The decree provided for the payment of $800 to the attorneys of each of the parties. The appellant and respondent had each previously been allowed $200 for attorneys' fees. However, this first allowance was to the parties to the action and not to the attorneys direct. The balance of the proceeds in the receiver's hands were ordered paid in the following manner: One-half thereof, plus $300, to the respondent; the balance to the appellant. The defendant appeals from the whole of the judgment.

[1] Appellant attacks the validity of that portion of the decree which provides for the payment of $800 directly to each of the attorneys of the respective parties rather than to the parties themselves. The action of the lower court in this regard was unauthorized and in excess of its jurisdiction. Sharon v. Sharon, 75 Cal. 1, 39, 16 P. 345; Pennell v. Superior Court, 87 Cal. App. 375, 377, 262 P. 48. The attorneys were not parties to the action, and any award of counsel fees should have been made to the parties litigant. It

necessarily follows that the portion of the decree directing the receiver to "pay to W. O. Tyler, Esq., and Bert MacDonald, Esq., Attorneys for the Defendant, * * * the sum of Eight Hundred dollars ($800) for accrued Attorney's fees," and "to Hugh E. Macbeth, Esq., Attorney for the Plaintiff herein, the further sum of Eight Hundred dollars ($800) for accrued Attorney's fees," was without the power of the lower court to make. It will be remembered that plaintiff husband did not ask for any attorney's fees in his complaint and the wife asked for only $250. Both parties received $200 as attorneys' fees. The appellant wife complains that the court made an allowance in the judgment of attorneys' fees for past services greater than was asked by her in her complaint. The $1,600 under our order will be returned to the common fund to be divided equally between the parties. Of course this order does not determine the question whether the attorneys for either party are entitled to a greater sum than the amounts which each has already received on account of attorneys' fees.

[2] Appellant urges further that the judgment is void in that the lower court made a finding which is a complete bar to the judgment which was given in favor of the respondent. This contention is based upon the trial court having made a general finding that the allegations of certain designated paragraphs of the complaint were true and that certain allegations contained in designated paragraphs by reference of appellant's first amended cross-complaint were untrue, the effect of which, appellant argues, was to create a negative pregnant and result in a finding that all of the allegations in the paragraphs mentioned of the defendant's first-amended cross-complaint are true, and under the doctrine of recrimination embodied in section 122 of the Civil Code, if said allegations be true, then such would be a bar to a divorce being granted to the respondent, and the judgment is therefore not supported by the findings. The appellant cites Auerbach v. Healy, 174 Cal. 60, 65, 161 P. 1157, 1159, as supporting such a contention. In that case, however, there was no finding upon a material issue, and it was sought to supply one by implication by resort to a general finding "that all of the allegations in defendants' answer are not true." The lower court properly held that because of certain material denials of the answer that this general finding did not negative the fact that some of the allegations may have been true. In the present case, however, the findings are direct that certain specified allegations of plaintiff's complaint are true, and that certain specified allegations incorporated by reference in the defendant's first amended cross-complaint are not true. This method of making findings is not erroneous.

In view of what has been said, further allowance of attorneys' fees is stricken from the judgment, and, as so modified, the judgment is affirmed.

215 Cal. 671

EKMANN v. PLUMAS COUNTY BANK et al.

Sac. 4562.

Supreme Court of California.

June 23, 1932.

1. Limitation of actions ⇐13.

Mortgagors' grantee, for whose benefit mortgagee granted extension on mortgagors' signing waiver of limitations, *held* estopped to assert limitations, though he did not sign written waiver.

2. Limitation of actions ⇐172.

Subsequent purchasers and incumbrancers may plead limitations against first mortgagee, though extension agreement, made without their consent after transfer or creation of junior encumbrance, prevents running of statute as between parties to mortgage.

3. Limitation of actions ⇐172.

First mortgagee was bound to ascertain existence of third party interests from public records before accepting extension of foreclosure limitation period.

4. Mortgages ⇐155.

Antecedent debt constitutes valuable consideration for transfer of property as security, and holder of security is purchaser for value as to third persons.

5. Limitation of actions ⇐13.

Bank without knowledge of extension of limitation period for foreclosure of first mortgage when it received trust deed from mortgagors' grantee *held* not estopped to assert statute as defense to foreclosure suit.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Isabella G. Ekmann against the Plumas County Bank and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

George F. Jones, of Oroville, for appellant.

H. B. Wolfe, of Quincy, for respondents.

SEAWELL, J.

The question presented by this appeal is whether a mortgagor, by waiving or extending the bar of the statute of limitations, could have affected the rights of a junior holder of

a trust deed, which had no knowledge of, and did not consent to, the agreement of waiver entered into between the senior mortgagee and mortgagor.

On October 6, 1921, George W. McMillan and Mary E. McMillan, his wife, being the owners of the real property in suit, acknowledged two deeds wherein said McMillan and wife were grantors and J. C. Boyle was grantee. Said deeds were not delivered or recorded until October 23, 1925, and appellant did not have actual notice of their existence until after she commenced her action to foreclose her first mortgage lien. On July 17, 1923, McMillan and wife executed a promissory note in the principal sum of $2,500, payable one year from date, to Isabella Ekmann. On the same day the McMillans executed a mortgage to secure the payment of said note, which was recorded on September 29, 1923.

On January 4, 1928, said J. C. Boyle and Rae E. Boyle, his wife, being indebted to respondent Plumas County Bank in the sum of $2,750, as evidenced by a promissory note dated October 5, 1927, and due December 4, 1927, executed a deed of trust in favor of said bank on the property described in the Ekmann mortgage. This trust deed was made to cover said antecedent indebtedness, and was recorded on February 15, 1928.

On July 16, 1928, said McMillan and wife, at the request of J. C. Boyle, who had been importuning appellant, Mrs. Ekmann, first mortgagee, not to commence a foreclosure proceeding, entered into an agreement in writing by the terms of which, in consideration of Mrs. Ekmann forbearing to file a foreclosure action within the period of the statute of limitations, they agreed to waive the right to plead the statute in defense of any action filed within six months from the 17th day of July, 1928, the date of the expiration of the period of limitations. It is admitted that the Plumas County Bank did not consent to said waiver, and did not know of its existence until after July 17, 1928.

Appellant, Mrs. Ekmann, on December 22, 1928, within the period covered by said waiver of the statute of limitations, but beyond the statutory period provided in the note and mortgage, commenced an action of foreclosure of said mortgage. Six days thereafter, to wit, December 28, 1928, the trustees under said deed of trust sold the real property in suit to the Plumas County Bank. Said bank pleaded the statute of limitations as a bar to the McMillan mortgage. The court found that the McMillan mortgage was barred as to said bank by the statute of limitations.

[1] There can be no doubt that Boyle, for whose benefit the extension was granted, was estopped to assert the statute of limitations, although he did not sign the written waiver. The extension was granted at Boyle's request, and, after it had been prepared by appellant's attorney, Boyle procured the McMillans to sign it. He represented to appellant that he was negotiating with the Plumas County Bank to refinance both loans on the property and expected to pay the debt due her. These negotiations were unsuccessful. It was Boyle who had originally induced plaintiff to make the loan evidenced by the McMillan note and mortgage.

[2] But it does not follow that the estoppel against Boyle is available against the said Plumas County Bank. The proposition that subsequent purchasers and incumbrancers can successfully plead the statute against the holder of a first mortgage, although an extension agreement entered into without their consent subsequent to the transfer or creation of the junior incumbrance, or the mortgagor's absence from the state, prevents it from running as between mortgagor and first mortgagee, was announced in early decisions of this court, and has since been too frequently reaffirmed to require discussion. Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754; Wood v. Goodfellow, 43 Cal. 185; California Bank v. Brooks, 126 Cal. 198, 59 P. 302; Filipini v. Trobock, 134 Cal. 441, 62 P. 1066, 66 P. 587; Brandenstein v. Johnson, 140 Cal. 29, 73 P. 744; Frates v. Sears, 144 Cal. 246, 77 P. 905; Foster v. Butler, 164 Cal. 623, 130 P. 6; California Title Ins. Co. v. Miller, 3 Cal. App. 54, 84 P. 453; 18 Cal. Jur. 416.

The distinction between the above-cited cases and Lent v. Morrill, 25 Cal. 492; Craig v. Dinwiddie, 77 Cal. App. 681, 247 P. 516; and Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L. R. A. 673, which appellant calls to our notice, lies in the fact that in the cases upon which appellant relies the acts avoiding the bar of the statute took place before, rather than after, the third party acquired title or a lien upon the mortgaged premises.

[3, 4] The law placed upon appellant the duty of ascertaining from the public records the existence of third party interests before accepting the extension. Boyle was present when her attorney prepared the agreement. The fact that the deed of trust in favor of the bank was executed as security for a pre-existing debt does not affect its position. It is the law that an antecedent debt constitutes a valuable consideration for a transfer as security, and the holder of the security is a purchaser for value as to third persons. Smitton v. McCullough, 182 Cal. 530, 537, 189 P. 686; Fowles v. Nat. Bank of California, 167 Cal. 653, 664, 140 P. 271; Chapman v. Hughes, 134 Cal. 641, 659, 58 P. 298, 60 P. 974, 66 P. 982; 17 Cal. Jur. 955. Furthermore, the rule which precludes the mortgagor from waiving the statute, except as to himself, has been applied in favor of the mortgagor's grantee in a deed of gift, and also to a devisee of the mortgagor. California Title Ins. Co. v. Miller, supra; Filipini v. Trobock, supra.

[5] Appellant made no attempt to show that the extension was procured with the consent of the bank, or at its suggestion, or upon its advice, but instead chose to rely on the fallacious theory that an estoppel as to Boyle would be available against the bank as a matter of law. Appellant was asked on cross-examination if at the time of execution of the extension she had any communication of any kind with respondent bank or the trustees under the deed of trust. Before she could answer, her attorney made the following statement: "We will admit that she did not—in other words that all of her negotiations were with George W. McMillan, Mary E. McMillan, and John C. Boyle." The bank was informed of plaintiff's mortgage lien when it received the deed of trust, but, according to the testimony of an official of said bank, had no knowledge of the extension until after the recordation, on August 6, 1928, of its intention to sell under its deed of trust. Boyle also testified that he did not inform the bank of the extension, as he did not know that its consent was required. It does not appear that the bank knew the appellant's mortgage was about to expire. In this condition of the record, a finding of estoppel against the bank would be entirely unsupported. The bank was not charged with fraud or bad faith in the transaction.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; TYLER, Justice pro tem.

215 Cal. 613

ARNOLD v. ARNOLD.

L. A. 12320.

Supreme Court of California.

June 15, 1932.

1. Husband and wife ⇐295.

In separate maintenance action, where court directed defendant to show cause why allowance pendente lite should not be granted plaintiff, excluding evidence showing defendant's inability to pay *held* error (Civ. Code § 137).

2. Husband and wife ⇐295.

In action for separate maintenance, court's discretion in allowing alimony pendente lite is not arbitrary (Civ. Code, § 137).

Such discretion must be exercised along legal lines, taking into consideration circumstances of parties, their necessities, and financial ability of husband.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action for separate maintenance by Mildred Avery Arnold against Leslie Philip Arnold. From an order granting temporary allowance to plaintiff during the pendency of the action and awarding costs and attorney's fees to her, defendant appeals.

Reversed.

S. H. Underwood and Harry A. Houser, both of Long Beach, for appellant.

Doyle, Clark, Thomas & Johnson, of Long Beach, for respondent.

PER CURIAM.

Appeal by defendant husband from an order granting temporary allowance during the pendency of an action for separate maintenance and support and awarding costs and attorney's fees.

After setting forth the necessary jurisdictional fact of residence, the complaint alleges that the appellant has refused to live with respondent and for more than a year last past has failed, neglected, and refused to support her. The parties were married in the state of New York in 1917, and appellant is alleged to have deserted respondent in 1918. No community property is involved and there are no issue of the marriage. The order appealed from was made and entered in response to an order, issued upon the verified complaint and affidavit of respondent, directing appellant to show cause why a temporary allowance should not be granted to the respondent. The defendant had already appeared and filed an answer. The order to show cause was heard on the complaint and said answer, the affidavit of respondent, and the oral testimony of the appellant. At the conclusion of the hearing the lower court made its order directing the appellant to pay to the respondent $75 forthwith, and $75 a month thereafter for her support until the further order of court, together with $50 for costs and $100 for attorneys' fees. At the request of the respondent the appeal was submitted on the appellant's brief alone.

In support of a reversal the appellant advances but two points, viz.: That the complaint does not state facts sufficient to constitute a cause of action and that the order based thereon is therefore of no effect; and that the trial court prejudicially erred in rejecting evidence offered by the appellant to show lack of financial ability to comply with the court's order and the ability of the respondent to maintain herself independently of appellant.

[1, 2] We find merit in the appellant's second contention. Section 137 of the Civil Code provides that during the pendency of an ac-

tion for permanent support and maintenance the court "may, in its discretion, require the husband * * * to pay as alimony any money necessary for the prosecution of the action and for support and maintenance. * * *" The court under its power might have made an ex parte order therefor. Instead of doing so it directed that the appellant show cause why such an order should not be made, and it was in response to this order that the appellant was called as a witness on behalf of the plaintiff and was examined by plaintiff's counsel. Inspection of the transcript discloses that at the conclusion of the appellant's direct examination the trial court refused to permit the appellant, on cross-examination, or otherwise, to introduce any evidence as to his financial inability to meet any order that might be made. The record discloses the following as illustrative of the trial court's attitude:

"Mr. Houser: Q. Just a minute, Mr. Arnold. Do you owe any money? A. Yes, sir.

"Q. How much?

"The Court: I don't care anything about that. * * *

"Mr. Underwood: If the Court please, won't we be allowed to show what money the man is earning and things of that kind?

"The Court: No; when a man comes into court that man will be required to pay counsel fees for his wife, and the order will be made requiring him to pay the sum of $100 on account for attorney's fees and $75 a month for alimony. * * *"

It is manifest that the trial court erroneously and arbitrarily precluded the appellant from introducing evidence on the main point in issue.

Evidence pertaining to the appellant's financial condition and his inability to meet the requirements of the trial court's order should have been admitted. As has been said by this court: "Although the court could have made the order ex parte, yet after it had directed a notice to be given to the plaintiff of the defendant's application, and he had appeared in pursuance thereof, he had a right to be heard upon all matters pertaining thereto. It would be unseemly, and inconsistent with judicial propriety, to direct him to show cause why the application should not be granted, and upon his offer, in response thereto, to show matters which, if true, would be a sufficient cause, refuse to hear him. The evidence offered on behalf of the plaintiff was relevant to the issue pending before the court, and should have been received." Mudd v. Mudd, 98 Cal. 321, 323, 33 P. 114, 115. See, also, Turner v. Turner, 80 Cal. 141, 144, 22 P. 72. The rule is well stated in 1 Cal. Jur. 965, § 19, as follows: "But discretion of the trial court in allowing alimony pending suit is not arbitrary; it must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities, and the *financial ability of the husband.*"

The conclusion we have reached makes it unnecessary that we consider the appellant's remaining contention.

The order appealed from is reversed.

215 Cal. 604

GATLEY v. SHOCKLEY.

S. F. 13997.

Supreme Court of California.

June 15, 1932.

1. Specific performance ⇐28(1).

Equity requires as condition of specific performance clear mutual understanding and positive assent on both sides as to terms of contract.

2. Specific performance ⇐30.

Defect in contract containing option to purchase in failing to specify amounts of mortgages could not be cured by cash tender after expiration of option (Civ. Code, § 3390).

3. Specific performance ⇐105(3).

Delay of nearly three years in attempt to enforce option after purchase of premises on execution sale against lessee having option to purchase constituted laches.

4. Landlord and tenant ⇐92(1).

Provisions in lease containing option to purchase against assignment applied equally to lease and to option.

Lease containing option clause giving the optionee right to purchase property for specified amount, on condition that option be exercised on or before certain date, expressly provided that lessee agreed not to assign lease or any part thereof or any interest therein without the written consent of the lessor.

5. Landlord and tenant ⇐76(2).

Evidence sustained finding that tender of amount due on option to purchase property was sham to accomplish assignment to third person in violation of agreement.

Evidence disclosed that lessee holding option had ceased to do business as corporation before purported tender, which was made by person acting for another corporation under authorization of defunct company, whose officers had theretofore resigned, and hence constituted a mere sham in attempt to accomplish an assignment to another of option agreement in violation of express provisions

of option forbidding assignment without written consent of lessor.

6. Landlord and tenant ⇐92(1).

Tender of notes for balance of purchase price of property *held* necessary in order to exercise option.

Lease containing option clause giving to optionee right to purchase property for specified sum on condition that option was exercised on or before certain date, and on condition that certain amount in cash was tendered at time option was exercised, provided, in addition, in reference to balance of purchase price, that balance was to be secured by mortgages on premises.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Richard H. Gatley, sometimes described as R. H. Gatley, against Laura M. Shockley, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Chas. C. Boynton, John T. Boynton, and Chas. H. Sooy, all of San Francisco, for appellant.

Edw. J. Mitchell, of San Francisco, for respondent.

PER CURIAM.

Plaintiff, who is admittedly the legal owner of certain improved real property in San Francisco, brought this action to quiet his title thereto as against the claims of defendant. Defendant contends that she has an equitable interest growing out of the exercise of an option to purchase the property which she alleges was exercised by her predecessor in interest. Defendant, by way of cross-complaint, asks specific performance of this agreement. The sole question presented at the trial and now presented on appeal is whether or not the defendant's predecessor in interest had in fact exercised the option as provided in the contract. The trial court found that the option had not been exercised, and quieted plaintiff's title as against the defendant. The property involved has had a rather complicated history since 1922, when defendant's predecessor in interest first became connected with it. It appears that in February, 1922, one Carl H. Petersen was the owner of the premises in question. On February 24, 1922, Petersen leased the premises to the Italia Motor Truck Company for a period of ten years at a stipulated rental payable monthly. The lease contained an option clause giving to the optionee the right to purchase the property for $40,000 on condition that the option was exercised on or before June 30, 1924, and on condition $5,000 in cash was tendered at the time the option was exercised. The option clause contained the following provision in reference to the balance of the purchase price: "The balance of purchase price is to be secured by mortgages on said premises, a first mortgage, to bear interest at the rate of six and one-half per cent. per annum, and a second mortgage, to bear interest at the rate of seven per cent. per annum. Lessee agrees to pay on said mortgages for principal and interest the sum of four hundred dollars per month, less such sums that it may pay for taxes or insurance. * * *" The lease option also provided, in the event the optionee desired to exercise the option, for the filing with the county recorder of a notice of intention to exercise the option. Time was made the essence of the agreement, and it was expressly provided that "said lessee agrees not to assign this lease or any part thereof or any interest therein * * * without the written consent of the lessor." As security for its performance of the lease provisions, the lessee executed in favor of Petersen a chattel mortgage on all machinery that lessee might install in the premises.

On May 19, 1922, the plaintiff herein purchased the property from Petersen, with notice of and subject to the lease option agreement of the Italia Motor Truck Company.

In May, 1923, the Italia Motor Truck Company became financially involved. At that time the directors and stockholders of the company organized a new corporation named the Italia Motor Truck Corporation. All of the business, property, and assets of the old company were transferred to the new corporation, with the exception that the bare legal title to the lease option was retained by the company. The corporation assumed all the liabilities of the company. All of the stock in the company was surrendered in return for stock in the new corporation, with the exception of four qualifying shares held by the directors of the old company. Thereafter the company ceased to do business, and became practically defunct, except in so far as it retained the bare legal title to the lease option.

In June, 1924, the new corporation was likewise financially embarrassed; the trial court finding that on June 30, 1924 (the expiration date of the option), the corporation was in fact insolvent. In fact, in September, 1924, the corporation was adjudicated a bankrupt.

In June, 1924, the officers and stockholders of the old company determined to attempt to realize some money by exercising the option. They knew that the Yellow Cab Company desired the property for its own purposes. After some negotiations with Arthur O. Smith, the president of the Yellow Cab Company, a meeting of the board of directors of the old company was held on June 26, 1924. The minutes of that meeting disclose that the board

formally determined that "this company is not in a position financially to pay the said sum of $5,000 and exercise said option" and that "it is desirable to assign the right of this company to exercise said option to anyone desiring to take it over from this company." The board then purported to authorize its secretary, Mr. Coolidge, to perform all acts necessary to "enable this company to realize some money out of the option." The secretary was vested with complete control over the four outstanding shares of stock in the company. The four directors by letter dated June 26, 1924, then tendered their resignations as members of the board of directors. The secretary of the old company then prepared a notice to plaintiff notifying him that Smith was authorized to act for the company in the matter of tendering performance. The secretary then indorsed and delivered to Smith the four outstanding shares of stock of the company. On June 30, 1924, the secretary executed a notice to Gatley that it, the company, elected to exercise the option. Smith recorded a copy of this notice. In the afternoon of June 30, 1924, Smith withdrew from the bank $5,000 of Yellow Cab Company money, and took this and his various authorizations to Burlingame, where the plaintiff herein resided. Plaintiff on that date was at his summer home in the Santa Cruz mountains, about fifty miles from Burlingame; it being his custom to spend his week-ends there during the summer months. Finding no one at home, Smith testified that he slipped a copy of the notice of election to exercise the option under the front door. Smith returned that evening and met plaintiff's son. Smith told the son of his mission, the son informing Smith that he could not act on behalf of his father, but that he would write to his father. Some time about the middle of July, 1924, Smith again called at plaintiff's residence and found him at home; plaintiff having returned to Burlingame several days after the 30th of June. At that time Smith did not have the $5,000, and made no formal tender, but he discussed the deal with the plaintiff. Plaintiff at that time knew that the Italia Motor Truck Company and the Italia Motor Truck Corporation were in financial difficulties, and he also knew that defendant herein, a creditor of the lessee-optionee, had attached the interest of the optionee in the property. Plaintiff therefore took the position that the option to purchase had not been properly exercised.

Defendant's connection with the property came about as follows: On July 3, 1924 (three days after the expiration date of the option), defendant sued the lessee under its old and new name for a debt owing to her. In that action she attached the interest of the company and corporation in the property involved herein. She obtained a default judgment on August 5, 1924, and on September 3, 1924, purchased the interest of the optionee at the execution sale. In the meantime, on August 28, 1924, the present plaintiff brought an action in unlawful detainer against the lessee. In that action the present defendant was not and could not have been made a party. The lessee defended the unlawful detainer action on the ground that it was lawfully in possession of the property because it had exercised the option to purchase on June 30, 1924, and therefore its liability for rent had terminated. The trial court, after a trial on the merits, found that the alleged tender of June 30, 1924, was not made by the Italia Motor Truck Company, but was in fact made by the Yellow Cab Company in violation of the provision against assignment, and further found that the "pretended tender of $5,000 was not made in good faith and that it was sham and mere pretense." No appeal was taken from the judgment in that action, and the same has long since become final. That decision was rendered in June of 1925. In July, 1925, the Italia Motor Truck Company brought an action against the present plaintiff for specific performance of the option agreement. Plaintiff filed a demurrer which has never been passed upon. That action is still pending in the trial court.

In September, 1925, the defendant herein received her sheriff's deed to the premises based on the execution sale; the redemption period having expired. She did not record her deed until February, 1928, evidently withholding the same from record in pursuance to an oral understanding with the Italia Motor Truck Company. In April, 1928, plaintiff brought this action to quiet his title as against defendant's claims. As already stated, defendant answered and cross-complained for specific performance of the option agreement. The trial court quieted plaintiff's title as against the claims of defendant. As disclosed by the findings, the trial court reached this conclusion on several theories:

(1) It found that the judgment in the unlawful detainer action, in determining that the option had in fact not been exercised, was res judicata in this action as to the same point.

(2) It found that the option agreement was too uncertain to be specifically enforced for the reason that the agreement does not state the amounts of the first and second mortgages.

(3) It further found that the purported exercise of the option was ineffectual for the reason that it was "sham and not made in good faith nor in accordance with the contract, but on the contrary in avoidance of its terms and conditions and of the express provision thereof against assignability"; that the purported tender was not made by Smith on behalf of the optionee "but was solely and wholly attempted in behalf and in the interest of the principal of said Smith, Yellow Cab Company."

(4) It further found as a fact that defendant has remained inactive since September 3, 1924, and until the filing of her cross-complaint herein in 1928; that plaintiff in 1925 leased the property to third parties.

We do not find it necessary to determine whether the decision in the unlawful detainer action is or is not res judicata in this case, for the reason that we are of the opinion the judgment of the trial court must be affirmed for other reasons.

[1, 2] It is to be noted that although the total purchase price and the amount of the down payment is specified in the option agreement, and it is further provided that the balance of the purchase price is to be evidenced by a first and second mortgage, the agreement is entirely silent as to the amounts of each mortgage. Defendant sought to prove an oral agreement between the Italia Motor Truck Company and Petersen, the plaintiff's predecessor in interest, to the effect that the first mortgage was to be in the amount of a bank loan to be later secured by Petersen. Assuming such an oral understanding to have existed with Petersen, it is not made to appear how that fact could cure the uncertainty as far as plaintiff is concerned; the evidence failing to show that plaintiff had actual or constructive knowledge of this alleged oral understanding. It is elementary that equity requires as a condition of specific performance a clear mutual understanding and a positive assent on both sides as to the terms of the contract, and it will withhold the exercise of jurisdiction in that respect unless there is such a degree of certainty as will enable it to do complete equity. The contract must not only contain all the material terms, but the terms must, in the language of the Code, be "sufficiently certain to make the precise act which is to be done clearly ascertainable." Civ. Code, § 3390; 23 Cal. Jur. 429, § 11. Here the contract fails entirely to provide for one of the most essential terms. This defect could not be cured by a cash tender made many months after the option had expired; time being the essence of the agreement and no waiver being pleaded or proved.

[3] Moreover, defendant has failed to satisfactorily explain why she rested on her rights for a period of approximately three years after she received her deed to the property. It would seem that such inaction, not satisfactorily explained, coupled with the releasing of the property by plaintiff, amounted to laches.

There is still another reason which clearly indicates that the judgment must be affirmed. Under the uncontradicted facts it appears that the purported tender by Arthur Smith was not the tender required by the contract, and was in direct violation of the nonassignable clause contained in the lease option agreement.

[4] It is clear that the lease and option constituted but one contract, the provisions of which were interdependent, the consideration for the lease likewise supporting the option. Gordon v. Dufresne, 205 Cal. 512, 271 P. 1066. It is likewise clear that under the terms of this lease-option the provision against assignment applied equally to the lease and to the option. Prichard v. Kimball, 190 Cal. 757, 214 P. 863; see note in 38 A. L. R. 1172.

[5, 6] It is obvious that for all practical purposes the Italia Motor Truck Company had ceased to do business as a corporation in May, 1923, when it assigned all of its business and assets to the Italia Motor Truck Corporation. After May, 1923, the old company had no assets of any kind or nature except the bare legal title to the lease option; the company being kept alive for the sole purpose of holding that title. In June, 1924, the company realized that neither it nor the new corporation, which was likewise insolvent, could exercise the option. The directors of the company knew that the Yellow Cab Company desired to purchase the property for its own purposes. The Yellow Cab Company had no desire to purchase the Italia Motor Truck Company. Its sole intent in the matter was to purchase the property for its own purposes. The minutes of the directors' meeting of the old company of June 26, 1924, disclose that the arrangement was in fact nothing more than an assignment to the Yellow Cab Company or to its president, Smith. The minutes specifically recite that "it is desirable to assign the right of this company to anyone desiring to take it over from this company," and the secretary was empowered to perform the acts necessary to accomplish that purpose. Various steps were taken thereafter which were obviously taken with the intent of making it appear that the Italia Motor Truck Company was exercising the option, when in fact every one connected with the transaction knew it was the Yellow Cab Company. The authorization by the defunct company to Smith to act as its agent was obviously a mere sham. Smith testified that at all times he was acting solely in the interests of the Yellow Cab Company. The money he used to make the alleged tender was not the money of the Italia Motor Truck Company, nor had it been loaned to it. It was Yellow Cab Company money, and when the tender was refused it went back into the Yellow Cab Company account. The other steps that were taken to accomplish the tender likewise indicate that the whole procedure was a sham. All the directors of the old company tendered their resignations on June 26, 1924, and likewise surrendered and indorsed their four shares of stock to Smith. Then on June 30, 1924, the former secretary of the old company, who had tendered his resignation and had indorsed his qualifying share to Smith, executed in the name of the company a notice of election to

exercise the option. At that time Smith was supposedly the entire Italia Motor Truck Company. It does not appear how the old secretary could act for the company after the old board of directors had passed out of existence by the surrender of their qualifying shares. In the circumstances, the finding of the trial court that the whole procedure was a sham to accomplish an assignment to the Yellow Cab Company in violation of the provisions of the option agreement is amply supported by the evidence. Furthermore, the alleged tender was merely of $5,000. There is no evidence that on June 30, 1924, or at any time prior thereto, Smith or any one else on behalf of the Italia Motor Truck Company ever tendered notes signed by the Italia Motor Truck Company or by any one else in the sum of $35,000 as evidence of the balance of the purchase price. This would seem to have been an integral part of the required tender.

For the foregoing reasons we are clearly of the opinion that no valid tender was made on June 30, 1924, by the optionee or by any one acting on its behalf, and for that reason the judgment appealed from should be, and hereby is, affirmed.

215 Cal. 616

PARR v. REYMAN.

L. A. 13274.

Supreme Court of California.

June 16, 1932.

Rehearing Denied July 14, 1932.

1. Executors and administrators ⇐315(6).

Where testatrix' son conveyed his interest in estate to his brother not provided for in will, final distribution decree awarding property to such brother *held* not conclusive of son's rights under oral agreement to reconvey (Code Civ. Proc. § 1666).

2. Wills ⇐741.

Probate court has no jurisdiction over contracts by heirs, devisees, or legatees concerning their shares, among themselves or with others.

3. Descent and distribution ⇐142.

"Matters of probate" within probate court's jurisdiction do not include claims against heir or devisee for his portion of estate, arising subsequent to ancestor's death, whether claim arises by virtue of contract or in invitum.

[Ed. Note.—For other definitions of "Matters of Probate," see Words and Phrases.]

4. Trusts ⇐365(2).

Where plaintiff, granting property to brother upon verbal promise to reconvey, remained silent during remaining twelve years of brother's life, action to subject property to trust *held* barred by laches.

5. Equity ⇐67.

Equity abhors stale claims.

6. Executors and administrators ⇐437(3).

Claims against decedents, especially when of long standing, are regarded with distrust by both law and equity courts.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Virgil E. Parr against Maysel Reyman, as administratrix with the will annexed of the estate of Willard A. Parr, deceased. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Superseding the opinion of the District Court of Appeal, reported in 6 P.(2d) 107.

Hert, Mussell & Withington, of San Bernardino, for appellant.

O'Connor & Findlay, of Colton, for respondent.

CURTIS, J.

Action against the defendant as administratrix with the will annexed of the estate of Willard A. Parr, deceased, to declare an oral trust in certain real and personal property. Plaintiff and Willard A. Parr were brothers. Their mother, Elizabeth Parr, died on or about May 3, 1916, leaving as her heirs at law the plaintiff, Virgil E. Parr, the deceased, Willard A. Parr, a third son, Enoch D. Parr, and a daughter, Emma A. Brady. She also left a last will and testament which was admitted to probate. By the terms of said will her entire estate was left to her two sons, Virgil and Enoch, and to her daughter, Emma A. Brady. Willard A. Parr took nothing under the will of his mother, and Virgil A. Parr was named as executor of said will. On June 12, 1917, pending the administration of said estate, by a deed absolute in form, Virgil A. Parr conveyed all of his interest in his mother's estate to his brother, Willard A. Parr. Thereafter, by a decree of distribution the interest in said estate conveyed by Virgil to Willard was distributed to Willard. At that time the residue of the estate consisted of both real and personal property, and the plaintiff now seeks to have declared a trust in so much of said real and personal property as the decedent Willard A. Parr acquired by virtue of the deed from Virgil to Willard of the date June 12, 1917. It is the contention of Virgil, and he so alleges that fact in his pleadings, that he conveyed his interest in the estate of his mother to his brother, Willard, "To hold and use all of said real and

personal property until such time as this plaintiff should require the reconveyance and delivery of said real and personal property to the plaintiff herein, and the said Willard A. Parr, as aforesaid, was to use the same and to have the income thereof until said time." Willard A. Parr died in January, 1929, almost twelve years after said conveyance, during which time he exercised complete control and dominion over said real and personal property in all respects as if he were the absolute owner thereof. No demand was made by Virgil Parr during the lifetime of his brother, Willard, that the latter reconvey to him any part of said real and personal property, nor, so far as the record reveals, was any claim made by Virgil during the lifetime of his brother, Willard, that he (Virgil) was the owner or claimed any interest in said real and personal property. Some four months after the death of Willard, and after Virgil had been appointed the administrator with the will annexed of his brother Willard's estate, the original executrix, Ida M. Mather, having died after her appointment as such executrix, the plaintiff first made claim to some interest in his brother's estate. This claim was in the form of a regular creditor's claim presented against said estate for a definite amount of money which he claimed was the value of the interest in said real and personal property, conveyed by him to Willard. This claim was subsequently withdrawn, and on December 5, 1929, Virgil commenced this action; he having resigned in the meantime as administrator, and the defendant having been appointed in his place. The case was tried by the court and findings were made and judgment rendered in favor of the defendant. The plaintiff has appealed upon the judgment roll.

The finding of the trial court as to the circumstances under which the conveyance of the interest in his mother's estate was made by Virgil to Willard, although somewhat equivocal and uncertain, appears to be favorable to the claim of Virgil that said conveyance was made under a verbal agreement that Willard should hold and use the property conveyed until such time as Virgil should require a reconveyance thereof to himself, when Willard was to reconvey said property to Virgil upon Virgil's demand. We are assuming that this finding is sufficient to sustain the agreement as alleged and set forth in plaintiff's pleadings. The court further found that by the decree of distribution said real and personal property was distributed to Willard. As conclusions of law from these facts the court held "that the terms and conditions of previous agreements, if any there were, were all merged in said decree of distribution in the estate of Elizabeth Parr, and bearing date the 2d day of February, 1918, and that said decree, never having been appealed from, is now final and conclusive in the premises and that the defendant is entitled to judgment herein together with her costs herein incurred."

[1] Appellant contends that the court misconstrued the law as applicable to the facts set forth in the findings, and that the decree of distribution is not final and conclusive as to the agreement entered into between Virgil and Willard at the time Virgil conveyed said real and personal property to Willard. It is the position of the appellant that his agreement with Willard at the time of said conveyance is not merged in the decree of distribution in his mother's estate, and that his rights under said agreement are in no way controlled or affected by said decree of distribution.

This contention of appellant must be sustained. The precise point was before this court in the case of Chever v. Ching Hong Poy, 82 Cal. 68, 22 P. 1081, 1082. In that case certain real property descended from the father to five sons, subject to an estate therein to their mother during her widowhood. One of said sons, during the administration of his father's estate, conveyed his fifth interest in said real property to his mother. Thereafter the decree of distribution in his father's estate distributed said real property to the mother during her widowhood, the remainder to her five sons, notwithstanding the deed of one of said sons of his interest in said real property to his mother. Thereafter a controversy arose as to the ownership of said one-fifth interest in said real property which said son had conveyed to his mother between this son and the administrator of his mother's estate. The trial court decided the controversy in favor of the administrator, and the son appealed. Quoting from the opinion the issue is stated as follows: "Upon this state of facts, the contention of appellant is that, notwithstanding his said deed to his mother of May 10, 1860, by which he conveyed to her all his right and title to the property, the subsequent decree of distribution entirely destroyed the effect of that deed, and conclusively established the title in appellant as of the date of the decree." In holding against this contention of appellant this court held (page 71 of 82 Cal., 22 P. 1081, 1082): "Section 1666, Code Civil Proc., provides that a decree of distribution 'is conclusive as to the rights of heirs, legatees, or devisees;' but it is conclusive against them only as heirs, legatees, or devisees,—only so far as they claim in such capacities. The probate court has jurisdiction to determine who are the legal heirs of a deceased person who died intestate, and who are the devisees or legatees of one who died testate; but its determination of such matters does not create any new title. It merely declares the title which accrued under the law of descents, or under the provisions of the will. The decree of distribution has nothing to do

with contracts or conveyances which may have been made by heirs, devisees, or legatees, of or about their shares of the estate, either among themselves or with others. Such matters are not before the probate court, and over them it has no jurisdiction. An heir may contract about or convey the title which the law had cast upon him on the death of his ancestor; and the validity or force of such contract is not affected by the fact that a probate court afterwards, by its decree of distribution, declares his asserted heirship and title to be valid." Our courts have in innumerable cases affirmed this doctrine. Estate of Burton, 93 Cal. 459, 461, 29 P. 36; Estate of Burdick, 112 Cal. 387, 391, 44 P. 734; Estate of Crooks, 125 Cal. 459, 58 P. 89; Martinovich v. Marsicano, 137 Cal. 354, 356, 70 P. 459; Estate of Ryder, 141 Cal. 366, 74 P. 993; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Estate of Howe, 161 Cal. 152, 118 P. 515; Estate of Lyon, 163 Cal. 803, 127 P. 75; Archer v. Harvey, 164 Cal. 274, 128 P. 410; Shaw v. Palmer, 65 Cal. App. 441, 224 P. 106.

In the case of Martinovich v. Marsicano, supra, this court stated the law applicable to the question now under discussion as follows: "'Matters of probate' include the ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount or proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will; but do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum; nor is the determination of conflicting claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of the estate a 'matter of probate.'"

[2, 3] An attempt is made to distinguish the line of authorities just cited from the present case. In the first place, it is contended that the appellant in this action is not claiming under the decree of distribution, but adversely to it, while in certain of the authorities relied upon above the claimant is a grantor claiming under a decree of distribution adversely to the terms of his prior grant. In the other authorities cited above it is pointed out that the claimant was not an heir, legatee, or devisee of the deceased, and had obtained his title during the pendency of the probate proceeding through a deed or other legal conveyance from an heir, devisee, or legatee, while in the present action each of the parties to the deed from Virgil to Willard was an heir of his deceased mother, and was properly before the probate court at the time of the distribution of her estate. As to the first of these attempted differentiations between this case and the authorities cited, we are unable to see any difference in principle, in so far as the question of the conclusive effect of a decree of distribution is concerned between parties where the grantor is claiming under a decree of distribution notwithstanding his grant deed divesting himself of all interest in the estate, and a grantor claiming adversely to the decree of distribution, which distributes the property conveyed by him in accordance with the terms of his grant. It is claimed that in cases where a grantor is claiming under a decree of distribution adversely to his deed, they might have rested upon the broad principle of law that a grant deed passes subsequently acquired title. Admitting for the present purpose that those cases might have been so decided, the decisions therein show that they were not. The decisions rested upon another equally well-recognized principle of law that the probate court has no jurisdiction over "contracts or conveyances which may have been made by heirs, devisees, or legatees, of or about their shares of the estate, either among themselves or with others. Such matters are not before the probate court, and over them it has no jurisdiction." Chever v. Ching Hong Poy, supra. Or, as was said in Martinovich v. Marsicano, supra, "'Matters of probate' * * * do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum. * * *"

The second of the attempted differentiations between the cited cases and the present case is equally unavailing. The quotations from the authorities cited above and the cases themselves plainly show that the probate court has no jurisdiction over contracts or conveyances made by heirs, devisees, or legatees, "either *among themselves* or with others."

The following authorities are relied upon in support of the ruling of the trial court that the decree of distribution is conclusive of the rights of the parties under the agreement to reconvey the real and personal property involved herein: Miller v. Pitman, 180 Cal. 540, 182 P. 50; Newport v. Hatton, 195 Cal. 132, 231 P. 987; Estate of Finch, 202 Cal. 612, 262 P. 34; Shipley v. Jordan, 206 Cal. 439, 274 P. 745. We have carefully examined these cases, and we find nothing in them which supports respondent's contention that the decree of distribution is conclusive of the rights of the parties under the agreement of reconveyance. The case of Miller v. Pitman, supra, appears to be relied upon more firmly than any of the other cases cited by respondent. In that case the facts showed that Elias W. Pitman at the time of his death was the owner of certain real property. He left a wife and children. By his will he bequeathed a life interest in said real property "to his wife, with remainders in fee to their children and to the heirs of their children's bodies." Under the terms of the will the plain-

tiff was entitled to receive one-sixth interest in the remainder estate. The estate was probated, and by the decree of distribution the whole of the estate was decreed and distributed to his widow. No appeal was ever taken from this decree. After the death of the widow the plaintiff brought an action to quiet title to a one-sixth interest in said real property. His claim was contested, and it was held that the decree of distribution was final and conclusive of his rights, and that under this decree of distribution all of the estate of Elias W. Pitman was decreed and distributed to his widow. That case can be readily distinguished from the instant case. As stated therein (page 543 of 180 Cal., 182 P. 50, 51), "Clearly, the probate court had jurisdiction of the subject-matter of the decree of distribution, and the fact that the decree erroneously construed the terms of the will did not operate to render the decree void." In the case before us, as we have stated before, contracts or conveyances which have been made by the heirs, devisees, or legatees are not matters "before the probate court, and over them it has no jurisdiction." Chever v. Ching Hong Poy, supra. It is not necessary for us to discuss further the other cases cited in support of the judgment of the trial court. The most favorable of them from respondent's point of view are simply along the line of Miller v. Pitman, supra, and none of them bears out the contention of respondent. It follows from the views expressed that the decree of distribution in the estate of Elizabeth Parr, deceased, is not conclusive of the rights of the parties hereto under the agreement made by Willard Parr to reconvey the real and personal property involved herein to his brother Virgil.

[4-6] However, we are not of the opinion that the judgment should be reversed. Respondent makes the further contention that the appellant's cause of action is barred by his laches. This contention, we think, must be sustained. As already noted, almost twelve years elapsed between the date of the verbal promise of Willard to reconvey the property to Virgil and the death of Willard, during which time Virgil never made any demand or request upon Willard for a reconveyance of said property, nor did Virgil during this time ever make any claim to said property, or to any part thereof. Relative to this matter the court found: "That the said Virgil E. Parr, the plaintiff herein, did not, during the lifetime of the said Willard A. Parr, ever make demand upon the said Willard A. Parr for the return to him of the real property theretofore conveyed to said Willard A. Parr by the said Virgil E. Parr, although the said Willard A. Parr had, during his lifetime and in expectation of death, called his said brother Virgil E. Parr to his bedside and asked him if there was any unsettled business between them and if there was any obligation owing from him to his said brother." In the face of this finding of fact it would appear that a conclusive case of laches had been made out by the respondent as against Virgil E. Parr, and that it would be most unjust and inequitable to permit the appellant after this long period of silence and inaction to now assert a claim against the estate of his deceased brother. Stale claims are abhorred by equity. Claims against deceased persons, especially when they have been of long standing, are always looked upon with distrust by courts of law as well as courts of equity. The weakness of appellant's claim is further emphasized by his failure to respond to the request made by his brother, we would infer while the latter was upon his deathbed, that Virgil make known and declare any unsettled business between them or any obligation which Willard might owe to his brother Virgil. To allow the appellant to remain silent during the lifetime of his brother, even to refuse upon request to disclose any claim he might have against the latter, and then, when death had sealed the lips of his brother, to permit him to enforce a claim resting in parol and made some twelve years previously, is asking a court to run counter to all rules of equity and to all principles of justice and fair dealings. The findings unquestionably make out a complete defense of laches.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; TYLER, Justice pro tem.

GRASS VALLEY BOUNDARY MINES CO. v. SLYE.

Sac. 4567.

Supreme Court of California.

June 20, 1932.

Rehearing Granted July 19, 1932.

1. Appeal and error ⇐337(1).

Appeal from judgment, granting plaintiff immediate possession of mining property and requiring defendant to account for ore extracted, *held* premature.

2. Appeal and error ⇐80(4).

Generally, judgment adjudicating issues, ordering accounting, and reciting that final judgment will be entered when terms are complied with, is not final appealable judgment.

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by the Grass Valley Boundary Mines Company, a corporation, against Joseph Slye. From an interlocutory judgment for plaintiff and an order denying defendant's motion to vacate and set aside the judgment, defendant appeals.

Appeal dismissed.

Vernon Stoll, of Grass Valley, and Joseph Slye and Peter A. Breen, both of San Francisco, for appellant.

W. E. Wright and W. A. Richardson, both of San Francisco, for respondent.

TYLER, Justice pro tem.

Action in ejectment. The complaint in substance alleges that in the year 1925 plaintiff and defendant entered into a written agreement wherein plaintiff agreed to sell, and defendant agreed to buy, certain mining property for the sum of $150,000, payable within two years, and a royalty of 20 per cent. net of all the ore extracted to be paid on account thereof; that the time for the consummation of the purchase and sale was mutually extended to the 16th day of March, 1929; that since said last-mentioned day plaintiff has been entitled to the possession of the property. It then charges that defendant, since the contract was entered into, has extracted from said property minerals of the value of $500,000; that he has failed to pay the purchase price of $150,000 or any part thereof or the royalty of 20 per cent. as provided for in the agreement. The prayer is for the recovery of $100,000 as the royalty on the ore extracted, and $100,000 as damages for the unlawful withholding of possession of the property. Defendant, answering, admits the entering into of the contract and the extracting of certain ores, but denies the value of the same was $500,000. He also admits that he has not paid the purchase price. He denies ownership in plaintiff, and also denies that the sum of $100,000 is due plaintiff from ore extracted from the mine. The recital of other allegations is not necessary, considering the questions involved on the appeal. After issue was joined, the case was set for trial on the 25th day of November, 1930. Upon that date the attorneys for the parties entered into a written stipulation by the terms of which it was provided that, in consideration of the continuance of the trial for a period of seventy days, the defendant was to purchase within said time certain shares of stock of the mining corporation and to make monthly accounting of bullion extracted from the mine. Defendant also agreed to deposit certain ore specimens or deposit certain stock in lieu thereof with one of plaintiff's attorneys. The stipulation further provided that, in the event of the failure of defendant to make payment in accordance with the terms of the stipulation and within the time set forth, judgment might forthwith be entered for plaintiff for the possession of the property, with or without notice. The terms of this stipulation not having been complied with by defendant, plaintiff, forty-six days after the stipulation was entered into, served a notice of motion setting forth that it would, on the 16th day of January, 1931, move the court for the entry of judgment. The hearing of the motion was continued to February 6, 1931, at the request of defendant.

On said last-mentioned day the court, in the absence of defendant, entered what it denominated as an interlocutory decree and judgment, reciting that defendant had failed to perform the terms and conditions of the stipulation and that more than seventy days had expired since the signing thereof. The decree granted respondent the immediate possession of the mines in question as described in the complaint; that all improvements used in the working of the property be and become the property of plaintiff; that defendant make a true and complete accounting within thirty days of all the bullion or ore extracted or taken from the property and pay over to plaintiff such amount as might be found due under the contract; that the agreement entered into on September 1, 1925, between the parties be canceled and declared void; and that certain ore specimens of gold mentioned in the stipulation be returned within five days to plaintiff; and that defendant be restrained from interfering with the plaintiff in taking immediate possession of the property. The decree further provided that this judgment should be considered an interlocutory decree, and, upon said defendant complying with the terms and conditions thereof, final judgment should be entered, and, in the event of said defendant failing to comply with the terms and conditions of this order, defendant upon motion of plaintiff would be ordered to show cause why he should not be punished for contempt.

[1, 2] A motion was made by defendant to vacate and set aside the judgment under the provisions of section 473, Code of Civil Procedure. The motion was based upon affidavits. The court denied the motion. Defendant appeals from the judgment and also from the refusal of the court to vacate the same. We do not deem a discussion of the case upon its merits to be necessary, as we are of the opinion that the appeal is premature and should be dismissed. The judgment appealed from is not the final adjudication of all the respective rights of the parties, but, as declared by the trial court, it is a mere interlocutory judgment. The general rule is that a judgment adjudicating the issues between the parties and ordering an accounting, which recites that final judgment will be entered when the terms and conditions of the decree are complied with, is not a final judgment. Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Gunder v. Gunder, 208 Cal. 559, 282 P. 794;

Di Blasi v. Di Blasi, 209 Cal. 753, 290 P. 7; Middleton v. Finney (Cal. Sup.) 6 P.(2d) 938. The appeal should therefore be dismissed. It is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

215 Cal. 655

HAYWARD LUMBER & INVESTMENT CO. v. GREENWALT et al.

L. A. 12262.

Supreme Court of California.

June 22, 1932.

1. Mechanics' liens ⇐284.

Action to foreclose mechanic's lien *held* properly dismissed for nonprosecution without giving notice of dismissal to a defendant who had demurred generally (Code Civ. Proc. § 1190).

Code Civ. Proc. § 1190, provides that, if proceedings to enforce mechanic's lien be not prosecuted to trial within two years after commencement thereof, court may, in its discretion, dismiss proceedings for want of prosecution.

2. Mechanics' liens ⇐284.

Trial court of own motion and without notice may dismiss action to foreclose mechanic's lien not prosecuted to trial within two years (Code Civ. Proc. § 1190).

3. Dismissal and nonsuit ⇐60(3).

Although defendant may bring about trial of issue presented by his demurrer, plaintiff must use due diligence to have demurrer determined.

It is incumbent on plaintiff to have issue presented by defendant's demurrer determined, and failure to do so is ground for dismissal of the action.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Hayward Lumber & Investment Company against O. B. Greenwalt, Wiley L. Beasley, and others. Defendants named permitted their defaults to be entered, after which, on motion of another defendant, the action was dismissed for want of prosecution, and plaintiff appeals.

Affirmed.

Le Roy B. Lorenz, of Los Angeles, for appellant.

Aldrich & Mack, of Bakersfield, for respondents.

SEAWELL, J.

Plaintiff appeals from a judgment of dismissal entered upon the granting of a motion of the defendant Citizens' Land & Loan Company to dismiss the action for want of prosecution. The appeal is presented on a clerk's transcript as provided by section 953a of the Code of Civil Procedure. Respondents have not filed a brief.

The complaint states a cause of action to foreclose a mechanic's lien for materials furnished and used in the construction of a building in the city of Bakersfield. The defendant Greenwalt, the contractor, and Beasley, the alleged owner, permitted their defaults to be entered. Defendant Ida Schmidt, alleged to have some interest in the premises, demurred generally to the complaint, while the defendant Citizens' Land & Loan Company, also alleged to have some interest, demurred both generally and specially, and also filed an answer. On February 14, 1930, two years and three months after the institution of the action, the respondent Citizens' Land & Loan Company noticed a motion to dismiss the cause for want of prosecution based on the provisions of section 1190 of the Code of Civil Procedure, which provides that, if proceedings to enforce a mechanic's lien be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution. The demurrer of Ida Schmidt, which in the meantime had been dropped from the calendar, was restored thereto and came on for hearing with the motion to dismiss; both matters being presented by counsel for the respective parties and submitted. It was set forth in the affidavit in support of said motion that the complaint was filed on November 23, 1927, that the answer of defendant Citizens' Land & Loan Company was filed on February 23, 1928; that the demurrer of Ida Schmidt was filed January 27, 1928, "and that no further action has been taken by plaintiff either to set said cause for trial, or to have the demurrer of Ida Schmidt set down for hearing; * * * that the time for setting said cause for trial has not been extended by the defendant Citizens' Land and Loan Company, nor by its attorneys, either by oral stipulation or by written stipulation; that since the date of the filing of said complaint, the title of defendants and of the defendant Citizens' Land and Loan Company has been clouded, to the extent that the said defendant could not dispose of said property, nor could it take any steps to assert any of its rights under the security until the question of the validity of said instant action and of the mechanic's lien sought to be foreclosed by this said action, was determined; that defendant has suffered hardship as the result of the delay in bringing said cause to trial." The reasons why defendant

could not bring said action to trial were also set forth.

The said demurrer and said motion to dismiss were argued by counsel for the respective parties on March 3, 1930, and submitted to the court for consideration and decision.

On March 7, 1930, the court rendered the following judgment: "In the above entitled action, the defendant, Citizens' Land and Loan Company, a corporation, having made a motion to dismiss the above entitled action, and the said motion to dismiss the action having come on regularly to be heard in the above entitled court on the 3rd day of March, 1930, with the plaintiff, Hayward Lumber & Investment Company, a corporation, represented in open Court by its counsel, Le Roy B. Lorenz, and the defendant, Citizens' Land & Loan Company, a corporation, being represented in open Court by Henry C. Mack, of Aldrich & Mack, and affidavits having been presented by both the defendant, Citizens' Land & Loan Company, a corporation, and the plaintiff, Hayward Lumber & Investment Company, a corporation, and the matter having been argued and submitted to the Court for its consideration and decision, and the Court being fully advised in the premises, Now, Therefore, It is by the Court Ordered, Adjudged and Decreed that the motion of the defendant, Citizens' Land & Loan Company, a corporation, for the dismissal of the above entitled action be and the same is hereby granted and the above entitled action is hereby dismissed."

[1, 2] Appellant complains of the judgment in so far as it purports to dismiss the action generally, and particularly as to respondent Ida Schmidt, but does not complain of the dismissal of the action as to respondent, Citizens' Land & Loan Company, and in this connection argues that as to Ida Schmidt the action could properly be dismissed only upon notice of motion. While ordinarily there would be merit in such a contention, we are here dealing with a dismissal by the court under section 1190 of the Code of Civil Procedure, which specifically provides that, if the proceedings to enforce a mechanic's lien are not prosecuted to trial within two years after the commencement thereof, the court in its discretion may dismiss the same for want of prosecution. The section nowhere provides for the giving of notice of such dismissal. In the absence of an express provision for the giving of such notice, bearing in mind that the section is summary in its nature, it is our opinion that a trial court of its own motion and without notice may dismiss any action for the foreclosure of a mechanic's lien which is not prosecuted to trial within the two-year period prescribed. However this may be, the motion to dismiss and the judgment of dismissal were directed at the entire cause.

[3] The fact that certain demurrers to the complaint remained undisposed of does not suggest a different conclusion. It is well settled that "while a defendant may bring about a trial of the issue presented by his demurrer, it is the duty of the plaintiff to take measures to have the demurrer determined. It is encumbent upon plaintiff to use due diligence in this respect and failure to do so is ground for dismissal of the action." Mowry v. Weisenborn, 137 Cal. 110, 69 P. 971; Prudential Ins. Co., etc. v. Superior Court (Cal. App.) 4 P.(2d) 294; 21 Cal. Jur., p. 115, § 74.

We do not find that the trial court abused its discretion in dismissing the action. The conclusion we have reached makes it unnecessary to consider the point made by the appellant that the order sustaining the demurrer without leave to amend was erroneous.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; TYLER, Justice pro tem.

215 Cal. 624

Ex parte WEISBERG.

Cr. 3505.

Supreme Court of California.

June 17, 1932.

Rehearing Denied July 14, 1932.

1. Constitutional law ⇐81.

Police power extends to everything expedient for preservation of public safety, health, comfort, or morals.

2. Constitutional law ⇐87.

Legislature may place such restrictions on use of property or conduct of business as may reasonably be necessary for public welfare.

3. Licenses ⇐5.

Cleaners' and Dyers' Act tends to foster fire prevention and to safeguard life and property, and is proper exercise of police power (St. 1931, p. 972).

St. 1931, p. 972, regulates cleaning and dyeing shops, sponging and pressing establishments, and kindred businesses that use volatile and inflammable products, provides for registration and licensing of persons engaged in such businesses, and the enforcement thereof by state fire marshal.

4. Constitutional law ⇐208(6).

Cleaners' and Dyers' Act is not discriminatory because it does not apply to larger establishments which are governed by different act (St. 1931, p. 972; St. 1927, p. 1924).

5. Constitutional law ⇐208(1).

Classification created for purpose of legislation must be reasonable.

6. Constitutional law ⇐208(6).

Cleaners' and Dyers' Act is not discriminatory because stores, hotels, hospitals, and sanitariums, not engaged in commercial cleaning and dyeing, are not included (St. 1931, p. 972).

St. 1931, p. 972, is not discriminatory because there is a natural and intrinsic distinction between commercial cleaning and dyeing establishments and stores, hotels, hospitals, and sanitariums not engaged in commercial cleaning and dyeing.

7. Statutes ⇐71.

Laws need not be universal in their application; it sufficing if they are of "uniform operation."

A law is of "uniform operation" if it applies equally to all persons embraced within class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced within it.

[Ed. Note.—For other definitions of "Uniform Operation of Laws," see Words and Phrases.]

8. Constitutional law ⇐48.

Legislative determination as to what is sufficient distinction to warrant a classification will not be overthrown unless palpably arbitrary.

9. Constitutional law ⇐208(6).

Cleaners' and Dyers' Act excludes all hotels, hospitals, and sanitariums that do dyeing and cleaning only incidentally, and hence is not discriminatory against those within commercial field (St. 1931, p. 972).

10. Constitutional law ⇐42.

Party who did not belong to classes allegedly discriminated against could not complain of statute on that ground (St. 1931, p. 972).

11. Licenses ⇐7(1).

Cleaners' and Dyers' Act is not objectionable because it permits issuance, without examination, of certificates and licenses to those operating cleaning and dyeing shops for three months before act takes effect (St. 1931, p. 972).

12. Statutes ⇐121(1).

Failure of title of Cleaners' and Dyers' Act to expressly mention provision providing for posting of bond as condition to certificate and license did not invalidate such provision (Const. art. 4, § 24; St. 1931, p. 977, § 5).

Failure to expressly mention in title posting of bond did not invalidate St. 1931, p. 977, § 5, because title need not contain an abstract or detailed statement of contents, and bond provision is germane to the regulation, registration, and licensing mentioned in the title.

13. Licenses ⇐7(2).

Legislature may reasonably require cleaning and dyeing establishments to furnish reasonable bond for protection of those dealing with them in such business (St. 1931, p. 977, § 5).

14. Constitutional law ⇐208(6).

Statutory provision requiring posting of bond for benefit of "any person having dealings" with cleaning and dyeing establishments *held* discriminatory and void (St. 1931, p. 977, § 5).

St. 1931, p. 977, § 5, is discriminatory and void, because language is broad enough to include any and all kinds of dealings, whether associated with or disassociated from the businesses regulated.

15. Constitutional law ⇐70(1).

Courts cannot limit plain effect of bond required by statute in order to make it conform with presumed intention of Legislature (St. 1931, p. 977, § 5).

16. Statutes ⇐64(8).

Invalidity of provision requiring bond *held* not to affect remainder of Dyers' and Cleaners' Act (St. 1931, p. 977, § 5).

Invalidity of St. 1931, p. 977, § 5, does not affect other provisions of St. 1931, p. 972, because latter are severable and distinct therefrom, and St. 1931, p. 972, contains usual saving clause in section 8 that Legislature would have passed act irrespective of the invalidity of any particular portion thereof.

17. Constitutional law ⇐62.

Cleaners' and Dyers' Act *held* not subject to objection that it gives fire marshal arbitrary power to determine persons entitled to pursue callings regulated (St. 1931, p. 972).

St. 1931, p. 972, is not subject to such objection, because discretion conferred on fire marshal must be reasonably exercised to effectuate purposes of St. 1931, p. 972, is subject to judicial review, and presumption that fire marshal will exceed his authority in making such rules and regulations will not be indulged.

18. Constitutional law ⇐62.

Cleaners' and Dyers' Act *held* not improper delegation of legislative power (St. 1931, p. 972).

St. 1931, p. 972, is not improper delegation of legislative power, because it declares what the law shall be, and gives fire marshal authority merely to adopt necessary and reasonable rules to carry out legislative intention therein expressed.

19. Constitutional law ⇐296(1).

Cleaners' and Dyers' Act *held* not to impinge due process clause of either state or Federal Constitution (St. 1931, p. 972).

St. 1931, p. 972, does not deny due process of law, because section 4 thereof not only expressly provides ample judicial remedy for relief against adverse decisions of fire marshal, but also provides that no licenses shall be suspended, revoked, or not renewed except on 20 days' notice in writing designating reasons therefor and fixing a time for hearing all interested parties.

In Bank.

Application by Jacob Weisberg for writ of habeas corpus to be directed to Chief of Police of the City of Los Angeles.

Writ discharged, and petitioner remanded.

Chas. I. Rosin, of Los Angeles, for petitioner.

Charles P. Johnson, City Prosecutor, Joe W. Matherly and John L. Bland, Dep. City Prosecutors, all of Los Angeles, for respondent.

U. S. Webb, Atty. Gen., Charles Wetmore, Jr., and James S. Howie, Dep. Attys. Gen., amici curiæ for respondent.

WASTE, C. J.

Application for a writ of habeas corpus.

Petitioner was taken into custody and incarcerated by the chief of police of the city of Los Angeles upon a complaint charging that he willfully and unlawfully conducted, maintained, and operated a cleaning and dyeing shop and store and operated a sponging and pressing establishment without a license from the state fire marshal, contrary to and in violation of "An act to regulate the location, construction, occupancy and operation of cleaning and dyeing shops or stores and spotting, sponging, and/or pressing establishments, or agencies thereof, and private schools and colleges of spotting, sponging and/or pressing; providing for the registration and licensing of persons engaged in such business; providing for the enforcement thereof by the state fire marshal as chief of the bureau of fire safety in the department of industrial relations; providing ways and means for enforcement, and providing penalties for violations." St. 1931, c. 425, p. 972.

[1, 2] It is urged that the act does not constitute a proper exercise of the police power. With this contention we cannot agree. Citation of authority is unnecessary to establish that the police power extends to everything expedient for the preservation of the public safety, health, comfort, or good morals. It is within the legislative discretion in the exercise of such power to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, comfort, or health. Riley v. Chambers, 181 Cal. 589, 592, 593, 185 P. 855, 8 A. L. R. 418; Mattei v. Hecke, 99 Cal. App. 747, 279 P. 470.

[3] The regulatory provisions of the act here attacked undoubtedly tend to foster fire prevention and safeguard life and property. The act therefore constitutes a proper exercise of the police power. In the case of Carter v. Stevens, 211 Cal. 281, 295 P. 28, we recently upheld as a proper exercise of the police power a statute (St. 1927, p. 1924) regulating the maintenance and operation of cleaning and dyeing establishments, keeping and storing liquid volatile and inflammable products in excess of one gallon, or solid volatile and inflammable products in excess of eight pounds. While the storing of such volatile and inflammable products in lesser quantities may correspondingly reduce the fire hazard and potential public danger, the fact still remains that their storage and use in any quantity may prove detrimental to the public welfare. Cleaning and dyeing shops, sponging and pressing establishments, and other kindred businesses, using such lesser quantities of volatile and inflammable products, may with propriety be subjected to reasonable legislative regulation in the exercise of the police power.

This brings us to a consideration of the reasonableness of the regulations prescribed. The petitioner urges that the act is discriminatory, unconstitutional, and void because it excludes from its operation certain types of cleaning establishments (those storing in excess of one gallon of liquid volatile and inflammable products or in excess of eight pounds of solid volatile and inflammable products), also all stores whose major business is selling merchandise, and which are not engaged in cleaning, dyeing, spotting, sponging, and pressing as a business for compensatory gain, and all hotels, hospitals, and sanitariums doing cleaning, spotting, sponging, etc., solely for their proprietors, employees, guests, or patients, and not commercially.

[4] Contrary to petitioner's contention, there has been no discrimination in favor of cleaning establishments using quantities of volatile and inflammable products in excess of those designated in the act here assailed. Cleaning establishments using such excessive quantities of volatile and inflammable products are governed and regulated by a statute peculiarly applicable to them (St. 1927, p. 1924), the constitutionality of which, as already indicated, was upheld by this court in Carter v. Stevens, supra.

[5-7] The classification created for the purpose of legislation must, of course, be a reasonable one. It must not be arbitrary. We do not think it discriminatory to exclude from the operation of the present act all merchandising stores, hotels, hospitals, and sanitariums not engaged in cleaning, sponging, dyeing, etc., commercially and for compensatory gain. It is not the rule that all laws shall be universal or general in their application. It is sufficient that laws of a general nature have "a uniform operation." A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it. In re Sumida, 177 Cal. 388, 391, 170 P. 823.

The act here assailed is general and uniform in its regulation of and operation upon cleaning and dyeing shops or stores, and spotting, sponging, and pressing establishments, using the quantities of volatile and inflammable products therein designated. In our opinion there is a natural and intrinsic distinction between such commercial entities and merchandising stores, hotels, hospitals, and sanitariums that engage in cleaning and dyeing only casually and solely as an incident to their main purpose. Thus it has been held that the fact that casual employees and agricultural and domestic employees are excepted from the operation of the Workmen's Compensation Act (St. 1917, p. 831, as amended) does not involve an arbitrary distinction. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 702, 151 P. 398. In Ex parte Murphy, 8 Cal. App. 440, 97 P. 199, it is held that public billiard and pool rooms form a class subject to special regulatory legislation, and the fact that the Legislature made reasonable exceptions in favor of private billiard and pool rooms and billiard and pool rooms in hotels for the use of guests did not render the law discriminatory and unconstitutional.

[8] The legislative determination as to what is a sufficient distinction to warrant a classification will not be overthrown unless it is palpably arbitrary. Western Indemnity Co. v. Pillsbury, supra. We are satisfied that the act here complained of does not create any artificial, unreasonable, or arbitrary distinctions. Operating as it does, uniformly on all persons and entities in the same category, it does not deny the equal protection of the laws or violate other constitutional prohibitions.

[9, 10] To petitioner's further contention that the act is discriminatory, in so far as it purports to exclude from its regulatory provisions all hospitals and sanitariums without the commercial field but not those within the commercial field, there are two sufficient answers. In the first place, this alleged discrimination is the result of petitioner's misconstruction of the act. A fair reading of the pertinent provision discloses that it excludes from its operation all hotels, hospitals, and sanitariums (commercial and noncommercial) that do cleaning, spotting, and sponging only incidentally and solely for their own purposes and "entirely without the commercial field." Petitioner's error in this regard is in his misapplication of the quoted phrase. However, assuming that such asserted discrimination is apparent from the terms of the act, it does not lie in the mouth of petitioner to attack its validity upon this ground, for he does not bring himself within the class affected thereby, and the point is not, therefore, properly before us in this proceeding. If the complaining party does not belong to the class discriminated against, he cannot, as a general rule, complain of the alleged discrimination. Ex parte Quong Wo, 161 Cal. 220, 233, 118 P. 714.

This latter reasoning is also applicable to petitioner's claim that the act discriminates between private schools and colleges and other schools and colleges teaching the operations and processes employed in cleaning, sponging, spotting, etc. A similar reply may properly be made to petitioner's contention that the act exceeds the bounds in so far as it purports to include within its provisions agencies conducted merely for the purpose of collecting clothing, etc., for spotting and renovating. Not being aggrieved by these several provisions, petitioner is not in a position to effectively complain of them.

[11] The act is not objectionable because it provides for the issuance, without examination, of certificates of registration and licenses to those operating and maintaining cleaning and dyeing shops or spotting and sponging establishments for a period of at least three months prior to the effective date of the act. In the adoption of qualifications and regulatory provisions governing the pursuit of certain callings or businesses falling within the regulatory power of the Legislature, it is not infrequent to exempt therefrom those who have lawfully practiced or carried on such callings and businesses for a prescribed time, and such provisions have received the sanction of the courts as not being violative of the Constitution on the grounds of unreasonableness or discrimination. Ex parte Whitley, 144 Cal. 167, 172, 77 P. 879, 1 Ann. Cas. 13; Bohannon v. Board of Medical Examiners, 24 Cal. App. 215, 220, 140 P. 1089. The registration and licensing provisions of the act here in question, including the provision for the payment of a registration fee, are reasonable and free from constitutional objection.

[12] Citing section 24 of article 4 of the Constitution, petitioner next contends that section 5 of the act, providing for the posting of a bond in the sum of $100 as a condition precedent to the issuance of a certificate of registration and license, is unconstitutional and void. Failure of the title of the act to specifically mention the bond does not invalidate this provision. The title of an act need not contain an abstract or detailed statement of its contents. Where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act. Heron v. Riley, 209 Cal. 507, 510, 511, 289 P. 160; People v. Jordan, 172 Cal. 391, 394, 156 P. 451. The bond provision here complained of is germane to the regulation, registration, and licensing mentioned in the title of the act, and therefore need not find definite expression therein.

[13-16] Undoubtedly the Legislature may with propriety require cleaning and dyeing shops and spotting and sponging establishments to furnish a reasonable bond for the protection of that portion of the public having dealings with them in that line of endeavor. Such provision might well be held to be reasonably connected with the purpose of the act, i. e., to protect the public from potential loss by reason of the fire hazard involved in such business. While in all probability such was the legislative intention in the instant case, the language employed in section 5 is not conducive of that result. Read literally, the section requires the owners and operators of such shops and establishments to furnish an undertaking for the benefit of "any person having dealings" with them. This language is sufficiently broad to include any and all kinds of dealings, whether associated with or disassociated from the businesses regulated by the act. A provision requiring such a bond is undoubtedly discriminatory and void. To uphold the same it would be necessary to limit its operation as above indicated. This would require reading into the statute a limitation not therein contained. This we cannot do, for the courts are without power to rewrite a statute so as to make it conform to the presumed intention of the Legislature. Seaboard Acceptance Corp. v. Shay (Cal. Sup.) 5 P.(2d) 882.

[17] The invalidity of the bond provision does not, however, affect the remaining regulatory provisions of the act, for they are severable and distinct therefrom, and not dependent thereon. Bacon Service Corp. v. Huss, 199 Cal. 21, 32, 33, 248 P. 235. Moreover, section 8 of the act contains the usual saving clause to the effect that the Legislature would have passed the act, irrespective of the invalidity of any particular portion thereof.

[18] We find no merit in petitioner's claim that the act confers arbitrary and uncontrolled power upon the state fire marshal to determine the persons entitled to pursue and the conditions upon which they may conduct the regulated businesses. This contention is sufficiently answered by Carter v. Stevens, supra, pages 289–293 of 211 Cal., 295 P. 28, and Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349. As stated in the latter case, "it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. United States, 204 U. S. 364, 367, 51 L. Ed. 523, 27 S. Ct. 367."

We cannot say that the present act confers unreasonable and arbitrary powers upon a subordinate officer or agent. The various duties and powers bestowed upon the fire marshal by the act may not be arbitrarily discharged, but must be discharged in the exercise of a reasonable discretion with a view to effectuating the purposes of the act. An abuse of these duties and powers may readily be remedied by resort to the courts. However, it is not to be presumed that the fire marshal will exceed his authority in making such rules as may be necessary to administer and carry out the terms of the act. Carter v. Stevens, supra. Any abuse in this regard would not, however, affect the validity of the act. Ex parte McManus, 151 Cal. 331, 337, 90 P. 702.

[19] The act does not improperly delegate a legislative function. It declares what the law shall be. This function has not been delegated to the fire marshal. He is merely given authority to adopt any necessary and reasonable rules and means to carry out the legislative intention as expressed in the act.

Section 4 of the act provides that the fire marshal shall not suspend, revoke, or refuse to issue or renew any license except upon twenty days' notice in writing designating

the reasons for such action, and fixing a time for hearing all interested parties. In the event of an adverse decision, the section further authorizes the person affected thereby to institute "an action in a court of competent jurisdiction * * * for the purpose of canceling or obtaining other relief therefrom." It does not appear, therefore, that the due process clauses of either the state or Federal Constitution are impinged by the act under consideration.

We have carefully examined petitioner's several briefs and find nothing calling for further discussion.

The writ is discharged, and petitioner is remanded to the custody of the chief of police of the city of Los Angeles.

We concur: TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

215 Cal. 595

ROBERTS, THOMAS & CO. v. ALLEN et al.

S. F. 14332.

Supreme Court of California.

June 3, 1932.

Rehearing Denied July 2, 1932.

Licenses ⇐26.

Corporate Securities Act *held* not applicable where one broker, co-operating with another in effort to market securities, failed to live up to his covenant with cobroker; hence surety on bond of alleged defaulting broker was not liable (St. 1917, p. 677, § 5, subd. 3, as amended by St. 1925, p. 967, § 3).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Roberts, Thomas & Company against Dean Allen and another, copartners, doing business under the firm name and style of Allen Bachelder Company, and the Columbia Casualty Company. From a judgment of dismissal as to the last-named defendant, plaintiff appeals.

Affirmed.

Superseding opinion in 7 P.(2d) 309, which superseded opinion in 298 P. 176.

Thomas, Beedy, Presley & Paramore, of San Francisco, for appellant.

Walter S. Rountree, of San Francisco, amicus curiæ.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondent.

PRESTON, J.

Appeal from judgment entered in favor of defendant Columbia Casualty Company, upon the sustaining of its general demurrer to plaintiff's first amended complaint and refusal of plaintiff to further amend.

Two questions are presented: Was the demurrer properly sustained on the ground that the transaction involved was illegal and invalid, being in effect an agreement to manipulate and artificially maintain the market price of certain stock? Was the transaction a "brokerage" transaction, within the meaning of the Corporate Securities Act (St. 1917, p. 673, and acts supplementary and amendatory thereto), creating a liability on the part of defendant surety company, under the statutory bond issued, pursuant to said act, by it to the other defendants, for their alleged breach of obligation to plaintiff's assignor?

Subdivision 3 of section 5 of the Corporate Securities Act, as amended in 1925 (St. 1925, p. 967, § 3), requires that prior to the granting of a certificate to do business thereunder as an agent or broker, the applicant file a good and sufficient surety bond for $5,000 conditioned upon "the strict compliance with the provisions of this act, and the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker, his agents and employees," etc.

The said amended complaint alleges that defendants Allen and Bachelder, doing business as Allen Bachelder Company, were engaged in the business of selling, offering for sale, negotiating for the sale of, and otherwise dealing in securities, for the sale of which permits had been issued pursuant to the provisions of said act, and in the business of underwriting issues of such securities and purchasing them "with the purpose of reselling them and of offering them for sale to the public"; that about January 17, 1929, said defendants, as principals, and defendant Columbia Casualty Company, as surety, executed the $5,000 statutory bond required by section 5 of the act above quoted. The complaint sets forth the provisions of the bond in their entirety, the condition of which is that the principal, his agents and employees, shall strictly comply with the provisions of the act and "shall honestly and faithfully apply all funds received and faithfully and honestly perform all obligations and undertakings in the purchase or sale of securities by said broker, his agents and employees; and further shall pay all damages suffered by any person damaged or defrauded

by reason of the violation of any of the provisions of said act," etc. It is further stated that any person injured may bring an action for damages in his own name upon the bond.

The complaint then alleges the transaction which took place between defendant Allen Bachelder Company and plaintiff's assignor, by reason of which plaintiff seeks to recover damages from defendant surety company under said bond, the substance of these allegations being as follows: On March 11, 1929, plaintiff's assignors, Carpenter & Co., wrote Allen Bachelder Company, stating: "We and our associates are forming a Selling Group in which we will participate, and in which we are pleased to include you, to offer to the public at $30 Flat per share any part or all of 15,000 issued shares" of a certain stock. We "shall be Managers of the Selling Group with full powers" and we and our associates "as members to this Selling Group shall have the same concession as others included therein * * * Members * * * will be entitled to a selling concessions of $3.00 per share on sales confirmed to them by the Managers, except as provided below. The Selling Group will terminate * * * May 11, 1929," unless extended for not exceeding 30 days or terminated at any time by the managers in their discretion. "Definitive certificates of stock will be deliverable * * * $29 per share flat; the balance of the selling concession to be paid upon termination of the Selling Group. This Selling Group Concession, however, will not be paid in respect to any shares delivered to any Selling Group member which may be repurchased or contracted for by the Managers during the life of the Selling Group, at or below $33. In lieu of cancelling the selling concession on any shares so repurchased the Managers may require * * * members to take up such shares at the cost of repurchase. * * *"

Defendant Allen Bachelder Company applied for 500 shares of said stock issue and agreed to be bound by the terms of the offer. They took delivery of 400 shares at $29. The selling group was maintained until May 29, 1929; upon its dissolution the stock dropped to $19 per share. Prior to that date, however, the 400 shares of stock had found their way back upon the market and had been repurchased by plaintiff's assignors at $30 per share, at which price they demanded that defendants take them up. This defendants failed to do, and as a result plaintiff claims its assignors were damaged in the sum of $11,200 (400 shares at $28, being the subscription price of $30 less the $2 unpaid balance of the $3 per share selling concession). Defendants also failed to take delivery of the other 100 shares of stock subscribed for, with alleged damage resulting to plaintiff's assignors of $2,700 ($30 per share less the $3 selling concession).

The complaint further alleges that defendants subscribed for said 500 shares "for the sole and single purpose of resale thereof to the public in the regular course of the brokerage business then and there being conducted by defendants as aforesaid." It alleges that defendants took delivery of 400 shares at $29, upon the representation that "irrespective of a resale of such securities to the public (they) were financially able to purchase and carry the same throughout the life of said subscription agreement" and were "financially able to perform all of their obligations" thereunder; that plaintiff's assignors relied at all times upon said representations, which defendants knew were false and were made for the purpose of inducing plaintiff's assignors to make said agreement.

The complaint also alleges that in the securities brokerage business there exists a general custom, universally recognized, whereby a group underwriting securities, and a group formed to offer such securities for sale to the public protect the public by agreeing to maintain a minimum market price for a period of time sufficiently long to permit the distribution of such securities into the hands of bona fide permanent investors, thus guarding against what is commonly known as a "bear raid" made by market manipulators to the injury of bona fide investors.

The prayer of the complaint is for judgment against the defendants in the sum of $4,400, interest and costs. Defendant surety company filed a general demurrer, which was sustained, as aforesaid, and judgment in its favor followed, from which plaintiff has appealed.

We have set forth the facts as alleged in the amended complaint at some length in order that there may be no misunderstanding as to the true nature of the transaction upon which plaintiff's alleged cause of action is based. It will be noted that under said act a broker's bond is required for the purpose of protecting persons injured by failure of a broker to perform "obligations and undertakings in the purchase or sale of securities." We take it to be evident that negotiations for the purchase or sale of securities, must be pending and that the injured party must be the buyer or the seller therein before the provisions respecting a bond may be held to apply.

Defendant broker, under the agreement here involved, did not contract to buy securities from plaintiff's assignor, as a principal; at most said defendant failed to live up to its covenants respecting subscription to stock owned by another. And plaintiff's assignor, under said agreement, sold no stock; hence both of these brokers were on practically the same footing—they were both salesmen of the stock of another and joint agents for that purpose.

The Corporate Securities Act confines its

solicitude largely to the welfare of the investing public; to protect them from fraud and imposition is its prime purpose. It is no concern of the corporation commissioner or of the public that one broker, co-operating with another broker in an effort to market a set of securities, fails to live up to his covenant with his cobroker. It is true that in Walsh v. Standard Accident Insurance Co. (Cal. Sup.) 12 P.(2d) 16, this day decided, we accepted and applied the enlarged definition of the term "broker" found in section 2, subdivision 11, of the act. We also held in that case that the relation of principal and agent was not a requisite to the maintenance of an action by an injured party against the offender. But these holdings do not authorize a departure from the spirit and purpose of the legislation so as to include transactions such as the one here under consideration.

Some space is devoted by counsel to discussion of the legality of a compact of this character between brokers. It is easily conceivable how such a plan of action might be so abused as to foist upon the public at an arbitrary price, securities which might, under normal stimulation, be practically worthless, thus effecting a subversion of the underlying purpose of this legislation. Nevertheless, the practice has its defenders. However, under the views which we have expressed it is unnecessary to deal with this question further at this time. It is enough to hold that the special remedy provided for in the act is not intended to apply to a situation such as the one before us.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.

215 Cal. 652

McARTHUR v. STATE BAR OF CALIFORNIA.

L. A. 13354.

Supreme Court of California.

June 22, 1932.

Attorney and client ⇐58.

Evidence that attorney obtained $3,000 of client's money by means of fabricated instrument justified 18 months' suspension from practice of law.

In Bank.

Application by Leland G. McArthur for a writ to review the recommendation of the Board of Governors of the State Bar of California that petitioner be suspended for 18 months.

Recommendation affirmed.

Otto A. Gerth, of Los Angeles, for petitioner.

Julius V. Patrosso, and Philbrick McCoy, both of Los Angeles, for State Bar of California.

TYLER, Justice pro tem.

Petition for writ of review in a disbarment proceeding.

Petitioner, a licensed and practicing attorney at law, was charged in a complaint filed with the State Bar of California with having unlawfully taken from one Cora Dodd Tippie the sum of $3,000, which sum it was alleged was intrusted to him while acting as her attorney, for the purpose of investment in the business of Western States Securities Company for the benefit of said complainant. The complaint charged that petitioner did unlawfully and with fraudulent intent, and for the purpose of defrauding said Cora Dodd Tippie, forge a certain instrument purporting to be a mortgage of real estate, to secure the payment of $3,000, signed by E. F. Richards and Josephine Richards, and made payable to Western States Securities Company. To this complaint petitioner filed his written answer denying the charges made. A hearing was had, and the evidence was submitted to local administrative committee No. 8 for Los Angeles county. The committee made its findings of fact, from which it concluded that petitioner had committed "an act involving moral turpitude, dishonesty and corruption in the course of his relations as attorney and counselor-at-law," and recommended to the board of governors of the State Bar that he should be disbarred from the practice of law in this state. Subsequently petitioner appealed to the board of governors of the State Bar of California, and, upon a hearing, the findings of the local administrative committee were approved, except that the board of governors mitigated the sentence and recommended to this court that petitioner be suspended from practice for a period of eighteen months.

Petitioner claims that the recommendation that he be suspended for this period is unjust and too severe; that the act which he committed merely warranted at most a discipline, and the disbarment proceedings have accomplished this end wthout any suspension. In this connection it is the claim of petitioner that he was not guilty of any act involving moral turpitude in the course of his relations with complainant as attorney or otherwise; that all the things done by petitioner were done at the request and with the full knowledge and approval of said prosecutrix; that

she parted with no consideration whatsoever of any kind for the document referred to in the complaint, and that all the money which petitioner received from her was received as a personal loan; that such document was made for the prosecutrix at her own suggestion, and was never intended as a binding obligation, and no consideration whatsoever was given for the same. The evidence taken upon the hearing, briefly stated, shows that in the year 1925 petitioner began acting as attorney for Mrs. Tippie. Shortly after this time, a friendship and infatuation arose between them, and there is evidence which indicates that their relationship became meretricious. For the purpose of concealing this intimacy and carrying on this relationship, and to present a plausible excuse for being constantly together, petitioner, so he claimed, organized the Western States Securities Company, at the request of Mrs. Tippie, as an instrumentality through which the prosecutrix could conduct her business. The headquarters of the company were in the office of petitioner. Petitioner claims that, after the company was formed and for the purpose of having it appear that it was transacting business, he, at the request of Mrs. Tippie, executed the instrument in question. The instrument purported to be a mortgage for $3,000, but as a matter of fact, it was a fabricated document.

It further appeared that during the years covering their intimacy Mrs. Tippie had advanced various sums of money to petitioner. Petitioner claims that the sums so advanced were mere loans which were never intended to be repaid, as the parties had agreed to a marriage in the event that petitioner should succeed in divorcing his wife. In 1928 petitioner's wife discovered petitioner in the apartment of Mrs. Tippie. This discovery resulted in a rupture of the relations existing between petitioner and Mrs. Tippie. After a conference with his father, petitioner concluded to have nothing more to do with Mrs. Tippie, and so informed her. She thereupon demanded that he account to her for the money she had advanced to him for investment. She claimed that these advances amounted to $8,000, and she informed him that, unless the sum was paid, she would take steps to recover the same. The sum demanded included the $3,000 represented by the spurious instrument. After this demand, petitioner executed two promissory notes in favor of Mrs. Tippie for $4,000 each. These notes were indorsed by petitioner's father, who also deposited certain security in stocks and bonds of the value of $7,500 as collateral. The notes were subsequently paid. Petitioner claims that, when he informed Mrs. Tippie of his decision to break off his relations with her, she became aroused, angered, and resentful, and that her charges were then conceived, in spite, with the one thought in view of injuring petitioner because he had abandoned her. Mrs. Tippie denied that such motives impelled her actions and in fact denied that any clandestine relations had ever existed between herself and petitioner. She testified that the only relations between her and petitioner were that of attorney and client; she also denied that she knew the document in question was fabricated. A further review of the conflicting evidence would answer no useful purpose. It is sufficient to say that there is ample evidence to sustain the finding of the board, and we are satisfied with its recommendation. It is therefore ordered that the petitioner herein, Leland G. McArthur, be and he is hereby suspended from the practice of law in this state for the period of eighteen months beginning on the 10th day from and after the filing of this order.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

124 Cal.App. 290

KNIGHT v. GOSSELIN et al.

KNUDSON v. SAME.

Civ. 4378.

District Court of Appeal, Third District, California.

June 14, 1932.

1. Automobiles ⇐245(26).

Whether prospective purchaser taking garage man's automobile at latter's request to get wife's consent to purchase was garage man's agent as regards liability for collision *held* for jury.

2. Automobiles ⇐245(26).

Whether garage owners were negligent in permitting intoxicated prospective purchaser to drive their automobile home rendering owners liable for collision *held* for jury.

Facts disclosed that prospective purchaser and garage owners were negotiating the sale of a certain automobile, and that on a certain night the garage owners permitted the prospective purchaser, while he was in an intoxicated condition, to take the automobile under consideration home to get his wife's consent to the purchase thereof, and that on the way home prospective purchaser collided with another motorist causing injuries.

3. Automobiles ⇐245(54).

Whether intoxication of prospective purchaser driving garage owners' automobile

at excessive speed and on wrong side of street caused collision *held* for jury.

4. Judgment ⇐241.

Rendering separate judgment against two joint tort-feasors on second trial did not constitute double obligation, though original judgment against third joint tort-feasor rendered on first trial remained in force and unsatisfied.

Such judgment against two joint tort-feasors, while original judgment against their codefendant remained in force and unsatisfied, did not constitute double obligation rendering such judgment invalid, because the two joint tort-feasors were relieved from the obligation of the original judgment when they were granted a new trial.

5. New trial ⇐8.

Granting two joint tort-feasors new trial did not amount to dismissal by plaintiff so as to constitute waiver of plaintiff's damage claim against them.

6. New trial ⇐173.

Refusing instruction on second trial that liability and negligence of prospective purchaser driving garage owners' automobile had been finally determined and could not be considered against garage owners *held* not error.

Instruction that jury should not consider negligence of prospective purchaser against garage owners unless plaintiff proved that garage owners did not act as ordinarily prudent persons would have acted, and that liability of garage owners was the only point for jury to determine, and that prospective purchaser's liability had been determined in first trial, was properly refused because it informed the jury that the liability of prospective purchaser causing collision had been finally determined, and that evidence with respect to his negligence could not be considered, when it was apparent that, except for the negligence of prospective purchaser in driving garage owners' automobile, latter would not have been liable for damages.

7. Appeal and error ⇐525(1).

Refusal of instruction may not be made basis of reversible error, where record did not show which party offered it.

8. Appeal and error ⇐928(1).

Where record does not show who offered challenged instruction, presumption is it was offered by appellant.

9. Trial ⇐260(1).

Refusal of instruction covered by other charges does not constitute reversible error.

Appeals from Superior Court, Humboldt County; Thomas H. Selvage, Judge.

Action by Ira Knight and by C. Knudson against Otto Gosselin, Andrew Poscic, Frank Poscic, and another. From judgments for plaintiffs, defendants Andrew Poscic and Frank Poscic appeal.

Affirmed.

E. S. Mitchell and Blaine McGowan, both of Eureka, for appellants.

Puter & Quinn, of Eureka, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiffs procured separate judgments in consolidated actions for damages against the defendants Gosselin, Andrew Poscic, and Frank Poscic, as joint tort-feasors, for personal injuries sustained in an automobile casualty. These judgments were rendered pursuant to verdicts which were found by a jury. The causes were dismissed as to other defendants. A new trial was granted to the defendants Andrew and Frank Poscic at their request. The original judgment against the defendant Gosselin became final. In a subsequent trial upon the same pleadings in which they were joined with the defendant Gosselin as joint tort-feasors another jury found a verdict of damages against the defendants Andrew and Frank Poscic for the same amount for which the original judgment was rendered. Judgment against these appellants was rendered accordingly. A subsequent motion for new trial was denied. From this last-mentioned judgment the defendants Andrew and Frank Poscic have appealed.

The appellants operated a garage at Eureka. They were possessed of a new Velie sedan automobile, which they kept at the garage for sale. The defendant Gosselin was a railroad brakeman, who was employed with the Northwestern Pacific Railroad Company. He resided at Eureka. While he was absent from home on his run, he frequently stored his Nash automobile in the appellants' garage. Negotiations for an exchange of the Velie and Nash automobiles were pending.

About 10:30 o'clock a. m. on December 21, 1926, Gosselin returned to Eureka and immediately went to the garage of the Poscic brothers, which was situated at the corner of Broadway and Washington streets, to get his Nash machine to drive home. He carried with him a hand satchel containing two bottles of whisky. At the garage he met both Frank and Andrew Poscic, who resumed negotiations to sell him the Velie sedan automobile. Frank Poscic did most of the talking. In the course of their conference they had several drinks of liquor together. Gosselin became intoxicated. He testified in that regard:

"Q. Now you say that morning that you and Frank Poscic had some drinks from that bottle? A. We did.

"Q. Did you get intoxicated? A. I guess I did.

"Q. Were you intoxicated when you left the garage? A. I guess I was."

Andrew Poscic afterwards admitted to Mr. Shepherd, a mechanic who was employed with the Pickwick Stages Company, that: "The car should not have been * * * (permitted to go) out in the condition in which he (Gosselin) was in."

After nearly two hours spent in the garage, Gosselin took the Velie sedan automobile and drove out on his way home. He took the machine at the request of Frank Poscic to get his wife's approval to purchase it. He testified that Frank wanted him to show it to his wife and get her consent to buy it. He said in that regard: "He wanted my wife to see it. * * * He told me to take it out and show it to her." Gosselin thereupon drove the Velie sedan out of the garage. He was very drunk and utterly unable to guide or control the machine. It lurched wildly along a devious course, careening and swerving from one side of the street to the other. Within five minutes of the time he left the garage and before he had traveled a distance of four blocks, he sped over onto the wrong side of the street and crashed into the plaintiffs' machine, which was slowly approaching on their proper side of the street. Mr. Gray, a spectator, who stood upon the walk nearby, described the conduct of Gosselin, as follows: "When I first saw him he was making the turn from 4th on to Broadway. He could not make the turn, but struck the curb on 4th street and bounced back into the street. * * * He went down * * * (the street) weaving along on one side of the road and then the other. * * * I should judge (he was traveling) between 35 and 40 miles an hour." The plaintiffs' car was demolished, and both occupants of the machine were seriously injured. The amount of the award of damages is not challenged.

The appellants contend there is a lack of evidence to show that Gosselin was driving the Velie car at the time of the accident as their agent or that they had sufficient knowledge of his intoxicated condition to charge them with negligence in permitting him to use the machine. It is also asserted the judgment against the appellants is void for the reason that it creates a double obligation against them, since the original judgment against their codefendant Gosselin is still in force and unsatisfied. The refusal of the court to give certain instructions is also assigned as reversible error.

[1] We are of the opinion the record discloses sufficient evidence to support the implied finding of the jury to the effect that Gosselin was engaged in driving the Velie automobile at the time of the accident as the agent of Frank and Andrew Poscic, and that they knew he was intoxicated when he took the machine from the garage. The automobile was under the control of the appellants. Frank Poscic testified in that regard as follows: "Q. It was under your control at that time for sale? A. Yes." The appellants told Gosselin to drive the car out and show it to his wife so as to obtain her consent to buy it. The sale had not been consummated. Gosselin declared he could not buy the machine without his wife's consent. He testified he was engaged in fulfilling this request of the appellants when the accident occurred. The Velie car did not belong to Gosselin. His own Nash car was in the garage at that time and might have been used by him instead of attempting to drive home in the Velie machine. His mission at that time was to aid the appellants in selling their car. There is sufficient evidence of the agency to charge the appellants with his negligence.

[2] Independently of the application of the doctrine of respondeat superior, there is evidence in the present case to sustain an implied finding that the appellants permitted Gosselin to use and drive their car, knowing him to be dangerously drunk at the time. This negligent permission for an intoxicated person to operate the automobile amid the traffic of a city street, may create a liability on the part of the owner of the machine for injuries sustained thereby. In the case of Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 257, 260, a father was held to be liable for injuries sustained by another person as a result of permitting his son, whom he knew to be a reckless driver, to take and operate his automobile. The court said: "In its simplest form the question is whether the owner when he permits an incompetent or reckless person, whom he knows to be incompetent or reckless, to take and operate his car, acts as an ordinary prudent person would be expected to act under the circumstances. If he were to intrust his car to a person whom he knew to be insane or intoxicated or utterly incompetent to run a car, it would certainly shock the common understanding to hold that he was not chargeable with negligence. There can be no difference in principle but only in degree, where he knows the driver to be careless and reckless in the operation of the machine. In any such case, consideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality."

[3] There is ample evidence that the intoxication of Gosselin caused the accident, and that the appellants should have known he was too drunk to trust as a driver of the car.

He had not proceeded four blocks from the garage when the accident occurred. He collided with plaintiffs' machine within five minutes from the time he left the garage. He had been drinking intoxicating liquor with Frank Poscic a short time before the casualty occurred. He was so drunk he was unable to guide the machine. He ran onto the curbing at the first corner and bounded back into the street. He was driving at a reckless rate of speed. One of the plaintiffs estimated his speed at 50 or 60 miles an hour. His machine went swerving and lurching down the street. It struck the plaintiffs' car on the wrong side of the street. He was pursued and overtaken by the officers immediately after the accident occurred. He was taken from the machine in a dazed and drunken condition. In response to questions, he appeared maudlin and mumbled his replies in an unintelligible manner. Under such circumstances it is highly probable Frank Poscic must have been aware of his intoxicated condition. It should have been apparent to Poscic when Gosselin left the garage only five minutes before the collision occurred. The question of the driver's agency, his intoxication, and the appellants' knowledge of his inebriate condition, were all problems for the determination of the jury under the facts of this case. The evidence on these subjects is conflicting. The judgment may therefore not be disturbed for these reasons.

[4, 5] There is no merit in the appellants' contention that the rendering of a separate judgment against them as joint tort-feasors creates a double obligation for the reason that the original judgment against their codefendant Gosselin remains in force and is unsatisfied. A joint and several judgment was rendered against all three defendants as joint tort-feasors. Upon motion of the appellants a new trial was granted to them. Gosselin waived his right to a new trial, and the judgment became final against him. In a new trial upon the same pleadings and issues which were involved in the first trial, a judgment was again rendered against the appellants for the same amount which was awarded against the three defendants at the first trial. In support of the appellants' claim that the final judgment against them is invalid, the case of Rankin v. Central Pacific R. R. Co., 73 Cal. 93, 15 P. 57, 58, is cited, wherein it is said: "Where the plaintiff takes a judgment against some of the defendants, his action amounts to a dismissal of the case against the other defendants sued as joint tort-feasors, and the judgment debtors cannot complain, there being no contribution."

In the present case, however, there was no voluntary dismissal of the action by the plaintiffs against any of the joint tort-feasors. A new trial was granted the appellants at their own request. The plaintiffs immediately prosecuted the action against them upon the same issues contained in the original complaint and secured another judgment against them for the same amount of damages which was originally awarded. This procedure may not be deemed to constitute a waiver of their claim to damages against the appellants. Nor does the rendering of the second judgment create a double obligation against the appellants. They were relieved from the obligation of the original judgment when they were granted a new trial. The very question which is here raised by the appellants was determined adversely to them in the case of Cole v. Roebling Construction Co., 156 Cal. 443, 105 P. 255, 258, wherein the court adopted the language used in Dawson v. Schloss, 93 Cal. 194, 29 P. 31, as a correct declaration of the law. It was there said: "On the first trial judgment was recovered against both Schloss and Hinkle for $5,000. A new trial was granted as to Schloss alone. The judgment against Hinkle for $5,000 remained in force, but wholly unsatisfied. A new trial resulted in a judgment against Schloss for $3,000. Schloss appealed from the judgment against him, contending that so long as the original judgment existed against Hinkle, no judgment should have been rendered against him on the new trial; that 'while separate suits may be brought against each of joint tort-feasors, yet it is well settled that, if the defendants are sued jointly, as here, there can be but one verdict and judgment.' This court said: 'Such is not the prevailing rule in the United States.' The judgment against Schloss was affirmed."

This is authority upon facts exactly like those in the case at bar holding that a complainant may recover valid separate judgments against joint tort-feasors under circumstances disclosed by the present record.

[6] It is contended the court erred in refusing to give to the jury the following proposed instruction, to wit: "You are instructed that no matter how reprehensible you may consider the acts of the defendant, Otto Gosselin, you are under no circumstances to consider any negligence or reprehensible conduct on the part of the defendant Gosselin against the defendants Poscic, unless the plaintiff has proven by a preponderance of the evidence that the defendants, Poscic and Poscic, did not act as an ordinarily prudent man would have acted under the circumstances. I instruct you further that the liability of Poscic and Poscic is the only point for you to determine in this case. That plaintiffs' cause against Otto Gosselin and his liability thereon has been heretofore determined and settled in this case."

[7, 8] The refusal of the court to give this instruction may not be relied upon as reversible error for two reasons. The instruction is misleading and erroneous in this re-

spect; it informs the jury that the liability of Gosselin has been finally determined, and that they may therefore not consider the evidence with respect to his negligence. It is apparent that except for the negligence of Gosselin in driving the Velie car, the appellants would not be liable for damages. The chief issue in the case against the Poscic brothers depends upon imputing the negligence of Gosselin to them as their agents because of their negligence in directing or permitting him to drive the car in his inebriated condition. Moreover, the transcript on appeal fails to show who requested the giving of this challenged instruction. The refusal of instructions may not be made the basis of reversible error unless the record on appeal shows which party offered the charge. Under such circumstances, in support of the presumption in favor of upholding a judgment, it will be assumed the challenged instruction was offered by the appellants. 2 Cal. Jur. 870, § 509; Gray v. Eschen, 125 Cal. 1, 57 P. 664; Murray v. Kunde, 91 Cal. App. 440, 267 P. 158. They may therefore not complain of the refusal to give this charge.

[9] The refusal to give to the jury the following instruction is also assigned as error: "I charge you that if you have any prejudice against the defendant, Otto Gosselin, or any prejudice has been created by reason of intoxication, recklessness, hit and run, or any other act or conduct on the part of the defendant, Otto Gosselin, that may have been created in your minds by the evidence, is not chargeable in any degree to the defendants, Poscic and Poscic. The only item you can consider in that connection is: 'Has the plaintiff proven by a preponderance of the evidence that Poscic and Poscic were negligent in delivery of the automobile to Otto Gosselin, and that the said defendants did not act as an ordinarily prudent person would be expected to act under like circumstances?' If the plaintiff has so failed, your verdict must be for the defendants."

The refusal to give this instruction does not constitute reversible error. All the material parts of it were covered by other instructions which were given in the charge of the court. The court elsewhere instructed the jury it was not permitted to render a verdict based on prejudice against any party to the action. That instruction was given as follows: "You are instructed that in arriving at a verdict you must not permit yourselves to be influenced in the slightest degree by sympathy, prejudice or any emotion in favor or against either party, but must proceed solely upon the evidence introduced and the instructions of the court."

Moreover, the court fully and fairly instructed the jury they could not render a judgment against the appellants unless they found that, "Andrew Poscic and Frank Poscic were negligent, * * * and that such negligence, if any, was the proximate cause of the damage, if any, to the plaintiff." The court further instructed the jury that they could not render a verdict against the appellants unless they found that they had negligently "delivered the automobile to Otto Gosselin, when said Otto Gosselin was in such a condition of intoxication as to be incompetent to operate the same, and that the said defendants, Poscic and Poscic, knew of such condition, or ought by reasonable care to have known [of his inebriated condition]."

The jury were fully and fairly instructed in the present case. There appears to have been no miscarriage of justice.

The judgments are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

124 Cal.App. 336

MERINO v. PACIFIC COAST BORAX CO.

Civ. 7282.

District Court of Appeal, Second District, Division 1, California.

June 16, 1932.

Rehearing Denied July 12, 1932. Hearing Denied by Supreme Court Aug. 15, 1932.

1. Judgment ⇐673.

Award of Industrial Accident Commission in proceeding against contractor in which property owner was party had effect of judgment binding upon property owner in employer's subsequent action against property owner, although property owner was dismissed from compensation proceeding (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

2. Master and servant ⇐400.

Property owner claimed to be responsible for injuries could appear in workmen's compensation proceeding against contractor (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

3. Master and servant ⇐416.

Every presumption is in favor of validity of judgment in workmen's compensation proceeding.

4. Master and servant ⇐389.

Amount of workmen's compensation award in proceeding against contractor *held* admissible in contractor's proceeding against property owner to establish expenditure which employer, contractor, was obligated to pay (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Negligence ⊂⊃121(2).

Where thing is shown to be under management of defendant and accident is such as in ordinary course of things does not happen if those having management use proper care, it affords reasonable evidence, absent explanation, that accident arose from want of proper care.

6. Death ⊂⊃58(1).

Absent evidence to contrary, presumption was deceased, injured while sacking clay when tank above him collapsed, exercised due care.

7. Negligence ⊂⊃121(3).

Where contractor and employee injured had merely right to use storage tank, which collapsed, controlled and maintained by defendant, res ipsa loquitur doctrine applied.

8. Master and servant ⊂⊃420.

Employer obligated to pay compensation could not recover from third party causing injuries attorney's fee in action (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

9. Master and servant ⊂⊃389.

Employer's failure to pay compensation awarded *held* not defense available to third party causing injuries to employee (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

10. Master and servant ⊂⊃389.

Employer against whom workmen's compensation is awarded may recover from third party causing employee's injuries amount of compensation award (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by J. Merino against the Pacific Coast Borax Company. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals.

Appeal from order denying a new trial dismissed, and judgment, as modified, affirmed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for appellant.

J. B. Joujon-Roche and Frank J. Barry, both of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

Plaintiff recovered judgment before the trial court, and defendant appeals from the judgment and also from the order denying its motion for a new trial.

The cause of action, as stated in plaintiff's complaint, is one based upon the provisions of section 26 of the Workmen's Compensation Act (St. 1917, pp. 831, 854, as amended St. 1927, p. 1213). This section provides as follows: "The claim of an employee for compensation shall not affect his right of action for damages arising out of injury or death against any person other than the employer; and any employer having paid, or having become obligated to pay compensation, may likewise bring an action against such other person to recover said damages."

The facts involved are comparatively simple, and, in so far as material to the questions presented upon this appeal, are admitted or supported by uncontroverted evidence. Plaintiff, at a date prior to the accident here involved, had contracted with defendant to sack ground clay from storage tanks constructed and maintained by defendant at its mining and refining plant situated at Death Valley Junction, Cal. The clay, after being ground in mills, was then transported by a screw conveyor to storage tanks. The storage tanks were eleven feet in diameter at the top. Ten feet from the top, the tank became conical, the height of the cone being eight or nine feet, and the apex of the cone, at the bottom of the tank, was about four feet from the surface of the ground. At the apex of the cone, and directly underneath the tank, provision was made to draw off the clay from the tank and into sacks. It was necessary for the workmen engaged in filling the sacks with clay to work underneath the tanks. The tanks were equipped with a compressed air appliance to loosen the clay in the tanks. The filling of the tanks with the clay, and the operation of the compressed air to loosen the clay in the tanks, was done by and under the direction and control of the defendant. Plaintiff's contract required that he fill the sacks with clay taken from the tanks and either load the sacks so filled upon cars, or store them as directed by defendant. One De la Mora, an employee of plaintiff, while engaged underneath one of the tanks in filling sacks with clay from the tank, was killed by the collapse of the tank. Defendant's superintendent testified, "that the cone bottom of the tank had telescoped, collapsed and let the tank down." There was also evidence that the tanks were originally designed to hold borax, and that borax was of lighter weight than the ground clay they contained at the time of the accident here involved.

After the happening of the accident, above referred to, a dependent of De la Mora filed an application for adjustment of claim for compensation for his death before the Industrial Accident Commission of the state of California. In said claim, so filed, appellant and its insurance carrier were named defendants. Thereafter, at the instance of appellant, respondent was made a defendant in the proceeding. The application was regularly heard by the commission, appellant and its insurance carrier dismissed as defendants, and an award of $4,408.95 was approved and made in favor of the claiming defendant. The award thus made included an attorney's fee

and provided for payment in weekly installments.

Respondent's complaint, in so far as material here, alleges the agreement to sack the clay, the death of De la Mora by reason of the collapse of the tank, the award of the Industrial Accident Commission, negligence by reason of a failure to keep and maintain the tank in a safe condition, the obligation upon plaintiff to pay the award made by the Industrial Accident Commission, the incurring of special damages in connection with the hearing before the Industrial Accident Commission, and by way of attorney's fees in the instant action.

The answer of appellant, the defendant below, after denying that the tanks at the time of the accident were under its control or that it failed to keep and maintain them in a safe condition, alleges that the tanks at the time of the accident were controlled and operated by respondent. The answer also alleges that the accident complained of was the result of "inevitable and unavoidable accident"; was caused by the negligent act of respondent; was caused by the negligent act of respondent's employee De la Mora.

[1, 2] Appellant's first assignment of error is that the evidence fails to support the judgment, in that there is no proof upon which the trial court could make a finding as to the amount of damages. From the findings of fact made by the trial court herein, it appears that the first element of damage recognized was that arising from the award made by the Industrial Accident Commission fixing respondent's liability to pay compensation in an amount duly specified in the said award. Section 26 of the Workmen's Compensation Act, supra, provides, in actions of this character, that: "If the suit be prosecuted by the employer alone evidence of any expenditure which the employer has paid or become obligated to pay by reason of said injury or death shall be admissible, and such expenditures shall be deemed a part of the damages, including a reasonable attorney's fee to be fixed by the court. * * *" Appellant contends that it is not bound by the award, as the award in express terms relieved appellant from all liability asserted in the proceedings, and therefore, by the terms of the award, the amount of compensation respondent is required to pay may not properly be considered as an element of damage in this action. In other words, the contention is that the findings and award of the Industrial Accident Commission do not constitute a judgment, and the matters in them contained are not res adjudicata as to appellant. Appellant was a party to the proceeding instituted before the commission and directly responsible for the joining of respondent here as a party defendant in the proceeding. Upon the issue, as presented to the commission, appellant was found to be not liable, and the award so states. The appellant was a party to the proceedings and not a stranger, nor one merely nominally interested. That the award duly made by the Industrial Accident Commission, under the circumstances here present, has the force and effect of a judgment, is a well-established rule of law in this jurisdiction. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 412, 156 P. 491, Ann. Cas. 1917E, 390; Thaxter v. Finn, 178 Cal. 270, 274, 173 P. 163; Williams v. Southern Pacific, 54 Cal. App. 571, 574, 202 P. 356.

The record presented here shows that the appellant was a party to the proceeding had before the Industrial Accident Commission and had notice of the proceeding and its nature. It appeared therein, and its rights under the terms of the act were considered at the hearing, and an adjudication of its rights was made by the commission, as the award made conclusively shows. The right of the appellant to appear, as it did in the proceeding, is unquestioned. Under the very terms of the Workmen's Compensation Act, the right to maintain the instant action is expressly saved, and a rule of damages established which directly affects the rights of appellant. The appellant was an interested party in the proceeding.

"It is a general principle that where one person is responsible over to another, either by operation of the law or express contact and he is duly notified of the pendency of the suit against the latter and afforded a full opportunity to defend, the judgment if obtained without fraud or collusion will be conclusive against him in favor of the indemnitee whether he appeared or not." 15 Cal. Jur., p. 203. No question of fraud or collusion is present here.

[3] "Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which will defeat the judgment." Canadian, etc., Co. v. Clarita Land & Invest. Co., 140 Cal. 672, 674, 74 P. 301, 302.

[4] Of the authorities cited by appellant it should be noted that none of them involves the effect of an award towards a third party, who had notice of an application for compensation arising from injuries for which the third person might be held liable in a subsequent action, such as the one here involved. Though there may be some question as to the admissibility of the amount of the award under a strict construction of the doctrine of res adjudicata, there can be no question that it was admissible under the express terms of section 26 of the Workmen's Compensation Act, in that it established an expenditure which the employer was obligated to pay.

The amount of such expenditure, under the circumstances presented here, appellant cannot question upon this appeal.

[5-7] Appellant next contends that there "was no negligence whatsoever shown on the part of the Pacific Borax Company (appellant)." This contention of appellant is not supported by the record. It is not questioned that the death of De la Mora resulted from the collapse of the tank, which tank was controlled, repaired, and maintained by appellant. It is also conceded that the clay was placed in the tank by appellant. There is evidence that the tank in question at the time of the accident was equipped with compressed air to assist in the removal of the clay from the tank, and that appellant had control of this equipment. The evidence also shows that neither respondent nor his employee, De la Mora, the man who was killed, made use of hammers or bars to loosen the clay in the tank by pounding upon the tank. It appears that De la Mora, at the time of the accident, was engaged underneath the tank in filling the sacks with clay by means of the valves installed and maintained by appellant for that express purpose. It is respondent's theory of the case that the evidence here present constitutes a prima facie case of negligence as against appellant, under the doctrine of res ipsa loquitur.

"It is elementary, that the maxim, 'res ipsa loquitur,' translated means simply, 'The thing, or affair, speaks for itself.' The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' * * *" Michener v. Hutton, 203 Cal. 604, 607, 265 P. 238, 239, 59 A. L. R. 480. There is no evidence that respondent or his employee, De la Mora, were guilty of negligence. In the absence of evidence to the contrary, it is presumed that the deceased exercised due and proper care. Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 506, 143 P. 714; Code Civ. Proc. § 1963, subd. 4. Appellant seeks to distinguish the instant case from cases in which the doctrine of res ipsa loquitur is applicable by contending that the tank in question was under the control of respondent at the time of the accident; the basis of this contention being that, at the time of the accident, respondent was engaged in the removal and sacking of the clay contained therein. The evidence fails to sustain appellant's contention. It is true, respondent's employee at the time of the accident was filling sacks from the tank, but in doing this he was merely making use of the instrumentality controlled and maintained by appellant. The use was a contemplated function of the tank, as controlled and maintained by appellant, and there is no evidence of misuse or negligent use on the part of the deceased. The structure failed during a time when it was being used in the manner and under the conditions which appellant, at least, impliedly authorized. Neither respondent nor his employee, the deceased, had control or management of the structure of the tank at any time, merely a right of use. There is nothing in the record to show that the use was other than that impliedly authorized. Under similar circumstances the doctrine of res ipsa loquitur has been upheld by our courts. Ingalls v. Monte Cristo, etc., Co., 23 Cal. App. 652, 662, 139 P. 97; Van Horn v. Pac. Refining & Roofing Co., 27 Cal. App. 105, 148 P. 951.

[8] Appellant contends that the trial court committed error in that it allowed respondent the sum of $500 as an attorney's fee in the instant action. Section 26 of the Workmen's Compensation Act, supra, provides in part as follows: "If the suit be prosecuted by the employer alone evidence of any expenditure which the employer has paid or become obligated to pay by reason of said injury or death shall be admissible, and such expenditures shall be deemed a part of the damages, including a reasonable atorney's fee to be fixed by the court."

The "expenditure" referred to in the above-quoted section is, by the terms of the section itself, limited to arise "by reason of said injury or death" of the employee. The "including a reasonable attorney's fee," therefore, refers directly to expenditure arising "by reason of said injury or death," which, in the instant case, refers to the award made by the Industrial Accident Commission, and which included in its terms an attorney's fee. The judgment rendered herein should be modified by striking therefrom the sum of $500 allowed by way of attorney's fee.

[9] The fact that respondent has failed to pay the compensation awarded is not a defense available to appellant here. We have been cited to no provision of law or other authority, creating any such defense. The question is no concern of appellant, but a matter between respondent and the dependent to whom the compensation was awarded.

[10] Appellant's last specification is that plaintiff is only entitled to judgment for an amount equal to the amount of payment due under the award at the time the judgment is rendered. Section 26 of the Workmen's Compensation Act provides: "Any employer having paid, or having become obligated to pay compensation, may likewise bring an action against such other person to recover said damages." The right of recovery is statutory and is to be distinguished from cases involving

subrogation. Wabash Water & Light Co. v. Home Telephone Co., 79 Ind. App. 395, 138 N. E. 692.

The act expressly provides that the employer may recover the amount he is obligated to pay, and, the award having fixed this obligation, he is entitled to recover the amount so fixed. No limitation upon this right to recover is to be found in the act, nor has any other authority to that effect been found or cited.

The purported appeal from the order denying a new trial is dismissed. The judgment, as modified by striking therefrom the sum of $500 allowed by the trial court as attorney's fees, is affirmed. The parties, respectively, shall bear their own costs. Code Civ. Proc., § 1027.

We concur: CONREY, P. J.; YORK, J.

124 Cal.App. 356

VOLANDRI v. TAYLOR et al.

Civ. 4593.

District Court of Appeal, Third District, California.

June 16, 1932.

1. Schools and school districts ⇐141(5).

Service of written notice from school board dispensing with services, received by probationary teacher before June 10, *held* valid, though clerk sent notice by unregistered mail (School Code, §§ 5.681, 5.682).

Service of such notice was valid because the manner of serving such notice, as suggested by School Code, §§ 5.681, 5.682, is not mandatory, the important requirement being that the discharged teacher shall receive written notice of termination of services before June 10 prior to following school year, and an acknowledgment by the teacher of the actual receipt of valid written notice of discharge within time prescribed by School Code, § 5.681, is sufficient evidence of service thereof.

2. Schools and school districts ⇐141(5).

Language reasonably understood to mean tenure as probationary teacher has been terminated is sufficient notice of termination of such teacher's services (School Code, §§ 5.681, 5.682).

3. Schools and school districts ⇐141(5).

Notice informing probationary teacher he was not re-elected as member of faculty *held* sufficient notice his services as teacher had been terminated (School Code, §§ 5.681, 5.682).

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

Action for writ of mandate by D. Volandri against Walter H. Taylor and others, as Trustees of the Jackson Joint Union High School District, Amador County. From a judgment directing that the writ issue, defendants appeal.

Reversed, and peremptory writ dissolved.

Ralph McGee, of San Francisco, for appellants.

R. C. Pardoe, of Stockton, and A. Caminetti, Jr., of Jackson, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a peremptory writ of mandate which was issued to compel the appellants as trustees of a union high school district, to reinstate a probationary teacher, whom they attempted to discharge.

The appellants are the duly elected and qualified trustees of Jackson joint union high school district in Amador county. The respondent was employed by said board of trustees and served as a probationary teacher in said high school district for the school year commencing September 2, 1930. He has held himself in readiness to continue his services as such probationary teacher in that district throughout the school year of 1931–32. May 4, 1931, the school board met in regular session in the office of the high school building at Jackson, and unanimously passed a resolution to the effect that the respondent's services as a teacher in that school for the ensuing school year were not desired. The clerk of the school board was then directed to so notify the respondent in the manner required by law. May 8, 1931, George Vela, who was then a member of said school board and the duly selected clerk thereof, sent the following written notice of a termination of his employment to the respondent:

"Jackson Joint Union High School

"May 5th, 1931.

"Mr. D. Volandri, Jackson, Cal.

"Dear Mr. Volandri: As Clerk of the Board of Trustees it becomes my painful duty to inform you that at a recent meeting of the Board you were not reelected as a member of the faculty.

"With my kindest personal wishes, I am,

"G. E. Vela, Clerk."

This written notice was mailed to the respondent on May 8, 1931, by inclosing it in an envelope, addressed to the respondent at the National Hotel at Jackson, Amador county, Cal., with the postage thereon prepaid. It was thereupon deposited in the United States post office at that place. The court found: "That petitioner [D. Volandri] re-

ceived the letter set forth in paragraph IX [containing the above quoted notice of termination of services] before the 10th day of June, 1931." The receipt of the above notice by the respondent, as declared by the finding which was adopted by the court, is not disputed in the record. The trial court further held that the mailing of the above notice in an unregistered letter does not comply with the requirements of the statute with relation to the service of such notice of termination of services of a probationary teacher; that he was therefore not lawfully discharged and was entitled to be reinstated and duly assigned to the performance of his services as a teacher in that school. A peremptory writ of mandate was thereupon issued commanding the board of trustees to forthwith assign the respondent to his class duties as a probationary teacher in that school. From this writ of mandate the trustees have appealed.

Two points are assigned by the respondent in support of the validity of the writ of mandate. It is claimed the notice of termination of services is defective and void because it was not mailed to the respondent in a registered envelope, as required by section 5.681, chapter 7, article 4, of the California School Code. That section provides: "On or before the tenth day of June in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year."

The following section of that Code provides: "Such notice shall be deemed sufficient and complete when delivered in person to such employee by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to such employee at his last known place of address."

[1] The law requires written notice of the discharge to be served on the probationary teacher whose services are dispensed with, on or before the 10th day of June prior to the following school year. This was done in the present case. The court found that he actually received this written notice before that date. This fact is not disputed. Having received the written notice before the expiration of the time limited by law, it does not matter whether the teacher received it by registered or unregistered mail. Steele v. Trustees of Pittsburg Schools (Cal. App.) 9 P.(2d) 217. The manner of serving this notice, as suggested by the statute, is not mandatory. The important requirement is that the discharged teacher shall actually receive written notice of the termination of his services before the 10th day of June prior to the following school year. It would be frivolous to hold that the validity of the notice was destroyed because the envelope in which it was transmitted did not contain a registered stamp. The statute above quoted does not so declare. It merely states that evidence of the service of the notice "shall be deemed sufficient" if it is "deposited in the United States registered mail," etc. This statute does not declare that the registration of a package containing a notice of the discharge of a teacher is the only method of proving the service thereof. An acknowledgment by the teacher of the actual receipt of a valid written notice of discharge within the limitation of time prescribed by statute is sufficient evidence of the service thereof. The service of the notice of discharge in the present case was therefore adequate.

It is finally contended that the form of the written notice terminating the services of the respondent as a probationary teacher is defective and insufficient to comply with the law. The regularity of the proceedings of the board in terminating his tenure is not questioned. The court found that at a regular meeting of the board of trustees, it "unanimously passed a resolution to the effect that the petitioner was not wanted as a teacher for the ensuing school year, and the clerk of the board was instructed to notify him of this action of the board."

[2, 3] It is true the employment of a probationary teacher is presumed to continue unless he is notified of the termination thereof as provided by section 5.681, supra. It is not necessary, however, to notify him in the exact language of the statute that "his services will not be required for the ensuing year." Any language which may be reasonably understood to mean that his tenure as a probationary teacher has been terminated is sufficient. Fleming v. Board of Trustees, 112 Cal. App. 225, 296 P. 925. We are of the opinion the written notice which was served on the respondent may not be reasonably construed to mean anything but a notice that the teacher's services had been terminated by the board of trustees. It begins by saying, "It becomes my painful duty to inform you." It may not be said this was a preface to the conveyance of good news that the board had failed to act upon his teacher's tenure, and that he was therefore automatically re-elected for another year. The instrument clearly conveys information of unfavorable action upon his tenure by the board of trustees. It says, "At a recent meeting of the board, you were not reelected as a member of the faculty." The only reasonable construction of this language is that it means the board acted unfavorably upon his retention as a member of the faculty for the ensuing year. Clearly this is a reverse way of declaring that the teacher's services were terminated by formal action of the board. We are of the opinion this notice of termination of services is sufficiently accurate and intelligible to conform to the requirements of section 5.681, supra. It fol-

lows that the respondent was discharged by the board of trustees as a probationary teacher in the Jackson joint union high school in the manner provided by law, and that he was duly notified of the termination of his services as a teacher therein. He is therefore not entitled to be reinstated or assigned to classes as a teacher in that school.

The judgment is reversed, and the peremptory writ of mandamus is dissolved.

We concur: PLUMMER, Acting P. J.; PARKER, Justice pro tem.

124 Cal.App. 393

ADAMS v. STANDARD ACCIDENT INS. CO. et al.

Civ. 7241.

District Court of Appeal, Second District, Division 1, California.

June 20, 1932.

1. Limitation of actions ⇐14.

Contractor's bond may limit owner's action to less than limitations period, unless limitation is so unreasonable as to show imposition or undue advantage.

2. Limitation of actions ⇐197(1).

Facts supported finding that limitation on owner's action on contractor's bond, contained in bond, had not run when owner commenced action.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Donald D. Adams against the Standard Accident Insurance Company and another. From the judgment, named defendant appeals.

Affirmed.

Culver & Nourse and Harold J. Richardson, both of Los Angeles, for appellant.

John F. Poole, of Los Angeles, for respondent.

CONREY, P. J.

By a contract dated June 23, 1924, the plaintiff, and defendant Zimmerman, doing business as the Zimmerman Construction Company, entered into an agreement for the erection of a one-story and basement warehouse, etc. In respect to this contract the appellant company executed a "faithful performance" undertaking, in a sum equal to 25 per cent. of the contract price. The liability covered by the judgment in this action is based upon the failure of the contractor to pay for materials furnished for use and actually used in the building, and the subsequent enforcement of the materialman's lien by judgment against the plaintiff herein. In appellant's brief, filed herein, it did not "present each point separately, under an appropriate heading, showing the nature of the question to be presented." Rule VIII. In other words, there is no direct and specific statement of errors shown by the record. Such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment.

[1, 2] In his final paragraph, headed "Conclusion," counsel for appellant states that the court erred in holding against appellant on its special defense that this action was commenced too late because it was brought over two years after the actual completion of the building. This, it is admitted, was the principal matter raised by way of defense. It was based upon a term of the undertaking which limited the owner's right of action to the period of twelve months "after the date, time or period fixed in the contract for the completion of the work specified therein." It is established law that such a stipulation may be made, even though the specified period be shorter than that of the statute of limitations, if the contract period be not so unreasonable as to show imposition or undue advantage in some way. Beeson v. Schloss, 183 Cal. 618, 622, 192 P. 292. But in the present case the contract did not fix any time for completion of the work, and the evidence does not definitely establish the date when the building was completed, after the abandonment by the contractor. In view of the contested validity of the materialman's claim, and in view of the refusal of appellant to join in the defense made against that claim, we cannot say that the court erred in deciding, as by implication it did decide, that the twelve months' limitation referred to in the undertaking had not run against respondent at the time when this action was commenced.

There being no merit in the point suggested as constituting the principal ground of appeal, the judgment is affirmed. The purported appeal from an order denying motion for new trial is dismissed.

We concur: HOUSER, J.; YORK, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

124 Cal.App. 317

SLOAN v. ORIGINAL STAGE LINE, INC., et al.

Civ. 7174.

District Court of Appeal, Second District, Division 2, California.

June 15, 1932.

1. Carriers ⇐300.

Bus driver approaching intersection at 35 miles per hour, and colliding with motorist slowly crossing intersection, injuring bus passenger, *held* negligent.

2. Carriers ⇐316(4).

Complaint alleging defendant so negligently operated bus as to cause collision did not specifically allege negligent act so as to make res ipsa loquitur doctrine inapplicable.

Complaint alleged that "defendant did so carelessly, negligently, recklessly, and unlawfully propel, operate, manage, and control motor bus so as to cause the same to collide with the automobile of the defendant."

3. Damages ⇐130(3).

$10,000 for causing pain in spine and occipital region, and constant twitching and jerking of muscles, *held* not excessive.

Facts disclosed that injuries caused extreme nervous disorder, and that injured person suffered from traumatic chorea, which is disorder of motor nerves, causing a constant twitching and jerking of muscles, and that injured person suffered from pain in the head, neck, and shoulders, and was exceedingly nervous and nauseated, and was unable to control herself, hardly able to eat her food, dress herself, and was unable to sleep.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by Elihu Sloan, as guardian of the person and estate of Zelma Henry, against the Original Stage Line, Inc., and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, for appellant.

IRA F. THOMPSON, J.

This is an appeal from a judgment for the sum of $10,000 in favor of the plaintiff for personal injuries suffered by his ward and against the appealing defendant.

The grounds of the appeal may be stated as follows: (1) The doctrine of res ipsa loquitur was improperly applied, first, because the proof established negligence on the part of the codefendant, and, second, because the complaint alleges specifically the negligent acts complained of; (2) that, in addition to instructions embodying this doctrine the court gave other erroneous instructions; and (3) that the verdict is excessive.

[1] We are supplied with no brief by the respondent, who was a passenger on the bus of the appellant. However, it is sufficient to say that the evidence adduced in this case brings it squarely within the law announced in St. Clair v. McAlister (Cal. App.) 8 P.(2d) 556 (with which we must presume counsel is familiar, inasmuch as he was appellant's attorney there), and the authorities there cited, in so far as the doctrine relating to the presumption of negligence is concerned. Also the testimony of the defendant Koenig was sufficient—stating, as he did, that the driver of the bus approached the intersection at a speed of about thirty-five miles an hour and ran into him while he was attempting to cross at five miles an hour—to authorize the jury to find that respondent was guilty of negligence. Also it may be noted that practically all of the witnesses placed the speed of the bus considerably in excess of fifteen miles per hour.

[2] The complaint alleges that "the defendant Original Stage Line, Inc., did then and there so carelessly, negligently, recklessly and unlawfully propel, operate, manage and control said motor bus so as to cause the same to collide with the automobile of the defendant." The quotation demonstrates that the complainant falls far short of setting out "specifically the negligent acts or omissions complained of."

The instructions of which appellant complains are based upon the law relative to the right of way of vehicles entering an intersection. It is the contention of appellant that, inasmuch as its bus was traveling upon a main or "Stop" boulevard, even though Koenig came to full stop before proceeding to cross, and although he approached "from the right," the bus was not required to yield the right of way. Appellant's counsel says: "The purpose of the boulevard stop is to require that vehicles approaching a main highway be brought to a complete stop and to remain there until they can with safety get started across the intersection before cars traversing the boulevard enter thereon. To hold that the vehicle approaching from the right after having stopped at the boulevard stop sign would still be entitled to the right of way against those coming from the left along the main highway, and those at the left be required to wait until the other car had started up again and passed, would be to seriously impede the traffic on the main artery and render ineffect[ive] an important part of the purpose of the boulevard stop." The accident here in litigation occurred February 24,

1928, and at that time the provisions of the California Vehicle Act with respect to the right of way contained no such exception as that which counsel would have us insert by a process of judicial legislation. We have no authority to enter this domain of government.

[3] We therefore proceed to examine the contention of appellant that the verdict is excessive; that is to say, so large as to indicate to us that it was arrived at as the result of passion or prejudice on the part of the jury. The injured lady, the ward, was 28 years of age at the time of the accident—apparently in good health. She described the injury to herself as follows: "Well, I struck my neck against the window and then hit on the—and then my side and then I hit my head against the floor. I just became numb for about five minutes and then when I got to my seat when the bus driver came and got me up. Well then it seems to me like all at once something broke loose and I was helpless. I was not unconscious or anything. I could not walk, I could not walk alone." Other testimony produced by the plaintiff establishes an extreme condition of nervous disorder evidenced by inability to sleep—a constant twitching and jerking of the muscles, with complaints by Mrs. Henry of pain in the head, neck, and shoulders. For example, the family physician who examined her after the accident testified that he "found her exceedingly nervous and nauseated, vomiting, complaining of pain in the occipital region and also along the spine—the side"; that she was suffering from traumatic chorea, which is "a disorder of the motor nerves, it causes a kind of jerking or contraction of the nerves. The individual is unable to keep still" and that "throughout all of that time (i. e., to the time of trial on July 26, 1929) the girl was exceedingly nervous and upset. It seems that the nervous system was thrown entirely out of gear, and she was just—well the condition was really pitiable that she was in. She was unable to control herself, hardly able to eat her food, or rest at any time, and at night she was unable to sleep—just completely upset." Her brother gave the following very graphic picture of her condition: "She was very nervous on February 24th and from then on she was unable to dress herself at times and did not eat herself but we had to feed her and had to put her clothes on her. She was excited, would get out of bed and hide. I would come home from work and she would not recognize me. She would not let no one see her but my wife, and she was so bad that I could not care for her. Instead of growing better she grew worse. She seemed to have lost her mind and her mentality was very bad. She could not sleep at night. I had to get up out of bed with my wife and sleep with her until she could go to sleep. We had to keep the lights burning all night for her. At times she would wake up at night and come into our bedroom or go into the front room and sleep on the floor. She would want to climb out of the windows and go into the bath tub and turn on the water and say she had been to the beach. At times she did not know her mind. She was afraid of everybody. She did not recognize anybody only my wife. She recognized her."

Another physician testified she was suffering from chorea. The general hospital, the records of which were produced at the instance of the appellant, took a blood test which disclosed a result of 4 plus. It is claimed by appellant that the mental or nervous disorder is the result of, or largely contributed to by, this condition. However, the family physician testified quite positively to the contrary, and in fact the hospital records disclose a negative condition of the spinal fluid, and Dr. Steele, a member of the lunacy commission, records this: "Had four plus blood Wasserman two months ago when patient was in medical ward. While there had spinal fluid which was absolutely negative and had no signs of nervous involvement, think it was a peculiar functional condition resulting from the accident." Her family physician testified with respect to the continuation of the nervous affliction as follows: "The prognosis in her case is what I would call unfavorable—that she will be bothered with these attacks for the balance of her life, that is [what] I believe, about it." It cannot be seriously argued, in view of the state of the record, that this case calls for our interposition on the ground that the verdict is so gross as to indicate passion or prejudice. There is pictured to us a condition more excruciating in its manifestation and mental suffering than the loss of a member of the body.

Judgment affirmed.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

HARRIS v. KESSLER.

Civ. 7501.

District Court of Appeal, First District, Division 1, California.

June 15, 1932.

Rehearing Denied July 15, 1932. Hearing Denied by Supreme Court Aug. 12, 1932.

1. Landlord and tenant ⇐79(3).

Where purchaser of leasehold interest defaulted in payment, vendor could treat sale as absolute and sue for amount due.

2. Landlord and tenant ⇐79(1).

Provision in leasehold sales contract providing for accelerated maturity was lawful one enforceable in equity.

3. Landlord and tenant ⇐79(3).

In absence of agreement, vendor need not demand payment before commencing suit for amount due under contract for sale of leasehold interest, especially where whole sum became immediately due on default.

4. Pleading ⇐223.

Where denials in answer were inseparably connected with matters pleaded specially, no fact issue remained where demurrer was sustained to entire answer.

5. Pleading ⇐87.

Defendant, not being entitled to recover under count of cross-complaint wherein all facts were specially pleaded, could not recover under common count.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by H. Harris against Fred G. Kessler, in which defendant filed a cross-complaint. From a judgment for plaintiff, and an order denying defendant's motion to vacate, defendant appeals.

Affirmed.

Superseding opinion in 3 P.(2d) 55.

Russell W. Cantrell, of San Francisco, for appellant.

Joseph T. O'Connor and M. L. Choynski, both of San Francisco, for respondent.

PER CURIAM.

Defendant declined to amend his answer and cross-complaint, after demurrers thereto had been sustained with leave to amend, and thereupon judgment was entered in favor of plaintiff as prayed for in the complaint. Subsequently defendant moved to vacate the judgment upon the ground that by reason of certain denials in the answer the cause was at issue when the judgment was entered. The motion was denied; whereupon defendant appealed from the judgment and the order denying his motion to vacate.

The action involved the alleged breach of a conditional sales contract for the sale and purchase of the leasehold interest in and the furnishings of a hotel, of which plaintiff was the owner. The complaint declared on a common count for the recovery of the sum of $7,900; it being alleged merely that the sum was due for personal property sold and delivered to defendant at the latter's instance and request. In his answer and in the first count of his cross-complaint defendant pleaded the execution of the contract and its terms, and attached a copy thereof to the pleading. It appears therefrom and from the allegations of the pleadings that plaintiff agreed to sell, and defendant agreed to purchase, the business for the sum of $24,000. Certain other property was included in the transaction, for which defendant was credited in the sum of $10,000. The agreement of sale provided that an additional sum of $4,000 was to be paid in cash when the contract was executed; the balance of $10,000 to be paid in monthly installments of $300 or more, together with interest on deferred payments until the whole sum was paid. A default clause provided in substance that, if the purchaser failed for a period of three days to pay any installment of principal or interest, as provided for, then the whole amount together with interest should immediately become due and payable. The agreement further provided that time was of its essence. At the date of the commencement of the action, defendant was in default according to the terms of the agreement in the sum of $1,500 on account of principal.

Under the acceleration clause, plaintiff elected to consider the full amount due, and sued for the same and caused a writ of attachment to be issued and levied upon the property covered by the sales contract. The main point involved in the case is whether or not the vendee was in default with respect to the meeting of the specified monthly payments, justifying the vendor in legally exercising his option to declare due and payable the entire unpaid balance of the purchase price, it being conceded that payments were never made by defendant in accordance with the strict terms of the contract, but were made and accepted by plaintiff after the same had become due, without objection and without any notification to defendant that future payments would have to be made strictly in accord with the agreement. Under these circumstances, it is appellant's claim and he so alleged in substance in his answer and cross-complaint that plaintiff waived the time element of the contract, and consequently prematurely instituted his action to recover the entire unpaid balance, and illegally took possession of the property through the attachment; that, having done so, the legal effect was to create a breach of

the agreement on his part, entitling defendant vendee to recover from plaintiff the full amount paid under the contract which amounted to the sum of $16,636.92 and for which judgment was prayed in the cross-complaint. In support of this claim, we are cited to numerous authorities to the effect that a seller under a conditional sales contract will not be permitted to declare a forfeiture of the rights of the purchaser under such a contract for nonperformance where such breach has been with the express or implied consent of the seller.

[1-3] There can be no question that the law is well settled that a waiver of the time element occurs under such circumstances where a forfeiture is involved. This principle, however, has no application to the instant case. No question of forfeiture is here presented. Plaintiff elected to treat the sale as absolute, and sue for the amount due. He seeks no forfeiture. This he had a right to do. The question is not one of first impression in this state. A provision in an agreement for accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms. Such an agreement is a lawful one which the parties may enter into, and when they do so the conditions will be enforced by courts of equity. No forfeiture is involved in such act, and no penalty imposed. Plaintiff is not asking for anything that has been paid under the contract by way of forfeiture, but is simply refusing to extend the credit for the reason that defendant has failed to comply with his contract. The situation is entirely different from an agreement of sale wherein, upon failure of payment of an installment, the vendor is attempting to retain payments made and also the property itself, the subject of the sale. Young v. Burchill, 96 Cal. App. 341, 274 P. 379; Righetti v. Monroe, Lyon & Miller, Inc., 109 Cal. App. 333, 293 P. 114. Nor does the fact that, after default, no notice was given the vendee that strict compliance with the time element of the contract would in future be enforced alter or in any manner affect the situation. In the absence of an agreement upon the subject, it is not essential that a demand for payment be made before suit in this character of action, and especially so where the whole sum of the principal becomes immediately due on default. As above indicated, there is no element in the case which would justify a court, upon the theory of waiver or estoppel, in denying plaintiff the right to enforce the express terms of the contract, as such an agreement cannot be condemned as being oppressive or opposed to equitable principle; no forfeiture being involved. Therefore, since the doctrine of waiver and estoppel sought to be invoked by defendant was not available to him either as a defense to the action or as proper subject of a cross-complaint, the demurrers were properly sustained.

[4] Defendant's next point is that the presence in the answer of certain denials put the cause at issue, and therefore precluded the entry of judgment on the complaint. If the denials stood alone, they would probably have such effect; but they were inseparably connected with, and made an integral part of, the matters pleaded specially in the answer, and therefore, since the demurrer was sustained to the entire answer, no issue of fact remained. Durst v. Jolly, 35 Cal. App. 184, 169 P. 449. If defendant desired a trial on the issues raised by such denials, he could easily have obtained the same by filing an amended answer under leave of court granted for such purpose, pleading the denials separately; but, as stated, he declined so to do.

[5] Nor do we find any ground for reversal because of the order of the court sustaining the demurrer to the second count in the cross-complaint without leave to amend. It was a common count for money had and received, the demand being for $16,636.92, which was the identical amount claimed under the first count, and manifestly was based on the same state of facts set forth in the first count. It follows, therefore, that, if defendant was not entitled to recovery under the first count, wherein all of the facts upon which the demand was based were specially pleaded, he was not entitled to recover the same under a common count.

The judgment and orders appealed from are affirmed.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. J. G. RUDDLE PROPERTIES, Inc., et al.*

Civ. 4439.

District Court of Appeal, Third District, California.

June 14, 1932.

Rehearing Granted July 14, 1932.

1. Alteration of instruments ⇐29.

Finding that trust deed was not altered after execution *held* supported by substantial evidence.

2. Appeal and error ⇐1010(1).

Finding supported by substantial evidence is binding on appellate court.

3. Licenses ⇐39.

Presumption is that holders of corporate bonds secured by trust deed took them in usual course without notice that permit for

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 23 P.2d 1016.

issuance had not been obtained (St. 1917, p. 679, § 12).

4. Licenses ⇐39.

Corporation which failed to obtain permit for issuance of bonds secured by trust deed cannot set up its own wrong against innocent purchasers (St. 1917, p. 679, § 12).

5. Mortgages ⇐512.

Where trust deed securing bonds so provides, court on foreclosure may order property sold in one parcel, if not "impracticable" (Code Civ. Proc. § 694).

"Impracticable" means incapable of being effected from lack of adequate means, impossible of performance, not feasible, while "feasible" means capable of being done, executed, or effected, practicable; fit to be used, dealt with successfully, suitable; likely, probable, reasonable.

[Ed. Note.—For other definitions of "Feasible" and "Impracticable," see Words and Phrases.]

6. Mortgages ⇐209.

Trustee in trust deed securing corporate bonds need not see to application of proceeds, absent provision in trust deed imposing such duty.

7. Mortgages ⇐486.

Absent contest among defendants to action to foreclose trust deed securing corporate bonds, court had no jurisdiction to decide their rights inter sese.

Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by the Security-First National Bank of Los Angeles against the J. G. Ruddle Properties, Inc., and others. From judgment rendered, named defendant and others appeal.

Modified and affirmed.

See, also, 211 Cal. 346, 295 P. 343.

James F. Peck and Robert L. McWilliams, both of San Francisco, Gibson, Dunn & Crutcher, of Los Angeles, Stephen W. Downey, of Sacramento, Edward Bickmore, of Merced, and C. H. White, C. F. Rafferty, Louis Ferrari, and T. J. Bricca, all of San Francisco, for appellants.

O'Melveny, Tuller & Myers, Walter K. Tuller, and Homer I. Mitchell, all of Los Angeles, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

The Security-First National Bank of Los Angeles, having succeeded to all the rights and authority of the Los Angeles Trust & Savings Bank and the Pacific-Southwest Trust & Savings Bank, was substituted as plaintiff in this action.

Plaintiff brought this action to foreclose a mortgage or deed of trust executed by defendant J. G. Ruddle Properties, Inc., to secure $300,000 in bonds.

Plaintiff was named as trustee in said instrument, and judgment was rendered in its favor as said trustee for the sum of $466,580.97, foreclosing the said mortgage and ordering the property described therein to be sold and the proceeds applied to the payment of said sum.

The judgment further provided that defendant Hunter, Dulin & Co. has a lien on said property, subject to plaintiff's mortgages, for $26,338.17; that defendant Carl E. Wagner has a lien on said property, subject to the lien of plaintiff and to the lien of Hunter, Dulin & Co., for $33,283.01; and that defendant T. H. Carlon has a lien on said property, subject to the lien of plaintiff and the liens of Hunter, Dulin & Co., and Wagner, for $29,163.55.

From this judgment defendants Ruddle Properties, Inc., Carlon, Lemas, Pareira, Bettencourt, Silva, Petta, and Wagner have appealed.

This mortgage or deed of trust was given to secure the payment of bonds to the amount of $300,000, 275 of said bonds being of the denomination of $1,000 each and 50 of said bonds being of the denomination of $500 each. Permit from the Corporation Commission was obtained for the sale of said bonds amounting to the sum of $225,000, but no permit was secured for the sale of the bonds amounting to the sum of $75,000.

The court found that all of said bonds were sold by appellant J. G. Ruddle Properties, Inc., to bona fide purchasers for value in good faith, before maturity, without notice of any defect or infirmity in said bonds, or any of them. The Hunter, Dulin Company acted as agents for J. G. Ruddle Properties, Inc., in negotiating the sale of said bonds.

The principal contention of appellants is that the mortgage or deed of trust was altered, in material respects, after its execution, without the knowledge or consent of appellant Ruddle Properties, Inc.

Allan Ruddle, a witness for appellants, testified that he was the vice president of Ruddle Properties, Inc., at the time the mortgage or deed of trust was executed. The original mortgage or deed of trust, together with a copy, was handed to witness by Hugh Landram, the attorney for Ruddle Properties, Inc. He took them home, and the next day, August 10, 1922, he, his father, since deceased, and his brother, Garland Ruddle, then secretary of said company, carefully read the said documents and that the two documents were identical. Witness testified that there were pencil alterations in both the original instruments and in the copy, and that the al-

terations were the same in each; that he retained possession of said documents until August 14, 1922, when he and his father and brother went to Merced, and in the office of their attorney, Landram, the original was signed and acknowledged; that at that time the pencil interlineations were still on the original after its execution; that Phil Brooks, the agent of Hunter, Dulin & Co., came to the home of witness on August 15, 1922, and brought the bonds which were signed by his father and brother and were delivered to said Brooks together with the mortgage or deed of trust; that Brooks said that, when he got back to Los Angeles, he would write in ink the pencil notations contained in the original; this witness also testified that there was a good deal of hurry and rush among the attorneys in order to get the papers in shape for the bond issue; that all papers regarding this matter were prepared in Los Angeles and sent up from there. The testimony of Garland Ruddle on behalf of appellants was substantially the same as that of Allan Ruddle.

An examination of the copy of the mortgage or deed of trust returned by Allan Ruddle, and which appellants introduced in evidence as their Exhibit No. 7, shows about thirty interlineations in pencil, whereas the original mortgage or deed of trust executed on August 14, 1922, shows none (being Plaintiff's Exhibit 1).

H. K. Landram, a witness for respondent, testified that he was the attorney who represented J. G. Ruddle Properties, Inc., in the matter of their bond issue of $300,000; that the deed of trust securing same was executed in his office in Merced and in his presence, and was acknowledged before him as a notary public; that the said instrument did not when so executed contain any pencil notations, nor did it have any of the pencil notations that appear on Appellants' Exhibit No. 7. He stated on cross-examination that he could not say whether or not he read the deed of trust over before it was executed. He had been instructed by Mr. North of the firm of Gibson, Dunn & Crutcher to be extremely careful that everything was done just right, and, while he could not say that the deed of trust produced in evidence by respondent was in the identical condition that the instrument was in when it was executed and acknowledged in his presence, he reiterated the statement that there was no pencil writing on that instrument at the time it was executed. R. L. North, a witness for respondent, testified that he was an attorney, and was associated with Gibson, Dunn & Crutcher of Los Angeles; that he had charge of legal matters connected with the bond issue of Ruddle Properties, Inc., and that he prepared the trust deed and other documents pertaining to the bond issue; that Landram was the attorney for said company, and that witness sent him the various documents relating to the transaction; that he sent Landram the deed of trust that was executed by the Ruddle Properties, Inc.; that Appellants' Exhibit No. 7 was an early draft of the proposed deed of trust; but that the deed of trust that he sent Landram for execution by the Ruddle Company was a completed instrument, and that the deed of trust is now in the same form it was when it was sent to Landram for execution; that the only writing with pen and ink that appears on the deed of trust is the filling in of certain dates which were placed there by witness before he sent it to Landram for execution; that a copy of this instrument was sent to the corporation commissioner a few days after its execution.

An inspection of Respondent's Exhibit No. 1, which is the deed of trust executed by the Ruddle Company, shows no pencil marks nor writings with pen and ink except the aforesaid dates.

One of the changes which appellant claims to have been made after its execution was that the deed of trust covers after-acquired property. On August 4, 1922, and again on August 11th following, resolutions were passed by the board of directors of the Ruddle Company authorizing the insertion of this clause in the deed of trust, and these resolutions were prepared by North.

Allan Ruddle testified that he discovered that changes had been made in the deed of trust in 1928; that at the last-named date he found a letter written by Brooks to Landram dated August 17, 1922, in which Brooks requested Landram to send his copy of the trust deed to him in order that he might substitute corrected pages which were made in the original, and that, upon such substitution being made, he would return it to Landram for his files. Landram made no reply to this letter. He further testified that he had a certified copy of this deed of trust made in 1924 for the purpose of securing a loan or for use in selling some of said stock.

[1, 2] The trial court found that the mortgage or deed of trust was not altered in any respect after its execution on August 14, 1924. We are of the opinion that this finding is supported by substantial evidence, and, such being the case, this finding is binding upon this court.

[3] Appellants next contend that the bonds amounting to $75,000 having been issued without the permission of the corporation commissioner are void. Supporting this contention he cites section 12 of the Corporate Securities Act of Statutes of 1917, p. 679, which provides "every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void."

The $75,000 worth of bonds for which no

permit was issued were all issued and sold by appellant Ruddle Company in 1923 and 1924 for value. None of them matured until 1926. While there is no direct evidence that the holders of these bonds took them without notice that a permit for their issuance had not been given by the corporation commissioner, yet the inference is that they took them in the usual course of trade without such notice.

In the case of Goodale v. Thorn, 199 Cal. 307, 249 P. 11, 12, the court said: "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities. Eames v. Crosier, 101 Cal. 260, 35 P. 873. To the same effect are the cases of Sinkler v. Siljan, 136 Cal. 356, 68 P. 1024; Bell v. Pleasant, 145 Cal. 410, 78 P. 957 [104 Am. St. Rep. 61]; Blochman Commercial Bank v. Moretti, 177 Cal. 256, 170 P. 419."

The trustee in this case, the respondent, is merely a nominal party in this action; the real parties in interest are the owners and holders of the bonds. In the recent case of Eberhard v. Pacific Southwest Loan & Mortgage Corporation (Cal. Sup.) 9 P.(2d) 302, 303, after stating that there was nothing whatever to show that plaintiffs were anything more than innocent victims of appellant, which was now seeking to profit by its own deliberate wrong, the court said: "The inhibitions of the Corporate Securities Act * * * against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (section 3517, Civ. Code), and other kindred principles, immediately recur to the mind. The above is but a recast of the doctrine abundantly supported by authority and applied in cases involving this very act done under similar circumstances. See Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, and Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 281 P. 396; Hemmeon v. Amalgamated, etc., Co., 95 Cal. App. 400, 273 P. 74."

[4] So in the instant case, there is no showing made that the bondholders are other than innocent victims of appellant, Ruddle Company, which is now seeking to profit by its own wrong.

We are therefore of the opinion that, under these circumstances, the defense that no permit was given to sell these bonds cannot avail appellants.

[5] Appellants claim that the court erred in ordering the property described in the deed of trust to be sold in one parcel, as an entirety.

Where the parties have contracted that the property shall be sold in one parcel, the court, in ordering the sale, shall proceed in accordance with the contract. In Humboldt Savings Bank v. McCleverty, 161 Cal. 285, at page 289, 119 P. 82, 84, the court said: "We do not doubt that the parties to a mortgage or a deed of trust may contract that the premises shall be sold as a whole, and that their agreement to this end is enforceable." See, Bank of Sonoma County v. Charles, 86 Cal. 322, 24 P. 1019.

In the instant case, the deed of trust provided that, under a judgment or decree of foreclosure, the whole of the property should be sold in one parcel, and as an entirety, unless such sale as an entirety is impracticable by reason of some statute or other cause.

The only evidence produced by either of the parties upon this matter was that of Allan Ruddle. He testified that 1,800 acres of the premises were in the river bottom and were divided into six units of dairies, each having a barn and dairy equipment, and each leased and operated by different persons; that 1,900 acres of upland were divided into 400 acres of vineyards, 600 acres in peach trees, and about 700 acres of pasture land, the remaining consisting of 300 or 400 acres lying under the canal; that he had some experience in selling land in the neighborhood; and that, if this property be sold as a whole, it would not realize 50 per cent. of its value.

It is manifest that the court was authorized to order the sale of the premises in one parcel, unless such sale in one parcel would be impracticable by reason of some statute or other cause. In Humboldt Savings Bank v. McCleverty, supra, the court held that section 694 of the Code of Civil Procedure did not apply to a mortgage which provided that the premises be sold in one parcel.

4 Words and Phrases, First Series, 3443, defines the word "impracticable" as incapable of being effected from lack of adequate means, impossible of performance, not feasible. Practically the same definition is given in 31 Corpus Juris, 259. Webster's New International Dictionary defines "feasible" as

follows: (1) Capable of being done, executed or effected, practicable; (2) fit to be used, dealt with successfully, suitable; (3) likely, probable, reasonable.

Appellants Ruddle Company and Wagner allege in their answers that the sale of the whole of said property in one parcel would be impracticable, for the reason that no purchaser could be found who would bid the market value of said property, and that it could not be sold as a whole for a sum approximating its value; that, if offered for sale in parcels and so sold, the proceeds realized therefrom would be in excess of the amount owing on the bonds.

Supporting these allegations is the testimony of Allan Ruddle which appears to have been received without objection. This testimony shows that the mortgaged property is not devoted to a single line of production, but included the growing of grapes and peaches and the operation of dairies. Under these conditions, it would appear that the practicable way of disposing of this large body of land so as to realize anything like its market value would be to segregate it into units. By this segregation purchasers who desired to purchase only the dairies would be given the opportunity of bidding for dairies, while those who desired the land planted to grapes or to peaches would be afforded the opportunity of bidding for these.

Appellants claim that the court erred in overruling their demurrers to the complaint. While they have failed to point out in their briefs the grounds upon which they rely to sustain this claim, we are of the opinion that it is without merit.

[6] They also claim that the trustee should have seen that the money realized from the sale of the $75,000 bonds was applied to the improvement of the mortgaged land. An examination of the deed of trust fails to show that the trustee was required to do this.

[7] Appellants also contend that the court had no authority to determine the priorities of the defendants' alleged liens among themselves, nor any authority to make the nunc pro tunc order, striking out of the judgment the clause entitling appellants Hunter-Dulin & Co., Wagner, and Carlon to have their said liens foreclosed.

In Rowley v. Davis, 169 Cal. 678, 147 P. 958, the court held that the conflicting claims of the defendants between themselves, in which the plaintiff was not interested, should be postponed for determination.

In the instant case, the pleadings showed no contest of appellants between themselves as to their liens or to the priorities thereof with respect to each other, consequently there was no issue raised that gave the court the right to pass upon their liens, or priorities of same, as between themselves. Such being the case, the matters involved in the appeal from the nunc pro tunc order are not necessary to be discussed by reason of the modification of the judgment hereinafter made.

The judgment is modified by striking out paragraphs III, IV, V, and VI of the judgment relating to the liens of Hunter-Dulin & Co., Carl T. Wagner, and T. H. Carlon; the judgment is further modified by striking out that part thereof requiring said mortgaged premises to be sold in one parcel and as an entirety and substituting for the part of said judgment so stricken the following words: "The property shall be segregated and sold in separate parcels or units"; the trial court to take evidence for the purpose of ascertaining into how many parcels or units said mortgaged property should be divided, and upon such hearing to divide said property into the parcels or units that appear from said evidence to be best adapted to produce the most advantageous sales of same, and thereupon to order said property to be so sold.

The judgment, as so modified, is affirmed; neither appellants nor respondent to recover costs on this appeal.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

124 Cal.App. 385

HOLT v. YELLOW CAB CO. OF SAN DIEGO et al.

Civ. 883.

District Court of Appeal, Fourth District, California.

June 17, 1932.

Rehearing Denied July 12, 1932. Hearing Denied by Supreme Court Aug. 15, 1932.

1. Carriers ⇐320(17).

Negligence of taxicab driver in proceeding along middle of street at excessive speed *held*, as respected liability for injuries to passenger, for jury (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

2. Carriers ⇐321(21).

Instruction on doctrine of res ipsa loquitur, in action by taxicab passenger for injuries sustained in collision, *held* not erroneous.

The driver of car colliding with cab was not a defendant, and court in instructions confined application of doctrine to consideration of the operation of the taxicab, so there was no confusion with other issues; and passenger was entitled to explanation from carrier as to why such collision occurred in center of broad and lighted paved street, unincumbered by other traffic.

3. Carriers ⇐321(21).

Instruction, in action to recover for injuries to taxicab passenger in collision, in respect to burden of proof shifting to defendant to show freedom from negligence, *held* not reversible error.

Instruction in respect to burden of proof shifting to defendant to show freedom from negligence appeared in instruction on doctrine of res ipsa loquitur, and merely pointed out to jury that, where presumption applied, defendant must then meet prima facie case with sufficient evidence to balance any presumption of negligence, in addition to which many other instructions repeatedly told jury that burden was on plaintiff to prove by preponderance of evidence that defendants were negligent and that such negligence was proximate cause of injury.

4. Evidence ⇐91.

Burden of proving case always rests upon plaintiff.

5. Appeal and error ⇐1064(1).

Instruction on doctrine of last clear chance, in action to recover for injuries to taxicab passenger in collision, *held* not prejudicial.

Since court at request of defendants had given a number of instructions to effect that defendants would not be liable if driver of taxicab without fault on his part took the wrong course in meeting sudden emergency, there was no error in also instructing jury to effect that defendants would be liable if driver of taxicab in the exercise of ordinary care should have avoided the collision even after the dangerous situation arose.

6. Damages ⇐132(1).

$12,000 for injuries consisting of numerous bruises and comminuted fracture of thigh bone with fragments of bone driven into muscles *held* not excessive.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Helen Holt against the Yellow Cab Company of San Diego and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. Haines and Gray, Cary, Ames & Driscoll, E. P. Sample, and W. H. Wylie, all of San Diego, for appellants.

Whelan & Whelan, of San Diego, for respondent.

BARNARD, P. J.

This is an appeal from a judgment for damages for injuries sustained in an automobile collision, based upon the verdict of a jury. The respondent was a passenger for hire in a taxicab owned and operated by the appellants. The collision occurred on First street, between Cedar and Date streets, in the city of San Diego. First street is a paved street, 52 feet wide from curb to curb, running north and south. As the taxicab proceeded north on the occasion in question, it collided with a south-bound automobile practically in the center of First street and about 46 feet north of the Cedar-street intersection, at a time when no other traffic was in sight.

[1] It is first urged that there is no substantial evidence of negligence on the part of the driver of the taxicab. This driver testified that when he was at the intersection of First and Cedar, he saw the other car at the intersection of First and Date, which was 300 feet away; that this other car was then coming south, being a little west of the center line of the street; that shortly thereafter that car wobbled back and forth across the center line of the street several times, finally going over to within 1 or 2 feet of the east curb of First street; and that it then suddenly came over to the center of the street and struck the taxicab. The driver of the taxicab also testified that during this time he was proceeding north at a speed of 15 miles per hour; that he was about in the center of First street; and that when he first saw the other car he tried to pull over to his right, but seeing that the other car was coming over to that side, he pulled over to his left and was trying to get out of the way when he was hit. On the other hand, the respondent testified that as they reached the Cedar street intersection she saw the other car coming south on First street; that both the other car and the taxicab were traveling about the center of the street; that the other car was not wobbling from side to side, and did not swerve over toward the east curb; and that right after they passed the Cedar street intersection the taxicab driver suddenly swerved his car to the left then back to the right again, at which time the collision occurred. Another passenger in the taxicab testified that it was proceeding north along the center of the road; that just after they passed the intersection of First and Cedar streets he felt the taxicab whip to his left and back again; that he then looked to the front and saw the other car right in front of them; that just before the impact there was more of the road on his right-hand side than there was on his left; that there was an arc light at the Cedar street intersection near which the collision occurred; and that the taxicab was traveling between 25 and 30 miles an hour. After the collision the taxicab came to rest pointing in a northeasterly direction and with its rear about 12 feet from the west curb line of First street. All of the

broken glass was west of the center line of First street and the two rear wheels of the taxicab and the right front wheel of the other car were broken. The evidence is conflicting as to just how the cars struck, there being some evidence that the other car hit the taxicab near the middle of its right side, and other evidence that the right front wheels of both vehicles first came together. Some contention is made by the appellants that the position of the cars after the accident conclusively demonstrates that the taxicab was not traveling on its wrong side of the street, but that the other car was. Too many factors enter into an automobile collision to give certainty to any such a conclusion. Fishman v. Silva (Cal. App.) 2 P.(2d) 473; Johnston v. Peairs (Cal. App.) 3 P.(2d) 617. It may also be observed that an inference may reasonably be drawn from the physical facts shown, including all marks upon the pavement, that the taxicab was entirely on its left-hand side of the road before it was struck. In any event, there is evidence that the driver of the taxicab was proceeding along the middle of this street, thereby violating section 122 of the California Vehicle Act (as amended by St. 1929, p. 540, § 50), that he was going faster than the law permitted at that time and place, and evidence to indicate that he had ample time and opportunity to do more than he did in an effort to escape the collision. It is apparent that the jury did not believe the testimony of this driver, and while the evidence is somewhat conflicting, it is sufficient to support the implied finding of negligence upon the part of the driver of the taxicab.

[2] The second point raised is that the court should not have instructed the jury in respect to the doctrine of res ipsa loquitur. It is argued that this doctrine should never be applied to a case, involving a passenger in an automobile, which grows out of a collision between that and another car, because of the presence of the question as to the actions and responsibility of the driver of the other car. This contention is without merit. Edwards v. Gullick (Cal. Sup.) 1 P.(2d) 11. In the case before us, the driver of the other car was not a defendant, and in its instructions the court confined the application of the doctrine to a consideration of the operation of the taxicab. Kilgore v. Brown, 90 Cal. App. 555, 266 P. 297. There was no confusion with any other issues. As to the general application of the doctrine, it would seem that this passenger for hire should be entitled to an explanation from the carrier, as to why such a collision occurred in the center of a broad and lighted paved street, unincumbered by other traffic. Such a fact does speak for itself in the absence of a satisfactory explanation. A closer question would have been presented had the instruction been objected to on the ground that direct evidence had been introduced to show the cause of the accident, but in any event it was harmless under the circumstances appearing. Edwards v. Gullick, supra.

[3, 4] The further point is raised that even if it was not reversible error to instruct the jury in relation to the doctrine of res ipsa loquitur, still the court erred in concluding such an instruction as follows: "When and if the plaintiff makes such proof, the burden of proof shifts to the defendants to show their freedom from negligence." This, in fact, is the principal attack made upon the instruction covering the doctrine referred to. It is argued that the burden of proof never shifts to the defendant, but, at most, this doctrine merely imposes upon a defendant the burden of going forward with the evidence to the extent of explaining the unusual happening which makes the doctrine applicable. This is true, of course, and the burden of proving his case always rests upon the plaintiff. But as pointed out in many cases, the effect of such language as here complained of is not to shift the burden of proof of the entire case to the defendant, but merely to point out to the jury that, where the presumption applies, the defendant must then meet the prima facie case with sufficient evidence to balance any presumption of negligence upon his part. As showing that this particular language was harmful in this case, the appellants rely upon a portion of another instruction in which the jury was told that, where the burden of proof rests upon a party, the facts in connection therewith must be established by a preponderance of the evidence. The other instruction referred to correctly and fully stated the law in connection with the matters therein considered. In many other instructions the jury was repeatedly told that the burden was upon the plaintiff to prove by a preponderance of the evidence that the defendants were negligent and that such negligence was the proximate cause of the injury. Not only was this repeated many times, but the jury was also instructed that, if the evidence as to negligence on the part of the defendants was evenly balanced, the plaintiff could not recover. The point here raised by appellants has been frequently considered, and we think it must be taken as established that the use of such language is not reversible error, where the rest of the instructions are proper. Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171; Bonneau v. North Shore Railway Co., 152 Cal. 406, 93 P. 106, 125 Am. St. Rep. 68; Cody v. Market Street Railway Co., 148 Cal. 90, 82 P. 666; Faras v. Lower California Dev. Co., 27 Cal. App. 688, 151 P. 35; Gonzalez v. Nichols, 110 Cal. App. 738, 294 P. 758; Bezera v. Associated Oil Co. (Cal. App.) 3 P.(2d) 622; Kilgore v. Brown, supra; Lawrence v. Pickwick Stages, 68 Cal. App. 494, 229 P. 885; Atkin-

son v. United Railroads, 71 Cal. App. 82, 234 P. 863.

[5] It is next urged that the court erred in giving the following instruction: "You are further instructed that if it is shown by a preponderance of the evidence that immediately prior to the collision complained of in the complaint the defendant Leo A. Goozey saw the plaintiff in a state of danger from which she could not escape by the exercise of ordinary care, and that defendant Leo A. Goozey was then and there aware of her dangerous situation, under such circumstances that he realized, or by using ordinary prudence ought to have realized, her inability to escape therefrom, and if defendant, Leo A. Goozey, after seeing plaintiff's perilous situation, had still a clear chance, by exercising ordinary care, to avoid the collision, and failed to do so, then your verdict should be for the plaintiffs."

It is objected that this instruction embodies the "last clear chance" doctrine and that this has no application here. At the request of the appellants, the court had given a number of instructions to the effect that the appellants would not be liable if the driver of the taxicab, without fault on his part, took the wrong course in meeting a sudden emergency. Having given these instructions, there was no error in also instructing the jury to the effect that the appellants would be liable if the driver of the taxicab, in the exercise of ordinary care, should have avoided the collision even after the dangerous situation arose. While the instruction complained of is not happily worded, it sufficiently covers this point and contains nothing prejudicial to the appellants.

It is contended that counsel for the respondent was guilty of misconduct in that at some stage of the trial, one of such counsel made reference to the alleged fact that the appellants were covered by insurance. Appellants neither set forth what was supposed to have been said, when it was said, nor point out a word of evidence in the record to substantiate the charge.

[6] The last point raised is that the amount of the verdict is excessive. The jury returned a verdict for $24,000 which, in connection with a motion for new trial, was reduced by the trial court to $12,000; the reduction being accepted by the respondent. The record does not give the age of the respondent, but it is apparent that she was a young woman. In addition to many bruises, she suffered a comminuted fracture of the thigh bone, with a number of fragments of bone driven into the muscles, and one coming nearly through the skin. In setting the fracture, it was necessary to make an incision and insert a steel plate, fastened by six screws, to hold the fragments of bone in place. She was in the hospital from November 13, 1929, until some time the next March, during all of which time her leg and her body were in a cast. There was evidence that she suffered great pain; that at the time of the trial, in June, 1930, the pain in her leg was still severe; that she still experienced great difficulty and pain in walking over uneven surfaces, even with crutches; that she might be able to walk without crutches after another five or six months; that there was a slight angulation in the bone as it had set; that she would limp as she walked for another year, and possibly permanently; and that she had already spent $1,477.75 for hospital and doctors' fees. At the time of the trial, a bone specialist testified that the bone was softening around the screws holding the steel plate; that a further operation would be necessary to remove the plate; that such an operation would confine her to the hospital for three or four weeks and "lay her up" for two months; and that it would cause her to use crutches for an additional three months. There was also evidence that the additional operation would cost $175 for surgeon's fees, besides hospital and nurses' expenses. At the time of the trial she had lost twenty-one weeks' salary, amounting to $651, and there was little probability that she would be able to work for another year to come. There is a fair inference from the evidence that her earning capacity will be permanently reduced. In view of this evidence, it cannot be said that the amount of the judgment is so excessive as to suggest passion and prejudice. The amount awarded by the jury was reduced by the trial court in the exercise of its discretion, and we find nothing in the record from which it may be said that this discretion was abused in not further reducing the amount thereof.

The judgment is affirmed.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 360

PEOPLE v. TRUESDELL.

Cr. 1210.

District Court of Appeal, Third District, California.

June 16, 1932.

1. Criminal law ⇐720(3).

Admission without objection of testimony as to writing of letter furnished basis for reference to testimony in argument to jury.

2. Jury ⇐142.

Objection that jury was summoned by officer who was biased or prejudiced against defendant because of collecting testimony was too late after trial had been concluded.

3. Rape ⇐51(1).

Evidence in prosecution for rape *held* to sufficiently establish that prosecutrix was not wife of defendant.

4. Criminal law ⇐798½.

Court's instructions in submitting various forms of verdicts as to pencil memorandum on one of forms *held* not erroneous as indicating verdict that should be returned.

> The court after submitting various forms of verdicts instructed jury that, in case they found defendant not guilty, they would use last form and merely sign it by foreman, and that, in the event they found defendant guilty, it would be necessary to determine whether defendant was guilty on all three or one or more counts in information and insert proper words in blank space, with statement that he had made pencil memorandum on one of the forms of verdict for their use to guide them in filling it out.

5. Criminal law ⇐854(7).

Separation of jury after cause was submitted merely by transportation in two automobiles to restaurant for lunch was not prejudicial error (Pen. Code, §§ 1121, 1128, 1181).

> Jury, when taken to lunch, pursuant to instruction of court, was transported in two automobiles, six in first, six in second, time of transport occupying not more than five minutes, and jury being at all times in presence or within sight of bailiff, in addition to which the chauffeur who drove one of the machines testified that not a word was spoken by him to the jury, nor a word by the jury to him, nor was the case mentioned during the five minutes' ride.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Ervin Truesdell was convicted of rape, and he appeals.

Affirmed.

Leola M. Buck, of Auburn, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of the court.

On the 14th day of March, 1932, an information was filed in the superior court of Placer county containing three counts, charging the defendant with three different acts constituting the crime of rape perpetrated upon the person of a girl of the age of 15 years, not the wife of the defendant, and also charging the defendant with a prior conviction of a felony.

The defendant upon arraignment pleaded guilty to the prior conviction of a felony, not guilty as to the three charges contained in the information, and went to trial thereon, which resulted in a verdict of guilty on all three of the counts contained in the information.

This appeal is prosecuted from the denial of the defendant's motion for a new trial and the judgment of conviction based upon the verdict of the jury.

A considerable portion of appellant's brief relates to acts and circumstances not set forth in the transcript, such as the attitude of the court, the demeanor of counsel for the people, and what we may call the adverse atmosphere in the courtroom attendant upon the trial. We have carefully read every word contained in the reporter's transcript and fail to discover anything therein in support of appellant's contention in the foregoing particulars. We have not been able to find a single remark of the trial court indicating a disposition to give the defendant other than the fairest possible trial, nor do we find any remarks of the trial court to which the defendant objected and to which any tenable objections could be made. In fact, the transcript is singularly clear from any adverse comments by the trial court or any words contained in the rulings upon the admission of testimony, which in the slightest reflect upon the character of the defendant or indicate any adverse prejudice or preconceived notions or intimations as to the guilt of the defendant by the judge presiding at the trial.

We may admit that all fair-minded men have a natural and an instinctive aversion toward a defendant charged with polluting the person of a young girl. In this particular we may state that the evidence shows that the acts of the defendant were consummated by the use of some degree of force and always with threats of bodily injury, in case of resistance or subsequent disclosures of the

offenses. Notwithstanding what we have said as to such natural aversion, we have not been able to find a single word or sentence used by the trial court indicating any hostile feeling toward the defendant, or which can be construed to indicate that a fair and impartial trial was not being accorded the defendant, although charged with a loathsome offense.

[1] Although the argument of the appellant specifies a number of errors committed on the part of the trial court, an examination of the testimony shows that only in one or two particulars, which we will examine hereafter, was there any objection made to the introduction of testimony, or any motion made to strike out the testimony after it was admitted. The record shows that, during the course of the argument for the people, reference was made to the contents of a certain letter, or rather as to the testimony of the defendant concerning the contents of a letter, which was written, as testified by the prosecuting witness, upon the dictation of the defendant asking an aunt for the sum of $50. The letter itself was denied admission, but the testimony as to the writing of the letter, the purpose for which it was written, and the request for the sum of $50, $25 to be given to the defendant, $25 to the prosecutrix, and the plan to go to San Francisco, all appear to have been introduced in testimony without objection, which laid the basis for the reference to these facts, even though the letter itself was not admitted in testimony.

[2] Again, it is argued that the jury was summoned by an officer who was adverse to the defendant and who was biased or prejudiced by reason of having collected some of the testimony or subpœnaed witnesses adverse to him. This objection, however, was not made until after the trial had been concluded.

The clerk's record shows that both the prosecution and the defendant announced that they were satisfied with the jury after it had been examined upon voir dire; whereupon the jury was sworn to try the cause, and, having announced that he was satisfied with the jury and also that he was ready to proceed with the trial, it is too late now to raise any questions as to its competency.

Following these objections, appellant urges the following grounds for reversal: (1) That there is no direct evidence that the prosecutrix was not the wife of the defendant; (2) that the court erred in giving forms of verdict to the jury; and, finally, defendant is entitled to a new trial by reason of an alleged separation of the jury after the cause was submitted for consideration.

[3] The prosecutrix was not asked the direct question as to whether she was the wife of the defendant, nor do we find that this question was propounded to any other witnesses. However, we think the testimony in the case sufficient to enable the jury to draw a correct conclusion upon this question, although it would have been better had the prosecution asked the direct question, and thus saved the consideration of this technical objection. The law is well settled as to what an information must contain, and the authorities cited by appellant all show that the information or indictment must charge the offenses as having been committed upon the person of a female not the wife of the defendant. However, we have found no decision nor has our attention been called to any cases which hold that the omission to ask the direct question cannot be supplied by testimony which evidences the fact that such relationship did not and does not exist.

The testimony in this case is to the effect that the defendant was employed in doing odd jobs at the home of the prosecutrix; that the prosecutrix was requested to bring water and beer to the defendant while he was working; that on several different occasions he seized the prosecutrix and accomplished his purpose against her will and wish. It shows that at the time of the accomplishment on several occasions the defendant threatened to kill the girl if she told her parents what had occurred, also told the prosecutrix if she told her mother or father he (the defendant) would be sent to jail. The language used by the witness is as follows: "Don't tell your mother and father. You know it will mean twelve years in jail for me if they find it out" —and, being told by the prosecutrix that she thought her mother and father ought to know about it, the defendant threatened to kill the prosecutrix if she told.

Again, when there was some conversation between the defendant and the prosecutrix relative to the condition of the prosecutrix, and that she was probably pregnant, the prosecutrix was again warned not to tell her mother and father. The testimony shows that the defendant had been twice married and twice divorced, and there is testimony in the record about his wives, referring to other than the prosecuting witness, but, it would appear from the record that none of the women referred to was the wife of the defendant at the time of the trial; also, the testimony, which we have stated, was allowed to go into the record as to obtaining the $50 and the plan to go to San Francisco to enter a house where they could make good money was all before the jury, from which the conclusion might justly be drawn, and which we think could only be drawn, that the prosecutrix was not the wife of the defendant. We may again repeat the part of wisdom would indicate that these technical matters should be carefully looked after by the prosecuting officers.

[4] In giving its instructions to the jury, the court also submitted to it various forms

of verdicts. In doing so, it is claimed that the court committed prejudicial error and indicated to the jury the form of verdict that should be returned finding the defendant guilty. Three forms of verdict were submitted, the first finding the defendant guilty on ——— counts; finding the defendant guilty on ——— counts as charged in the information and recommending that the defendant be imprisoned in the county jail; (2) finding the defendant guilty on ——— counts and recommending that the defendant be imprisoned in the state prison; (3) finding the defendant not guilty.

The court then instructed the jury as follows: "Of course in the event you find the defendant not guilty you will use this last form and merely sign it by your foreman. In the event you find the defendant guilty, then it will be necessary for you to determine whether the defendant is guilty upon all three or one or more of the counts in the information and insert the proper words in the blank space. For instance, it reads: 'We, the jury, find the defendant Ervin Truesdell guilty of the crime of rape on blank counts.' In the event you should find him guilty on each of the three counts you should insert there the words 'the three,' on the three counts charged in the information. If you should find the defendant guilty of the first, the words 'first,' 'first and second,' or 'second and third.' I have made pencil memorandum on one of the forms of verdict for your use to guide you in filling that out. Of course, as you have been heretofore advised and instructed, you must in the event you find him guilty determine whether he shall be imprisoned in the county jail or state prison."

The jury, as heretofore stated, found the defendant guilty on all three counts, and recommended that he be punished by incarceration in the state prison.

If the words, "I have made pencil memorandum on one of the forms of verdict for your use to guide you in filling that out," stood alone, it would certainly impinge upon the rule that the court should not indicate to the jury what its verdict should be, but, taken in connection with the whole paragraph, it appears that these words are predicated upon the fact of the jury having first found the defendant guilty on all three of the counts contained in the information.

In 24 California Jurisprudence, 881, the text supported by the authorities reads as follows: "The court may instruct the jury as to the form of their verdict, and may furnish blank forms, appropriate instructions being given as to the filling in of the blanks."

That, in fact, was all that was done in this case when the whole paragraph is read together, which we think is the correct rule of interpretation.

[5] It is finally argued that prejudicial error resulted from allowing the jury to separate after the cause had been submitted to it for determination. The facts as to the alleged separation of the jury are not in dispute. They are as follows: After the jury had retired to deliberate upon its verdict and had been deliberating for somewhat over an hour, the court instructed the bailiff to take the jury out for lunch. In so doing, they were taken after what was called the rush hour to a restaurant near by for a noon meal. The jury was transported in two automobiles, six in the first, six in the second; the time of transport did not occupy more than five minutes. The jury was in the presence or within sight of the bailiff all of the time. The chauffeur who drove one of the machines testified that not a word was spoken by him to the jury nor a word by the jury to him, nor was the case mentioned during the five minutes' ride. The same facts appear in testimony relative to the first automobile in which the jurors were riding. As soon as the two automobiles arrived at the place selected for luncheon, they were marched in together, seated together and under the eyes of the bailiff during all of the meal. As soon as luncheon was concluded, the jury was brought back to the courtroom; the courtroom being used as a jury room for the time being, where the deliberation of the jury was resumed.

The affidavits showing this separation and the affidavits to which we have referred justify the trial court in the conclusion that not a word was said to the jury by any one during the limited separation, and that nothing occurred which could possibly prejudice the rights of the defendant.

Section 1121 of the Penal Code provides only for the separation of a jury prior to the submission of the cause. Section 1128 of the Penal Code provides what may be said to a jury and how they shall be kept together after the jury has retired for deliberation. Section 1181 of the Penal Code specifies the grounds upon which the court may grant a new trial, and contains the following: "When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented."

The language of the section is that the court may grant a new trial, not that it must. In considering this subdivision of the section, it has been held that the burden is cast upon the people to prove that no prejudice has resulted. In the present case, the affidavits show without contradiction that no one communicated with the jury. During the few minutes occupied in transporting it from the courtroom to the restaurant and from the restaurant to the courtroom, no discussion was had of the defendant's case.

In People v. Knight, 63 Cal. App. 68, 218 P. 79, 81, we find the following: "Appellant

claims that he is entitled to a new trial upon the ground that, after the case was submitted to the jury, the officer in charge of the jury was guilty of misconduct in that he allowed the jury to separate, and himself entered the jury room and was with the jury on four different occasions during the time of its deliberations. The separation of the jury consisted in the fact that the officer allowed the jury to leave the jury room and go down the hall to the toilet, during which time a portion of them were talking in the hallway, where a number of other persons were present. There is nothing in the affidavits tending to show that any of these occurrences of which complaint is made included any discussion of the case or any fact prejudicial to the defendant. While it may properly be said that the officer did not strictly conform to the proprieties pertaining to his duty in caring for the jury, we are satisfied that there is nothing in the facts shown which would furnish a sufficient cause for granting a new trial."

In People v. Cross, 64 Cal. App. 443, 221 P. 684, a number of cases having to do with the question we are now considering was under consideration. From these cases the conclusion is drawn that the burden rests upon the prosecution to rebut the presumption of prejudice, but, if that presumption is rebutted, the trial court may properly deny the application for a new trial based upon such grounds.

In the Cross Case, supra, the facts show that other people were allowed to converse with the jury, and it is shown conclusively in that case also that the jurors were out of sight of the officer, who had been sworn to take charge of them.

In several of the cases where a new trial has been granted it has been shown that the jurors were placed in different rooms over night, from which the conclusion was inescapable that the officer could not make affidavit that they were always under his personal supervision, or that anybody did not meet and converse with them.

We readily concede that, where the jury has been allowed to separate and other persons had and exercised the opportunity of conversing with the jury, and the jurors have mingled with others than themselves before coming to a conclusion, then and in that case, a new trial should be granted, but the circumstances we are considering show no such prejudicial occurrences and rebut any presumption of prejudice.

We may further add that no impartial person can read the record without coming to the conclusion beyond a reasonable doubt that the defendant is guilty and guilty on all three counts contained in the information and that the verdict of the jury is the only one which could be returned consistent with their oaths.

The order and judgment are affirmed.

We concur: PARKER, Justice pro tem.; R. L. THOMPSON, J.

124 Cal.App. 369

NESTOR v. BURR et al.

Civ. 8293.

District Court of Appeal, First District, Division 1, California.

June 17, 1932.

Rehearing Denied July 16, 1932.

1. Judgment ⇐256(1).

Judgment entered upon trial court's decision must be supported by and conform to findings.

2. Vendor and purchaser ⇐299(4).

In vendor's quiet title action against purchasers, judgment giving purchasers money recovery against vendor *held* not supported by findings.

Judgment could not be supported upon the theory that the amount awarded purchasers represented the total sum they paid to vendor under their land sale contract, since there was no finding that they ever paid any such amount, and, even if there were, it would not follow that they were entitled to the return thereof, in the absence of additional findings showing a rescission, or of facts from which it might be determined that they were entitled to rescind, and there were no such findings.

3. Appeal and error ⇐907(3).

In determining appeal presented on judgment roll alone, it must be presumed that omission to find on allegations resulted from failure to present supporting evidence.

4. Appeal and error ⇐1152.

Where that part of judgment giving defendants money recovery against plaintiff was unsupported by findings, reviewing court could not modify judgment by eliminating portion unsupported by findings.

Appeal from Superior Court, Los Angeles County; F. B. Brown, Judge.

Action by T. J. Nestor against Richard Burr and another. From a portion of the judgment, plaintiff appeals.

Reversed.

C. Roy Smith, of Long Beach, for appellant.

Burr A. Brown, of Long Beach, for respondents.

KNIGHT, J.

In this action to quiet title to real property the judgment decreed title and right of possession in plaintiff, but that defendants "first have and recover of and from plaintiff the sum of twenty-five hundred twenty-eight dollars." Plaintiff appeals from the portion of the judgment quoted, and presents his appeal on the judgment roll alone, contending as grounds for reversal that the findings are insufficient to sustain the portion of the judgment from which the appeal is taken.

The court found that plaintiff was the owner in fee and entitled to the possession of the property, and that defendants had no interest therein "other than that which arises solely by reason of a certain agreement of sale and purchase made and entered into the 18th day of June, 1924"; that under said agreement plaintiff agreed to sell and defendants agreed to buy said property for $5,500, of which defendants agreed to pay $550 at the time of the execution of the agreement and the balance in thirty-six equal monthly installments with interest; that in said agreement it was provided that time was of the essence thereof; that in default of making the payments plaintiff was given the option, without being required to give notice of the exercise thereof, to declare the agreement null and void and thereupon was entitled to immediate possession of the property and to retain all payments theretofore made as rental for the use of the property; that waiver of any breach of condition or covenant should be construed as a waiver of any succeeding breach; and that no verbal agreements at variance with the written agreement were valid or binding on the seller. The court then found that at the time of the commencement of the action (April 6, 1929) defendants were and that ever since January 18, 1925, they had been in default in their payments and that no extensions had been given by plaintiff, "and even though plaintiff did on the 20th day of October, 1928, give defendant Richard Burr notice in writing that said agreement would be cancelled if a substantial payment was not made thereon before November 1, 1928, no payment has been made thereon since the 15th day of January, 1927." The concluding finding (IV) was as follows: "The court finds that the seller agreed in said agreement that he would, within a reasonable time, grade and gravel the streets in said tract No. 8245 according to the contract and bond theretofore given by him, the seller, to Los Angeles county, California. The court finds that plaintiff consumed more than twelve (12) months' time from and after the 18th day of June, 1924, in grading and graveling the streets in said tract No. 8245, but finds further that it is not true that defendants, or either of them, have been damaged to the extent of ten thousand five hundred dollars ($10,500) or any sum whatever, by reason of the failure of plaintiff to grade and gravel the streets in said tract No. 8245 within twelve (12) months' time from and after the 18th day of June, 1924." The conclusions of law drawn from the above findings were "that the plaintiff is entitled to judgment declaring him to be the owner in fee and entitled to the possession of the real property described in plaintiff's complaint on file herein, and decreeing that the said defendants do not, nor do either of them, have any right, title, interest, claim 'or estate therein or thereto, but' that the said defendants shall first have and recover of and from plaintiff the sum of twenty-five hundred twenty-eight dollars ($2528.00)."

[1-3] It is fundamental that a judgment entered upon the decision of a trial court must be supported by and conform to the findings (24 Cal. Jur. 996), and it is apparent without the aid of discussion that the foregoing findings disclose no facts authorizing the rendition of a money judgment against plaintiff. Defendants endeavor to explain the portion of the judgment in question upon the theory that the amount awarded them represented the total sum they paid to plaintiff under the agreement; but there is no finding that they ever paid any such amount; and even if there were it would not follow that they were entitled to the return thereof in the absence of additional findings showing a rescission or of facts from which it might be determined that they were entitled to rescind; and admittedly there are no such findings. In this connection defendants call attention to the allegations of the special defenses pleaded in their answer, which they assert were sustained "by a preponderance of credible testimony," all of which may be true, but no findings whatever were made on those allegations, and since the evidence is not before us and the validity of the judgment is to be measured by the findings as set forth in the judgment roll, it must be presumed that the omission to find on those allegations was the result of failure to offer any evidence in support thereof. Estate of Shirey, 167 Cal. 193, 138 P. 994; Wood v. Dailey, 44 Cal. App. 219, 186 P. 177.

[4] We cannot agree, however, to appellant's final proposition that this court modify the judgment by eliminating therefrom the portion which the findings do not support. In the present state of the record the rendition of a different judgment will require new findings, which, in the absence of the evidence, we are unable to make.

The judgment is therefore reversed.

We concur: TYLER, P. J.; CASHIN, J.

124 Cal.App. 312

THURBER et al. v. FISHER et al.

Civ. 7111.

District Court of Appeal, Second District, Division 2, California.

June 15, 1932.

1. Guaranty ⇐53(1).

Willingness of holder of note to apply rent thereon and extend to makers reasonable opportunity to make good default *held* not binding agreement for reduction of monthly payments, so as to relieve guarantors (Civ. Code, §§ 2819, 2820).

2. Bills and notes ⇐281.

Person transferring note by indorsement containing guaranty of payment, combined with waiver of demand, notice, and protest, *held* liable as indorser.

3. Guaranty ⇐30.

Indorser's guaranty of payment of note *held* to pass to remote holder.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Jay R. Thurber and others against Lyndon L. Fisher and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Clay & Handy, of Los Angeles, for appellants.

Laughlin & Laughlin, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

On March 15, 1926, the defendants Fisher executed to the defendants Gire their certain promissory note in the sum of $2,500, payable in installments of $60 per month, which note was secured by a trust deed. On June 17, 1926, the defendants Gire transferred the note to Simon E. Hammer and Edna A. Hammer, with the following indorsement: "For value received, we, do hereby transfer and assign to Simon E. Hammer and Edna A. Hammer, his wife, as Joint Tenants, the within note, together with all rights accrued or to accrue under the Deed of Trust securing same so far as same relate to this note, and do hereby guarantee the payment of this note, and waive presentment, demand, protest and notice of protest. Earl C. Gire, Edna G. Gire." On May 24, 1928, the Hammers delivered the note to Anna R. Hope, their indorsement being without recourse. On May 31, 1928, Anna R. Hope delivered the note to plaintiffs herein, guaranteeing payment, and waiving presentment, demand, and protest. The installment payment falling due on June 1, 1928, was not paid, nor were any of the other insallments up to March 22, 1929, paid, on which last-named date respondents declared the whole amount of the note, principal and interest, due and caused the security to be sold by the trustee and the proceeds of the sale applied as provided in the note and deed, leaving a deficiency. On March 28, 1929, plaintiffs filed their complaint for the unpaid balance, making the makers of the note and all the indorsers and guarantors defendants. All of the defendants except Earl and Edna Gire allowed judgment to go against them by default. This is an appeal from the judgment in favor of plaintiffs.

[1] Appellants contend that the evidence showed that an agreement was entered into between plaintiffs and the makers whereby the monthly payments under the note were to be reduced, and that this was such an alteration of the contract as to release appellants from their obligation as guarantors under section 2819 of the Civil Code. The evidence relating thereto is as follows:

"Q. After the payments were not made on the note, Mr. Thurber, what did you do? A. Why I rang up Mr. Gire and also had the bank notify Mr. Fisher, * * * Mr. Fisher said he would try to rent the house, he had moved out in the meantime, and agreed the rent would apply on the house, and a little later I went back, I left town for a while, and when I got back they had rented the house and used up some of the money on the repairing— * * * In the fall when I came back, I couldn't locate Mr. Fisher, and the agent wouldn't turn the money over to me and I started proceedings."

On cross-examination he testified:

"Q. After you saw Mr. Gire you saw Mr. Fisher? A. Yes sir.

"Q. At that time you told him you would take the rents from the place and apply them on the note, that would be satisfactory at that time? * * * A. Sure.

"Q. You told Mr. Fisher? A. Yes, I told him I was willing to hold off a little bit until he got on his feet and tried to do something.

"Q. How much was the rent, do you know? A. About $33.50 a month."

Section 2819 of the Civil Code reads as follows: "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." The case of Dean v. Sedan Milling Co., 19 Cal. App. 29, 124 P. 736, 738, presents a similar question. In that case a note for $2,000 payable in 90 days was indorsed and guaranteed by one of the defendants, and the court found that shortly after

the note was due, the plaintiff, who was the payee, "entered into an oral agreement" with the maker, whereby the plaintiff "extended the time of payment of said promissory note as follows: $1,000 and the interest on said $2,000 at the same rate of interest as provided in said note, to-wit: eight per cent per annum to be paid on the second day of January, 1909, and the balance of $1,000 with the same rate of interest as provided in said note * * * to be paid on the second day of February, 1909." Upon default under this agreement plaintiff sought to hold the guarantor, who also invoked the same section of the Code relied upon by appellants here. The court there said: "Was the oral extension of time of the payment of the note void? Appellant, correctly, we think, states the rule that, in order to relieve the guarantor from liability, *there must be a valid extension of time for a definite period*, and there must exist the *mutual* promises, first, by the lender to forbear his right to full payment during the period of extension; second, by the debtor to retain the money for the extended time, and such extension must be supported by a sufficient consideration." The court then quotes from section 2820 of the Civil Code, which is as follows: "A promise by a creditor, which for any cause is void, or voidable by him at his option, *does not alter the obligation or suspend or impair the remedy, within the meaning of the last section*" (referring to section 2819). The court then says: "We are thus brought back to the question whether the promise of plaintiff was for any cause void. If it lacked consideration it was void, and the guarantor was not exonerated. * * Another element is brought into the case. The contract (promissory note) is in writing, and section 1698 of the Civil Code provides: 'A contract in writing may be altered by a contract in writing or by an oral *executed* agreement, and not otherwise.' * * *" (Italics ours.)

It will be observed that the conversations had between the respondent Jay Thurber and the maker had none of the essentials of a contract sufficient in form to release appellants from their guaranty, as contemplated by section 2819 of the Civil Code. The most that may be said of the effect of the negotiations is that respondents were willing to extend a reasonable opportunity to the Fishers to make good the default without immediately exacting their "pound of flesh." It follows that appellants' contention, that there was not sufficient evidence to sustain the finding that there was no agreement with the makers to pay thereon only such amount as they should receive from rents, cannot be sustained.

[2] Appellants next contend that they were not sued as indorsers and cannot be held as such. There is nothing to be found in the record which indicates that plaintiffs intended to hold them on their guaranty only. In so far as their liability as indorsers is concerned, there is authority to the effect that, where the payee of a note for the purpose of negotiating it indorses a guaranty thereon combined with a waiver of demand, notice, and protest, he becomes an indorser with enlarged liability. Bank of Italy Nat. Trust & Sav. Ass'n v. Symmes (Cal. App.) 5 P.(2d) 956, and cases there cited. In the case of Kellogg v. Douglas County Bank, 58 Kan. 43, 48 P. 587, 62 Am. St. Rep. 596, we find the following language: "An indorsement made on the back of a promissory note in the following language: 'For value received, we hereby guaranty payment of within note at maturity, waiving demand, protest, and notice of protest,'—signed by the payee of the note, is a commercial indorsement, as well as a guaranty of payment; and the note, being negotiable in form, is sufficient to pass a valid title to the paper, and protect an innocent purchaser thereof." See, also, Fisher Lumber & Coal Co. v. Robbins, 104 Kan. 619, 180 P. 264, and Hutson v. Rankin, 36 Idaho, 169, 213 P. 345, 33 A. L. R. 91, to the same effect.

[3] These cases also dispose of the contention that the respondents were not entitled to recover against the appellants for the reason that the guaranty did not pass to them as subsequent holders.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

124 Cal.App. 345

BURCKHARDT v. WOODS et al.

Civ. 7547.

District Court of Appeal, Second District, Division 1, California.

June 16, 1932.

1. Fraud ⇐11(1).

Representations as to corporation's product, success thereof, and demand therefor, and as to financial condition of corporation, *held* not mere matters of opinion.

2. Pleading ⇐35.

In action for fraudulent misrepresentations inducing plaintiff to loan money to corporation, allegation that officers conspired together was immaterial and could be eliminated.

3. Pleading ⇐10.

Petition alleging in detail false representations made to plaintiff to induce loan to

corporation need not give in detail precise arrangement between parties.

4. Pleading ⇐67.

In action for fraudulently inducing plaintiff to make loan to corporation, assertion or additional or modifying agreement would properly constitute matter of defense.

5. Action ⇐48(2).

Causes of action for damages resulting from making loan to corporation and from purchase of stock *held* properly joined, where loan and purchase were induced by same representations (Code Civ. Proc. § 427).

6. Fraud ⇐41.

Complaint in action against officers of corporation for fraud *held* sufficient as against technical objections (Code Civ. Proc. § 426).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake and Myron Westover, Judges.

Action by F. O. Burckhardt against Harry Woods and others. From a judgment sustaining the demurrer to the amended complaint and dismissing the action, and from an order denying motion to set aside the judgment and denying leave to file another amended complaint, plaintiff appeals.

Reversed, with instructions.

Edwin J. Miller, of Los Angeles, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondents.

HOUSER, J.

An action "for fraud—money demand" was brought by plaintiff in the lower court against each of the defendants therein named, to wit, Harry Woods, Grace Woods, Bingham T. Wilson, and Wilson Farm Tool Corporation, a corporation. The last two named defendants answered the complaint. The demurrer to the complaint of defendants Harry Woods and Grace Woods was by the court sustained. Thereupon an amended complaint was filed, to which the said defendants also demurred and which demurrer was likewise sustained. Identical proceedings continued until three separate amended complaints had been filed, as to each of which a demurrer by the same defendants was interposed and by the court sustained. The last of such demurrers was sustained "without leave to amend" the complaint. Thereafter, on application of plaintiff, the former order by which plaintiff was denied the right to amend his complaint was vacated, and at the same time the plaintiff was granted leave to amend his complaint. Thereupon a fourth amended complaint, followed by a fifth amended complaint, was filed by plaintiff, each of which met the same fate as did each of its predecessors; and, on making the order by which the demurrer to the fifth amended complaint was sustained, the lower court again denied to plaintiff the right to further amend his complaint. A judgment was then rendered by the court by which the action was dismissed and said defendants awarded their "costs of suit." Plaintiff's subsequent motion that said judgment be "set aside" and that plaintiff be permitted "to further amend the complaint" was denied by the court. Thereupon plaintiff appealed "from the judgment * * * sustaining the demurrer to the fifth amended complaint without leave to amend, and dismissing said action, * * * and from the order denying the motion to set aside said judgment and denying leave to file the said proposed sixth amended complaint. * * *"

The principal ground upon which the demurrer of Harry Woods and Grace Woods to the fifth amended complaint rested was that as to them said complaint failed to state a cause of action.

The fifth amended complaint, which purportedly was for "damages for fraud and false representations," was divided into three counts or causes of action. The first count thereof, after having made assumedly appropriate allegations with reference to the character, business, etc., of the defendant corporation, as well as to the relationship which each of the several individual defendants bore to the corporation, contained the allegation: "That on or about the first day of May, 1928, at the County of Los Angeles, California, the defendants, Bingham T. Wilson, Harry Woods and Grace Woods, and said Wilson Farm Tool Corporation, a corporation, acting through its said officers and agents, corruptly confederated, agreed and conspired together to fraudulently induce the plaintiff to loan Five Thousand Dollars ($5,000.00) in cash to said corporation without security; the said corporation then and there being insolvent; and with such fraudulent intent to deceive and defraud the plaintiff, said individual defendants as individuals and as officers of the said corporation, and said corporation, through its president and vice-president, falsely and fraudulently represented to the plaintiff the following facts and representations, to wit:" That said corporation was then and for many months last past had been engaged in the manufacture of and sale of the said farm tool known and designated as the swinging arm plow, for the cultivation of groves and other farm crops; that the defendants were experienced in the manufacture and sale thereof; that said plow was then being used by many citrus growers; that said growers had stated that said plow was satisfactory; that defendants stated that from their experience and knowledge they knew it to be a fact that orchards had been cultivated with said plow,

and that the cultivation of said groves was less expensive than those cultivated with any other farm tool; that the cost of manufacturing was $45; the selling price $165; that there was a profit of $120 per plow; that said corporation then had on hand written requests from 1500 different farmers in Southern California for the purchase of said tool; that the demand therefor was unlimited; that the tool had been used by hundreds of citrus growers with great success and satisfaction; that the defendants had never had any complaint from any purchasers or users thereof; that the defendants before that time had sold large numbers of said tools which were then in use, and that the farmers and growers demanded said tool in such large quantities that defendants could not manufacture the same fast enough to supply the demand; that said corporation was solvent and was doing, and had been doing, a profitable business; that it was free from debt; that the capital stock thereof was very valuable; that the 15,000 shares issued to the defendants were worth $50,000; that the corporation then had assets reasonably worth, and would sell for, $50,000; that they had received an order from a certain dealer in Lindsay, Cal., for fifty plows to be delivered immediately; that defendants had on hand only eight of said plows; that for the purpose of deceiving the plaintiff, and in the presence of plaintiff, they loaded said (eight) plows onto trucks and shipped the same to Lindsay, Cal.; that the corporation was in good financial condition; that its business was profitable; that its capital stock was of great value; that plaintiff was perfectly safe in loaning $5,000 to said corporation; that said corporation would repay the same within ninety days thereafter; and that the plaintiff would sustain no loss by reason of making said loan.

In effect, it was then alleged that the plaintiff, not knowing otherwise, believed and relied upon said representations and was induced thereby to lend and did lend to said corporation $5,000 in cash; that each and all of said representations were false, and known to the defendants, and each of them, to be false and fraudulent when they made the same; that the said representations were made for the purpose of deceiving and defrauding the plaintiff, and for the purpose of inducing him to lend said $5,000 without security, and for the purpose of defrauding him out of said money.

By its succeeding allegations, the complaint then proceeded to specifically deny the truth of each of the said several representations theretofore alleged to have been made by the defendants to plaintiff; which allegations were followed by the statement that, although demand had been made by plaintiff of the defendants that they pay to plaintiff the loss thus sustained by him, the said defendants had refused to do so, "and the same has been and now is wholly lost to the plaintiff by reason of said fraud."

The second count incorporated therein the false representations theretofore alleged in the first count as hereinbefore set forth, and then charged that the defendants confederated, conspired, and agreed together to cheat and defraud plaintiff out of $5,000 on the purchase of stock held by Harry Woods and Grace Woods in said corporation; that plaintiff accepted, believed, and relied upon said false representations and purchased the said stock and afterwards discovered that said stock was entirely worthless; that said corporation was insolvent; that each and all of the said representations were false; and that, by reason of the plaintiff having paid $5,000 on the purchase price of the capital stock of said corporation, the same had become wholly lost to him and he had been damaged on that account in the sum of $5,000.

The third cause of action likewise adopted as its own the principal allegations of the first count as hereinbefore set forth, and then charged that the loan of the $5,000 to the corporation and the payment of the $5,000 to Harry Woods and Grace Woods for the said stock were each different parts of one and the same transaction; that each and all of the defendants participated in the fraud, the same as theretofore had been set forth in the first cause of action; that the plaintiff paid to the defendants $10,000 in cash by reason of said false and fraudulent representations; that the said stock was worthless; that the corporation had no credit; that, although demanded of them by plaintiff, the defendants failed and refused to return to plaintiff the said money or any part thereof; that plaintiff had been damaged in the sum of $10,000 actual damages; which was followed by a prayer for punitive damages in the further sum of $10,000.

[1] Considering the effect of the several allegations which are set forth in the pleading of plaintiff, this court is unable to discover any such defect therein as should result in a declaration that the complaint fails to state a cause of action. From a consideration of the authorities generally, and especially those to which reference is made in 12 California Jurisprudence, 800 et seq., it would appear that in all essential particulars the complaint substantially conforms to the legal requirements in an action for damages alleged to arise from the fraudulent acts of the defendants in the action. Nor, except in some particulars immediately herein to be noticed, do the respondents contend that said complaint is lacking in essential averments.

Specifically, first, the objection by respondents that "a majority of the representations therein alleged to have been made by defendants to the plaintiff were mere matters of

opinion" is so clearly without merit that any discussion of the point would appear to be entirely unnecessary.

[2] Secondly, the suggestion by respondents that the allegation in the complaint that defendants "corruptly confederated, agreed and conspired together to fraudulently induce the plaintiff to loan $5,000 in cash to said corporation, without security," together with the allegation wherein in detail the false representations of the defendants are set forth, constituted but "mere statements of opinion and of desire or hope for the future, * * *" is likewise untenable. In view of the remaining allegations in the complaint, the statement therein contained with reference to a "conspiracy," as such, may be and should be treated as so much unnecessary matter.

In the case of More v. Finger, 128 Cal. 313, 319, 60 P. 933, 935, it is said: "The complaint alleges that the plaintiff has been deprived of the note by the wrongful acts of the defendants, and that they entered into a conspiracy for that purpose, but the conspiracy thus alleged is not the gist of the action. The gist of the action is the injury done to the plaintiff by these wrongful acts, and this injury is actionable whether it is the result of a conspiracy or not. The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved. The plaintiff is entitled to relief for the injury from such of the defendants as she can show have united or co-operated in doing her the wrong. Herron v. Hughes, 25 Cal. 556; Hamilton v. Smith, 39 Mich. 231; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629 [15 Am. St. Rep. 230]."

And in Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943, 946, the same principle is stated as follows: "It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. Herron v. Hughes, 25 Cal. 555; Davitt v. Bakers' Union, 124 Cal. 99, 56 P. 775; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; Menner v. Slater, 148 Cal. 284, 83 P. 35. In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor, and regardless of the degree of his activity. Cohen v. Fisher, 135 App. Div. 238, 120 N. Y. S. 546; White v. White, 132 Wis. 121, 111 N. W. 1116; Miller v. John, 208 Ill. 173, 70 N. E. 27. A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or co-operated in inflicting a wrong upon him. Herron v. Hughes, supra; More v. Finger, 128 Cal. 313, 60 P. 933; Nevin v. Gary, 12 Cal. App. 1, 106 P. 422." To the same effect are Mox, Incorporated, v. Woods, 202 Cal. 675, 262 P. 302; McPhetridge v. Smith, 101 Cal. App. 122, 139, 281 P. 419.

In Blair v. Guarantee Title Co., Inc., 103 Cal. App. 260, 270, 284 P. 719, 723, the court said: "Appellants argue that respondents have wholly failed to prove that a conspiracy existed between Cronin, Bellotti and Wright to obtain the deed from Mrs. Blair and defraud her of her equity in the Long Beach property. Conceding, for the sake of argument, that this claim is true, it does not defeat plaintiffs' action. It is wholly unnecessary to establish such a conspiracy, because the gist of the action is the injury done to Mrs. Blair by the fraudulent and wrongful acts of Cronin, Wright and Bellotti, and this injury is actionable, whether it is the result of conspiracy or not. The allegations of a conspiracy are immaterial and need not be proved. Mrs. Blair is entitled to relief for the injury done her from such of the defendants as can be shown to have participated or cooperated in doing her the wrong. More v. Finger, 128 Cal. 319, 60 P. 933; Herron v. Hughes, 25 Cal. 555; Nevin v. Gary, 12 Cal. App. 1, 106 P. 422; Revert v. Hesse, 184 Cal. 295, 193 P. 943; Bowman v. Wohlke, 166 Cal. 121, Ann. Cas. 1915B, 1011, 135 P. 37; 5 Cal. Jur. 528; Mox, Incorporated, v. Woods, 202 Cal. 675–678, 262 P. 302."

[3, 4] Neither is available to them the third general objection by respondents to the sufficiency of the complaint that it "neither sets up according to its legal effect, nor in hæc verba the terms of the agreement. * * *" In alleging as he has the situation of the respective parties to the transaction and in complete detail the false representations which were made to him by the defendants, plaintiff has so thoroughly notified the defendants of the nature and character of his accusations against them that any further specific allegations with reference to the precise arrangement which may or which may not have been agreed upon by the parties would be but evidentiary of the facts which possibly may have surrounded or entered into the transaction, and which consequently were unnecessary of declaration by plaintiff in his complaint. If perchance, some modifying or controlling agreement in addition to that which is indicated in the complaint was actually entered into between the respective parties to the transaction, its existence and the terms thereof more properly constitute matters of defense to be set up by the defendants in their answer to the complaint, rather than matters of attack to be alleged by plaintiff in his complaint.

As a final objection to the sufficiency of the complaint, the respondents urge that, "although plaintiff entitled his action 'Damages for fraud and false representations,' it is ob-

vious that he is attempting to obtain a rescission of the contract," etc. In that connection, respondents cite various authorities relative to required legal conduct on the part of a person who desires to rescind a contract; also regarding the sufficiency of allegations of a complaint in an action of the character of that which would be necessary in such a situation. But, even conceding as thoroughly sound the argument on the point presented by respondents, it does not follow that in the instant situation it should prevail. As is noted by respondents, on the face of its entitlement, the action purports to be one to recover "damages for false and fraudulent representations." Nor does the prayer of the complaint contain even a suggestion that plaintiff seeks to have the "contract" rescinded. In no place in the complaint is the word "rescind," or any of its derivatives, used. Aside from the description of the parties defendant, and the allegations with reference to their alleged fraud, the complaint contains no allegations which are peculiarly or distinctively appropriate to an action for rescission. To all appearances respondents have "set up a straw man" and have proceeded to "knock him down." At any rate, as applied to the facts herein, this court is unable to appreciate the force of the argument with reference to the point under consideration.

[5] In view of what hereinbefore has been stated with reference to the nature of the several causes of action set forth in the complaint, it necessarily follows that the ground of demurrer urged by the defendants to the complaint to the effect that "several causes of action have been improperly united and not separately stated" is without support either in fact or in law. Section 427, Code Civ. Proc.

[6] But it is contended that, because certain alleged ambiguities, uncertainties, and unintelligibilities exist as to specified allegations in the complaint, the demurrer was properly sustained. Of such character of objections the first two are that it cannot be ascertained whether Harry Woods was vice president, or whether Grace Woods was a director, of the defendant corporation on the date when the alleged fraud was perpetrated. The third and the fourth respectively of such objections are that from the complaint it cannot be ascertained in what capacity said Harry Woods or said Grace Woods is or are respectively sued. Fifth, whether the action is against all the defendants as joint tortfeasors, or whether they are sued on their stockholders' liability. The sixth objection is that the complaint is ambiguous, etc., in that it does not appear therein "who the president and vice-president were at the time of the alleged fraudulent representations." And, finally, it is claimed that from the allegations of the complaint it cannot be determined "what fraudulent representations were made by the defendants."

In the situation here presented, manifestly it would be much too much to expect of this or any court that it consider and discuss seriatim each of such specifications. It may be that, taken with reference to some single isolated paragraph or sentence appearing in the complaint, each of the several objections made by the defendants may literally have some merit; but, when such objection is considered from a standpoint of what is contained in the entire pleading of the plaintiff, each and all of such objections become of small significance. For example, considering the fact that the defendant corporation was charged with having, through its officers, made the representations of which plaintiff complains, what final difference could it make who was president, or vice president, or a director, of the corporation at such time? From a consideration of each of the specifications in question, it is clear that it is either of little or no materiality to the cause of action stated in the complaint, or that in fact it is groundless. All that is required in stating the cause of action is that the facts relating thereto be stated in "ordinary and concise language." Section 426, Code Civ. Proc. On reading the complaint herein it clearly and unmistakably appears that a person of ordinary understanding would have no appreciable difficulty in fully comprehending each and every essential fact therein endeavored to be set forth. Certainly in the instant action no defendant who was represented by an able attorney could fail to be fully informed as to the exact nature of the cause of action as a whole, or as to the import of any necessary ultimate fact contained within the several allegations of the complaint. As a finality, likewise is it certain that in no imaginable conditions or circumstances could either of the defendants be in any wise deceived or misled in regard to what representations he was charged with having made to plaintiff, or as to what effect they had upon the latter, nor even as to what injury or damage was claimed to have resulted to plaintiff by reason thereof.

We conclude that, viewed in the light of modern statutes and decisions which relate to the effect which technical objections may have on pleadings generally, the complaint under consideration, although not to be commended as a model, was in substantial compliance with the requirements of the law.

It is therefore ordered that the "judgment * * * dismissing the action" be and it is reversed, with instructions to the trial court to overrule the demurrer to the fifth amended complaint.

We concur: CONREY, P. J.; YORK, J.

In re HULLEN.

HULLEN v. UNITED STATES DEPARTMENT OF LABOR, NATURALIZATION SERVICE.

Civ. 4583.

District Court of Appeal, Third District, California.

June 13, 1932.

Rehearing Denied July 13, 1932.

1. Aliens 68(6).

Where neither motion for new trial nor notice of appeal was made for more than four months after judgment denying petition for citizenship, appeal *held* not within time (Code Civ. Proc. §§ 581, 939, 963, subd. 1; 8 USCA §§ 351–353, 356, 357; 28 USCA § 230).

2. Aliens ⇐67.

In entertaining jurisdiction of application for naturalization, state courts act as federal government's agents.

3. Aliens ⇐68(6).

For purpose of appeal, judgment denying application for citizenship *held* entered when minute order was made and signed by court as required by rule adopted by Secretary of Labor (Code Civ. Proc. §§ 581, 939, 963, subd. 1; 8 USCA §§ 351–353, 356, 357; 28 USCA § 230).

4. Appeal and error ⇐348(1).

Notice of entry of judgment *held* not necessary to start running of statutory limitation for perfecting appeal (Code Civ. Proc. § 939).

Appeal from Superior Court, Sonoma County; Benjamin C. Jones, Judge.

Proceeding by Jakob Hullen against the United States Department of Labor, Naturalization Service. From an order denying his application for admission to citizenship, the petitioner appeals.

Appeal dismissed.

A. W. Hollingsworth, of Santa Rosa, and R. W. Henderson, of Bakersfield, for appellant.

George J. Hatfield, U. S. Atty., of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order of the superior court denying the application of Jakob Hullen to become a citizen of the United States. This order was made on the ground that the petitioner was not attached to the principles of the Constitution. A motion to dismiss the appeal was made on the grounds that: (1) The law does not authorize an appeal from an order granting or denying a petition for citizenship; and (2) the appeal was not perfected within the time allowed by law.

Upon hearing the application for citizenship, the petitioner testified that he believed the government should confiscate all private property without compensation, and hold, use, manage, and operate the same for the general benefit of the public. He admitted that he desired to become a citizen of the United States so that he might assist in carrying out his belief in these communistic principles. On September 17, 1930, this petition was heard and the superior court denied his application for citizenship on the ground that the alien was not attached to the principles of the United States Constitution. The order of court denying the application for citizenship was made in the following language:

"U. S. Department of Labor, Naturalization Service

"Citizenship Petitions Denied

"State of California County of Sonoma, ss.
"List No. 4

"In the Superior Court of California.

"Upon consideration of the said (1) petitions for citizenship listed below and the motion of C. J. Vermillion for the United States in open court made, that each of such petitions be denied, and the court having found for the cause stated opposite each petitioner named herein that the petition should not be granted, it is hereby ordered that each of said petitions be, and hereby is, denied.

Petition No.	Name of Petitioner	Cause for Denial
1618	Jakob Hullen	Communist

"By the Court, this 17 day of September, 1930.

"[Signed] Benjamin C. Jones, Judge."

From this order a motion for new trial was made and filed February 9, 1931. This motion was heard and denied February 27, 1931. Notice of appeal was served and filed March 5, 1931, in the following language:

"To Paul Armstrong, Director of Naturalization and to Geo. P. Sanborn, Clerk of the above entitled court.

"Please take notice that the applicant in the above entitled matter hereby appeals to the Supreme Court, of the State of California, from the judgment rendered therein and from the whole thereof, by which petitioner's petition for citizenship is denied upon the ground that petitioner is not attached to the principles of the Constitution of the United States."

Jurisdiction to pass upon applications of aliens to become naturalized citizens of the United States is conferred upon superior courts of the various states by the United States statutes. 8 USCA § 357, p. 402; Sato v. Hall, 191 Cal. 510, 217 P. 520. Supervision of proceedings for the admission to citizenship of aliens is conferred upon the Bureau of Nat-

uralization. 8 USCA §§ 351–353, p. 401. Congress has vested the Secretary of Labor with authority to "make such rules and regulations as may be necessary for properly carrying into execution the various provisions" for the naturalization of aliens. 8 USCA § 356, p. 402. Pursuant to the last-mentioned statute, rule 8, subdivision D, of the rules to govern naturalization procedure was adopted by the Secretary of Labor, as follows:

"There shall be furnished by the Bureau of Naturalization loose leaf sheets, Form 2228, 'Citizenship Petitions Granted,' and Form 2229, 'Citizenship Petitions Denied,' for use in making lists of petitions in the various naturalization courts on which to enter orders granting or denying petitions, respectively. * * * Such forms shall be prepared in triplicate and dated, the original and the duplicate copies for the signature of the court. The original lists after being dated, and signed by the court, will be bound in covers to be furnished by the Commissioner of Naturalization, and retained as a part of the permanent records of the court. The duplicate and triplicate copies of the lists will be transmitted by the clerk of the court to the proper district director of naturalization * * * after each final hearing for which they were prepared."

The proceedings and order denying the petitioner's application for citizenship in the present case were strictly followed in conformity with the rules of the Bureau of Naturalization and the federal statutes with relation thereto. Neither the motion for a new trial nor the notice of appeal was made for more than four months after the rendering of judgment denying the petition for citizenship.

[1] The motion to dismiss the appeal must be granted for the reason that the appeal was not perfected within the time allowed by law. It is therefore unnecessary to determine the question as to whether the right of appeal exists from the order of a state court denying a petition for citizenship. We shall refrain from determining that problem. It is interesting, however, to note the fact that the case of In re Wilkie, 58 Cal. App. 22, 208 P. 144, 146, decided that a judgment of the superior court denying a petition for citizenship was not subject to review because Congress had failed to authorize the appeal by means of appropriate legislation. That case was decided on the authority of United States v. Dolla (C. C. A.) 177 F. 101, 21 Ann. Cas. 665. This last-mentioned case was lately overruled by the Supreme Court of the United States in Tutun v. United States, 270 U. S. 568, 46 S. Ct. 425, 428, 70 L. Ed. 738, in which Mr. Justice Brandeis, who delivered the opinion of the court, said: "The Circuit Court of Appeals has jurisdiction to review by appeal the order or decree of the District Court denying the petition to be admitted to citizenship in the United States."

[2] In entertaining jurisdiction of an application for naturalization, the state courts act merely as the agents of the federal government. In re Wilkie supra; In re Christern, 56 How. Prac. (N. Y.) 5; Eldredge v. Salt Lake County, 37 Utah, 188, 106 P. 939. In the Wilkie Case above cited, adopting the language used in the case of State v. Superior Court, 75 Wash. 239, 134 P. 916, Ann. Cas. 1915C, 425, it is said in that regard: " 'The state courts, in exercising that jurisdiction, exercise it as a function of the national government, and the procedure is controlled by the laws enacted by Congress.' "

In the case of In re Gee Hop (D. C.) 71 F. 274, and in State v. Superior Court, 75 Wash. 239, 134 P. 916, Ann. Cas. 1915C, 425, it is also said the procedure in naturalization matters which are conducted in state courts is controlled by the acts of Congress. Since an appeal may be taken in naturalization matters from a United States District Court to the Circuit Court, as declared by the Supreme Court in the Tutun Case, supra, on principle it follows that an appeal from the judgment of a state court, in a similar matter, should also exist, since the state courts are but agents for the federal courts in these proceedings, and they are governed by United States laws. Assuming there is authority for an appeal from the judgment of a state court denying a petition for citizenship, a serious question arises as to whether the appeal should be taken to the federal court or to the state Supreme Court. This question is not necessarily involved in the present proceeding.

[3] Regardless of whether state or federal statutes apply, the appeal was not taken in this case within the time allowed by law. The judgment was rendered September 17, 1930. The motion for new trial was not made until February 9, 1931. Notice of appeal was not filed until March 5, 1931. This was more than four months after the rendering of judgment. For the purpose of appeal the judgment must be deemed to have been entered when the minute order was made by the court and signed as required by rule 8, subdivision D, of the Procedure for Naturalization, which was adopted by the Secretary of Labor, pursuant to the authority therefor vested in him by the act of Congress. This judgment was entered in strict conformity with form 2229, above recited, which was specifically designated as the manner for rendering judgments denying citizenship in petitions for naturalization of aliens. This rule requires these separate form sheets to be furnished "on which to enter orders granting or denying petitions." They shall be dated and signed by the court. Compliance with this order constitutes due entry of judgments in naturalization matters. It has been held that "Separate unbound sheets may constitute a judgment book within the meaning of the statute." 34 C. J. 58, § 185; Lynch v. Burt (C. C. A.) 132 F. 417.

It is not necessary that all orders of courts shall be formally written out and signed by the judge in order to become final judgments from which an appeal is authorized. For instance, judgments of nonsuit and orders granting or denying motions for new trial may be made in open court. The minute orders with respect thereto become appealable without the signature of the judge. Section 581 of the Code of Civil Procedure provides: "The dismissals mentioned in subdivisions three, four and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered."

An appeal from such minute order, without more formal entry of judgment, is authorized. Bengal v. Traeger, 100 Cal. App. 526, 280 P. 538. In the present case the rules regulating the court's disposition of petitions for citizenship, which rules are authorized by an act of Congress, specifically provide for the manner of entry of judgment. The judge signed this order in the manner so provided. It therefore became a valid judgment of the court without further formality. Sections 664 and 671 of the Code of Civil Procedure have no application to judgments denying or granting naturalization. A petition for citizenship is a special proceeding as distinguished from an action at law. Sections 22, 23, Code Civ. Proc.

Regardless of whether the limitation of time in which to appeal from a judgment denying a petition for citizenship in a state court is governed by federal or state enactments, the petitioner in the present case failed to perfect his appeal within the time allowed by law. Judicial Code of the United States (28 USCA p. 409, § 230) provides: "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

No notice of appeal, motion for new trial, or application for a writ of review was made in this case within three months after the entry of judgment. The effort to appeal was therefore ineffectual.

In view of the fact that state courts act in naturalization matters merely as agents for the federal courts, it may be true that an appeal from the judgment of a state court may lie to the federal court. If so, that appeal would necessarily have to be perfected pursuant to federal procedure, and not according to the rules of law governing the state courts. Assuming, however, that the petitioner had a right of appeal to the Supreme Court under the provisions of subdivision 1 of section 963 of the Code of Civil Procedure, which recites that such an appeal may be taken "From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court," still the right of appeal was forfeited by failure to act within sixty days from the entry of the judgment. Section 939 of the Code of Civil Procedure provides: "An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other code, or under any other statute, within sixty days from the entry of said judgment or order."

[4] The time allowed by statute for giving notice of appeal in the present case was not extended by virtue of the fact that a motion for new trial was subsequently filed. That notice of intention to move for a new trial was not filed until February 9, 1931. This was more than four months after the entry of judgment. Before the notice of intention to move for a new trial was filed, the time for appeal had expired, and the judgment then became final. Ransome-Crummey Co. v. Beggs, 185 Cal. 279, 196 P. 487; Steward v. Spano, 82 Cal. App. 306, 255 P. 532; Busing v. Moore (Cal. App.) 2 P.(2d) 841. Notice of the entry of judgment was not necessary in order to start the running of the statute which limits the time for perfecting an appeal. Bley v. Board of Dental Examiners, 101 Cal. App. 666, 282 P. 19; Cook v. Cook, 208 Cal. 501, 282 P. 385.

For the reason that the petitioner failed to perfect his appeal within the time allowed by law, the motion to dismiss the appeal should be granted.

The appeal is dismissed.

We concur: PRESTON, P. J.; PLUMMER, J.

HAMMELL v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY, Respondent.*

Civ. 8300.

District Court of Appeal, Second District, Division 2, California.

June 9, 1932.

Hearing Granted by Supreme Court Aug. 8, 1932.

Courts ⇐169(3).

Action on assigned laborers' claims cannot be maintained in superior court, where it has no jurisdiction of component parts of aggregate demand (Const. art. 6, §§ 5, 13; St. 1929, p. 838).

Application for writ of prohibition by D. C. Hammell against the Superior Court of the State of California in and for the County of Los Angeles.

Writ granted.

*For subsequent opinion see 17 P.2d 101.

Dana R. Weller and Thomas H. Hearn, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

Numerous claims, each amounting to less than $2,000 for services alleged to have been rendered by laborers, were transferred for collection by assignments in writing to the chief of division of labor statistics and law enforcement, department of industrial relations, who commenced an action in the superior court of Los Angeles county against the employers of said claimants, praying judgment in the aggregate sum of about $3,000. One of the defendants in said action, petitioner herein, made application for a writ of prohibition to restrain the trial court from rendering judgment, upon the ground that it had not jurisdiction of the subject-matter thereof.

The complaint, consisting of two causes of action, alleged: (1) That the defendants employed certain workers listed in an exhibit attached thereto, at stipulated wages for services which had been rendered, that said wages had been earned, but were unpaid, and that the same had been assigned to the plaintiff to be collected under the authority vested in him by law. (2) That the allegations of the first cause of action were incorporated in the second, that the workers had been discharged by the defendants, but had been denied payment of their compensation. The largest claim of any laborer, including the penalty, amounted to but $990, and the smallest claim alleged was $137.50. The Constitution (article 6, § 5) provides, in part, that: "The superior courts shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also, cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts). * * *" Municipal courts are invested with jurisdiction of all civil cases wherein the demand, exclusive of interest, is for $2,000 or less. Const., art. 6, § 11.

The respondent cites Fraser v. Oakdale Lumber & Water Co., 73 Cal. 187, 14 P. 829, and seeks to rely upon the rule that the jurisdiction of the superior court is not defeated by the fact that the demand is made up of integral parts if the aggregate amounts to more than $2,000. There is slight, if any, analogy between the instant case and the cited case. Fraser, a labor claimant, instituted suit for an amount alone within the jurisdiction of the superior court, joining with his claim two others acquired by assignment, each of which was then also within the jurisdiction of the superior court. Robinett v. Brown, 167 Cal. 735, 141 P. 368. Other authorities cited by the respondent are beside the issue here presented. Since the inauguration of the municipal court system such suits in equity are cognizable by the municipal court if not founded upon demands in excess of $2,000. St. 1929, c. 477, p. 838. It has been held that a joint personal judgment in favor of several plaintiffs, for a sum aggregating more than $300, the respective demands being less than that sum, cannot be sustained if the inferior court be found to have jurisdiction of the causes of action. Miller v. Carlisle, 127 Cal. 327, 59 P. 785, 786. In the case last mentioned it was said: "It is in the exercise of its jurisdiction in equity that the superior court entertains suits to enforce the liens of mechanics and others provided for in the present statute." We are cited to no authority, and are aware of none, which has sanctioned the maintenance in the superior court of an action wherein it had no jurisdiction of the component parts of the aggregate demand, equitable or otherwise.

The writ of prohibition is granted, as prayed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

215 Cal. 662

BASTJAN v. BASTJAN.

L. A. 11309.

Supreme Court of California.

June 23, 1932.

Rehearing Denied July 22, 1932.

1. Divorce ⇐127(3).

In action for divorce, all evidence of prevailing party need not be corroborated.

2. Appeal and error ⇐1011(1).

Conflicts in testimony are to be settled by trial court, and not on review.

3. Husband and wife ⇐252.

Desert claim entered in name of husband, but paid out of community funds, *held* community property, as regards division of property in divorce action.

4. Frauds, statute of ⇐56(9).

Each spouse entering oral partnership agreement to pool real estate not excluding any property held separate real estate in trust for other, statute of frauds not being applicable (Civ. Code, § 1741).

5. Divorce ⇐252.

In divorce action, husband and wife having entered into partnership agreement to pool their realty, court erred in not awarding plaintiff her interest in property remaining in husband's name.

6. Divorce ⇐235.

In divorce action, court awarding plaintiff one-half of appraised value of property pooled by spouses' partnership agreement did not abuse discretion in refusing permanent maintenance.

7. Divorce ⇐194, 227(2).

Award to plaintiff in divorce action of $300 counsel fees and $200 appeal costs, *held* not excessive.

Such an award was not excessive when property awarded plaintiff paid small income, and defendant was earning a salary in addition to income from his share of property.

In Bank.

Appeals from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Divorce suit by Stefani Bastjan against Frank Bastjan, in which defendant filed a counterclaim. From a decree granting an interlocutory judgment of divorce and an order for counsel fees and costs, and refusing to award plaintiff maintenance pending appeal, both parties appeal.

Order and decree granting interlocutory judgment of divorce affirmed. Decree in other respects reversed and remanded, with directions.

For opinion of District Court of Appeal herewith adopted, see 4 P.(2d) 824.

I. Henry Harris and Patrick F. Kirby, both of Los Angeles, for Stefani Bastjan.

George S. Hupp and Frank C. Hill, both of Los Angeles, for Frank Bastjan.

PRESTON, J.

In this cause the opinion of Mr. Justice Sturtevant, heretofore rendered by the honorable District Court of Appeal for the First Appellate District, Division 2, is hereby adopted as a portion of the opinion of this court herein, as follows, to wit:

By their pleadings, each party asked for a divorce and a division of properties. Each spouse accused the other of cruelty. The plaintiff set forth all properties held by both parties claiming to own a half interest in each. The defendant set forth all properties making the same claim, except that he claimed as separate property a tract located at Newport in Orange county, and a tract located in San Bernardino county.

The trial court made a finding that the plaintiff's allegations of cruelty were true, and that the defendant's allegations of cruelty were not true, and awarded the plaintiff an interlocutory decree of divorce, counsel fees in the sum of $500, costs of suit, and also awarded her properties of the estimated value of about one-half of all the properties exclusive of those located in Orange county and those located in San Bernardino county. Those tracts the court held to be the separate property of the husband. After the decree was entered, the plaintiff announced her intention to appeal, and the court made an or-

der awarding her counsel fees on appeal in the sum of $350, and, for costs on appeal, $200. It refused to award her maintenance pending the appeal. Each party appealed from the judgment, and also from the order. Each party settled a bill of exceptions, but they have brought up only one transcript.

[1, 2] The defendant claims the evidence was insufficient to support a finding of cruelty against him. In this behalf, he claims that all of plaintiff's evidence was not corroborated. But it is not necessary that all of the evidence of the prevailing party should be corroborated. Cooper v. Cooper, 88 Cal. 45, 25 P. 1062. That at least a part of the testimony given by the plaintiff was corroborated is clear. Tr., fols. 698, 818, 723, 707 and 717. The fact that the defendant and Helen (his daughter by a former marriage) gave testimony contradicting the plaintiff created at most a conflict, but all conflicts were to be settled by the trial court, and not a court of review.

All other questions turn on the division of the properties between the parties and the awards of relief or refusal of relief to the plaintiff. It will not be controverted that in divorce actions the trial court has the power, where the charge is extreme cruelty, to award to the offended party such part of the community property "* * * as the court, from all the facts of the case, and the condition of the parties may deem just." Civ. Code, § 146, subd. 1. The record before us shows that at all times the court and both counsel were attempting to ascertain what properties each spouse had an interest in, and to divide such properties share and share alike. The record shows that the parties were married October 26, 1918. At that time the plaintiff was possessed of moneys in her own right in the sum of $3,100. The defendant was the owner of what is called the Newport property, fifteen acres, for which he paid $350 per acre and on which he owed $2,000. His equity amounted, therefore, to $3,250. He owned a lot valued at $1,200, but his brother held a judgment lien thereon for $350, leaving an equity of $850. The defendant also held a desert claim on 320 acres, being the property located in San Bernardino county. Later it was entered in his own name, but paid for out of community funds. There was evidence that shortly after their marriage the parties agreed orally to pool their interests and to become equal partners, that they did so, and that they bought and sold certain properties after the date of their marriage and before April 15, 1925, the date this action was commenced. The judgment held by the defendant's brother was paid by moneys advanced by the plaintiff. The incumbrance on the Newport property, both principal and interest, was paid by the partnership. Lands purchased were taken by the spouses under joint tenancy deeds. The expenses of both spouses and of the husband's daughter, Helen, were paid out of a joint bank account. During that same period, the expenses of, and the taxes and insurance on, all properties were paid out of the same joint bank account. This was done whether the title stood in the name of both spouses or in the name of the defendant. The Newport property stood of record in the name of the husband at the date of the marriage, and the record was never changed. The desert claim was taken in the name of the defendant, and was never changed. No writing was executed by the spouses showing the partnership nor the properties owned by it. In finding No. IV, the trial court found that the parties acquired as copartners and as community property and held in joint tenancy every parcel except the lands in Orange county and those in San Bernardino county.

In finding No. V, the court found that the Newport property and the desert claim were the separate property of the defendant. It did not find the value of either tract, but awarded both tracts to him. We think that the court erred in applying the law to the facts.

[3] The desert land claim was clearly community property. The general rule regarding conveyances and contracts of and concerning claims to public lands is stated in 50 C. J. 1123: "But in the absence of any express or implied prohibition in the statute under which he is seeking to acquire the land, an entryman or one whose application to purchase land has been approved has an equitable interest in the land which he may assign or convey to another, although he has not yet paid the government price for the land." At an early date, that rule was adopted in California. For many years it had been provided by the federal statute that homestead claims might be located. On June 8, 1872, a statute was passed authorizing individuals to locate additional lands. U. S. Rev. Stats. § 2306 (43 USCA § 274). A claim entered under that section was the subject of dispute in the case of Rose v. Wood & Lumber Company, 73 Cal. 385, 15 P. 19. Speaking of the assignment of such a right, on page 388 of 73 Cal., 15 P. 19 the court said: "As stated before, section 2306 is independent of the other provisions of chapter 5, and in the absence of an express prohibition against an alienation of the property by the claimant, after the issuance of a certificate from the general land-office, to locate in person or by agent a certain number of acres, we cannot say that the right so to alienate does not exist. It is a right which need not in terms be granted by the sovereign authority, for it exists if not expressly prohibited, or opposed to public policy." Under federal legislation supplemented by state legislation, provision was made for the location of lots under what was known as the "Townsite Acts." A married

woman had entered certain lots and a man who afterwards became her husband had located certain other lots. Later they married. Litigation arose regarding the title of the husband to the lots located by him. Title to the lots upon his request was taken in the name of his wife. The payments were made by the husband out of his separate money. In the case of Morgan v. Lones, 78 Cal. 58, 20 P. 248, it was held that said lots were community property. In Phillips v. Carter, 135 Cal. 604, 67 P. 1031, 87 Am. St. Rep. 152, the court was considering lands entered under the same statute as the desert claim was entered in the instant case. Commencing on page 606 of 135 Cal., 67 P. 1032, the court cites many cases decided by the Supreme Court of the state of California, and also many cases decided by the Supreme Court of the United States, which declared the rule as stated above. Turning again to Morgan v. Lones, 78 Cal. 58, at page 62, 20 P. 248, 250, we quote as follows: "The presumption is that property acquired by purchase during marriage is community property, and the party who claims that it is separate property must prove it to be such by clear and satisfactory evidence. (Citing cases.)" In the record before us, the defendant did not introduce evidence sustaining that burden.

[4] As to the Newport property, the facts are slightly different. Both before and after the marriage it stood in the name of the husband. There was clear testimony of an oral partnership agreement. The court found a partnership was formed. If it was formed for the purposes hereinabove recited, then from the moment it was formed the partners held the properties in trust for themselves and for each other, and no writing was necessary to take the case outside the statute of frauds. 12 Cal. Jur. 861. There was no evidence that the interests of the partnership were, by the terms of any contract, limited to properties other than the Newport property. That property, as well as all others, went in. It thus appears that there was no evidence to sustain finding No. V; that is, that the Newport property and the desert claim in San Bernardino county are defendant's separate properties.

The Newport property was set over to the defendant as his separate property because the trial court was of the opinion that a contract in writing was indispensable evidence in proof of any claim by the plaintiff. Whatever may be the rule in other jurisdictions, the rule is settled in this state contrary to the holding of the trial court. It will not be contended that a partnership may not be created by an oral agreement. When that agreement is entered into and is partly performed, the statute of frauds (Civ. Code § 1741) is not applicable. Pio Pico v. Cuyas, 47 Cal. 174, 178, 179; Hill v. Den, 121 Cal. 42, 53 P. 642. In Bates v. Babcock, 95 Cal. 479, commencing on page 486, 30 P. 605, 607, 16 L. R. A. 745, 29 Am. St. Rep. 133, the court said: "No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud. * * * It is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships. The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. * * * If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and, although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its enforcement for the purpose of carrying out its original purpose, the division of the profits resulting from the speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners." Koyer v. Willmon, 150 Cal. 785, 787, 90 P. 135, is to the same effect. See, also, 12 Cal. Jur. 861.

[5, 6] In framing its decree, the trial court awarded to each spouse property equal to one-half of the appraised value of those parcels found to be community, partnership, or joint. Having done so, it refused to allow to the plaintiff permanent maintenance in addition to said property awards. We have shown above that the plaintiff should have been awarded property, in money or in kind, representing her interest in the Newport property and her interest in the desert claim, and that the court erred in not doing so. But the record does not contain any evidence showing that it was an abuse of discre-

tion to refuse an allowance as for maintenance.

[7] The properties awarded to the plaintiff are not producing much of a net income. If counsel fees and costs had not been awarded to her the plaintiff would have been compelled to incur debts in order to maintain this appeal. The defendant is employed and receives a wage. He also has some income from his properties. These several facts show that the trial court did not err in allowing the wife $300 as counsel fees, and $200 as for costs on appeal. Nor can it be said that said sums are excessive.

Defendant husband attempts to distinguish the various cases cited above to support the holding that the Newport property was partnership property upon the ground that in all of said cases the oral partnership applied only to lands to be acquired in the future; that in none of them is it held that an oral partnership agreement is effective to transfer lands already owned by one of the parties, for the reason that this would constitute a transfer of real property without written agreement in violation of the statute of frauds.

This very question, however, arose in the recent case of Perelli-Minetti v. Lawson, 205 Cal. 642, 272 P. 573, and the court there upheld the partnership agreement. See, also, Browne on the Statute of Frauds (5th Ed.) § 261a; Musick Con. Oil Co. v. Chandler, 158 Cal. 7, 109 P. 613; Scott v. Jungquist, 179 Cal. 7, 175 P. 412; Duryea v. Burt, 28 Cal. 569. As stated in Browne on the Statute of Frauds, supra, the doctrine stands either as an application of the law of implied trusts to cases of land purchased and held by one partner in derogation of his fiduciary obligation to the other or as a bald exception to the rule that no oral agreement can be made, directly or indirectly, to effect the transfer of any interest in land. In other words, the partners stand in a fiduciary relationship toward each other, and each is estopped to assert the statute of frauds for the purpose of perpetrating a fraud upon the other.

It must, of course, be shown from the partnership agreement and the conduct of the parties that the property in question was to become part of the partnership property. In this case, as pointed out by the Appellate Court, the evidence thoroughly established the fact that the Newport property was to go to the partnership along with all the other properties of the parties.

The order denying plaintiff alimony pending appeal is affirmed; the order granting her attorneys' fees and costs on appeal is affirmed. So much of the interlocutory decree as grants an interlocutory judgment of divorce, together with counsel fees and costs, is likewise affirmed. Said decree, in all other respects, is reversed, and the cause is remanded to the court below for further proceedings not inconsistent with these views.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; TYLER, Justice pro tem.

215 Cal. 685

McCOMAS v. AL. G. BARNES SHOWS CO. et al.

L. A. 11719.

Supreme Court of California.

June 24, 1932.

1. Master and servant ⇐301(4).

Trainer of elephant hired by motion picture studio remained employee of owner of elephant, so that owner was liable for trainer's negligence in fastening howdah holding actress.

2. Master and servant ⇐329.

Actress falling off elephant when howdah slipped was not required to allege or prove particular acts of trainer constituting negligence.

3. Negligence ⇐121(2).

Res ipsa loquitur doctrine applies when negligence is pleaded both generally and specially.

4. Appeal and error ⇐1068(3).

Instruction in substance that it was admitted that elephant trainer's negligence was imputed to owner *held* harmless where, under evidence, owner was liable for trainer's negligence.

5. Appeal and error ⇐1064(1).

In action for injuries sustained by actress falling off elephant when howdah slipped, instruction in effect that res ipsa loquitur doctrine applied *held* not prejudicial.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Lila McComas against the Al. G. Barnes Shows Company, the Alliance Investment Company, and others. From a judgment for plaintiff, defendant Alliance Investment Company appeals.

Affirmed.

Superseding opinion in 4 P.(2d) 997.

Arthur S. Guerin, A. Feldman, Smith & Breslin, and Joseph Smith, all of Los Angeles, for appellant.

William C. Ring and Faucett & Ring, all of Los Angeles, for respondent.

CURTIS, J.

Action to recover damages for personal injuries sustained by the plaintiff by reason of the negligence of the defendant Alliance Investment Company. The plaintiff was employed by the Wm. Fox Studio as an actress to ride an elephant which was used in connection with the filming of a certain moving picture which the Wm. Fox Studio was then engaged in making. The defendant the Alliance Investment Company was the owner of the elephant and its equipment, and on the day in question the Wm. Fox Studio hired the elephant, its equipment, and an attendant, or trainer of the elephant, from the Alliance Investment Company, for the use of which in the making of said picture the Wm. Fox Studio paid the Alliance Investment Company the sum of $115. This sum was to and did include the wages of said trainer. At about 5 o'clock p. m. on the day agreed upon, the elephant, with its equipment and its trainer, was brought in a truck to the place where the picture was being made. The trainer then prepared the elephant for the plaintiff to ride thereon by placing a chair, called a howdah, on the back of the elephant and by strapping girths under and around the body of the elephant. After the howdah was placed and "harnessed," a robe made to fit over it was placed upon the elephant's back and another was draped over the howdah. The elephant was then stationed where it could be conveniently led out before the camera at the proper time. Early in the evening the plaintiff was assisted on the elephant by the trainer and instructed by him how to sit and ride thereon. The part of the picture in which the elephant and its rider were to be shown depicted a scene within an amusement zone. Among the attractions which were here to be represented were various amusement contrivances, such as roller coasters, airplane devices, and other contrivances, usually found in this type of amusement places. During the rehearsal of this scene these different contrivances were set in motion with the result that their combined effect produced loud and tumultuous noises. These noises had a disquieting effect upon the elephant. During one of the rehearsals which took place about an hour and one-half after midnight, the elephant escaped from his trainer and ran away. It was only after an extended pursuit that the trainer succeeded in recapturing the animal and returning it to its appointed place. Upon reclaiming the elephant the trainer administered to it a severe punishment by hitting and beating it over the head and ears with a "bull hook," an instrument used by the trainer to control the elephant. This punishment may not have added to the elephant's peace of mind. After the elephant had been recaptured and returned to its place, the trainer made no examination of the equipment which held the howdah in place upon the elephant's back. Nor did any one else then, or at any time before the accident, make such an examination to ascertain whether the equipment was in proper condition or the howdah securely strapped upon the elephant. About twenty minutes thereafter, or as some of the witnesses fix the time, at about 2 o'clock in the morning, the accident happened. During this twenty minutes the elephant stood in his appointed place with the plaintiff sitting in the howdah on its back. The elephant was swaying its body back and forwards, or, as one witness described its movements, "the elephant was weaving back and forth." While the elephant was going through this movement, the howdah for some reason slipped from its back and fell to the ground carrying the plaintiff with it. The howdah, which weighed 150 pounds, fell upon the plaintiff as she struck the ground, inflicting upon her serious injury. There is evidence that the trainer left the elephant a few minutes after he had recaptured it and returned it to its proper place, and was not present when the howdah slipped from the elephant's back, nor for some ten minutes prior thereto.

Plaintiff instituted this action against the Al. G. Barnes Shows Company, the Wm. Fox Studio, a corporation, and a number of fictitious persons, both natural and corporate. The action was dismissed against the Wm. Fox Studio, upon its being shown that plaintiff was in the employ of that company at the time she sustained the injury, and therefore that her remedy against said company was for compensation and not for damages. The Al. G. Barnes Shows Company appeared by answer and denied that it was the owner of the elephant or the employer of Nance, the trainer. The Alliance Investment Company, sued as John Doe Company, appeared and by answer admitted the ownership of the elephant and that it had hired said animal and trainer to the Wm. Fox Studio. The case was tried by the court with a jury. At the close of plaintiff's case the court granted a nonsuit as to the defendant Al. G. Barnes Shows Company. The jury rendered its verdict in favor of the plaintiff and against the defendant the Alliance Investment Company, and judgment thereon was entered accordingly. From this judgment said defendant has appealed.

It is not contended that the judgment of $15,000 is excessive or that the evidence is not sufficient to support the verdict. The contention is made, however, that the trial court grievously erred in giving one instruction to the jury and in refusing to give another proposed by the appellant.

The instruction given by the court to which the appellant takes exception is in part as follows:

(1) "It is admitted that Mr. Nance, the trainer of the elephant, on the occasion in controversy here, was the agent, employee and servant of defendant Alliance Investment Co., a corporation, and his negligence, if any, with respect to a duty of the defendant is imputed to the said defendant Alliance Investment Company, a corporation. * * *"

"(2) If you determine from the preponderance of the evidence that the plaintiff was injured as a result of the howdah slipping or falling off the elephant and you determine that at the time it happened the elephant and its equipment were under the control of the defendant, then the plaintiff may recover without proving exactly what caused the howdah to slip or fall. That is, you may or may not infer, from the facts given that the defendant was negligent, and may so find, without further evidence in plaintiff's behalf." The parts of this instruction omitted are merely repetitions of the statements contained in the above quotations from said instruction.

The proposed instruction which the court refused, and which refusal appellant claims resulted in prejudicial injury to it, in so far as it is necessary for our purposes here, is as follows:

"You are instructed that it is the law, that one who is the general servant or employee of another may be loaned or hired by the master for some special service, so as to become as to that special service the servant of such third party; and where a general servant or employee is so loaned or hired to another, and as regards the particular service, for which he is so loaned or hired, is subject wholly to the direction and control of the other, the latter, and not the general employer, is the master, so far as the particular or special service is concerned, and is liable for injuries caused by the negligent and wrongful acts of the servant, while engaged in the duties pertaining to such service.

"Therefore, if you find from the evidence that the trainer of the elephant, to-wit: J. O. Nance, was employed by the defendant, Alliance Investment Company, in a general capacity as trainer of its elephants and was hired out by that company, together with the elephant in question, to the Wm. Fox Studio, both for the purpose of taking part in the motion picture called 'Sunrise' then being made by Wm. Fox Studio and that said J. O. Nance was subject wholly to the direction and control of said Wm. Fox Studio while performing the duties for which he was hired by defendant to said Wm. Fox Studio, then said Wm. Fox Studio is liable for any injury caused to said plaintiff by the negligent and wrongful act or acts of said J. O. Nance while engaged in the duties pertaining to his services for said Wm. Fox Studio."

Appellant now contends that by the first paragraph of the above-quoted instruction given by the court, the jury were told by the court that it was admitted that the negligence of Nance, the trainer, was imputed to the Alliance Investment Company, the appellant, and that by refusing to give the proposed instruction, the trial court denied the appellant the right to have the question as to whether Nance, the trainer, at the time of the accident, was the servant of the appellant or was the servant of the Wm. Fox Studio considered by the jury. We have grouped these two contentions under one head for the reason that they are closely related to each other, and because we think that they can better be treated together rather than separately. We think the court was possibly in error in stating to the jury that it was admitted that the negligence of Nance, the trainer, was imputed to the appellant. As we view the pleadings, the evidence, and the admission of counsel made during the trial of the case, we are not entirely satisfied that the admissions of the appellant go to that extent. It is clear that appellant admitted its ownership of the elephant, its employment of Nance as trainer, and the hiring of the elephant and its trainer to the Wm. Fox Studio for the purposes of filming the picture which the Wm. Fox Studio was then engaged in making. This admission was made principally for the purpose of showing the true relationship between itself and the Al. G. Barnes Shows Company. As we have seen, the Al G. Barnes Shows Company was made a party to this action and plaintiff alleged in her complaint that said company was the owner of the elephant and the employer of Nance, and was, therefore, responsible for her injuries. The Al. G. Barnes Shows Company in its answer denied these allegations of the complaint, and the answer of appellant also contained denials of the same allegations, with further allegations that appellant was such owner and employer. In the course of the trial these issues were involved and were the subject of more or less discussion between counsel. As stated before, we find nothing in the record that thoroughly satisfied us that the appellant made any admission that it was liable for the acts of Nance at the time of the accident. It did admit, both in its pleadings and elsewhere, that it, and not the Al. G. Barnes Shows Company, was the owner of the elephant and the employer of Nance, but it further contended that after hiring the elephant and its trainer to the Wm. Fox Studio they were wholly under the direction and control of the latter company while performing the duties for which they were hired, and that the Wm. Fox Studio was solely liable for the injury sustained by plaintiff. It was error, therefore, for the court to instruct the jury as it did regarding such admission. The practical effect of the first paragraph of this instruction was to withdraw from the consideration

of the jury the question as to Nance's employment at the time of the accident, and whether he was then in the employ of his general employer, the appellant, or his special employer, the Wm. Fox Studio. By its refusal to give the instruction quoted above and proposed by appellant, the trial court denied the appellant the right to submit this same question to the jury. If this question was, under the evidence in this case, a proper one for the consideration of the jury the action of the court in giving the first-mentioned instruction, and also in refusing to instruct the jury as requested by appellant in the proposed instruction quoted above, was not only erroneous but it was prejudicial to the substantial rights of the appellant.

[1] Whether the question was a proper one for the consideration of the jury depends entirely upon the evidence bearing upon the question of Nance's employment at the time of the accident. If the uncontradicted evidence shows as a matter of law that Nance was then in the employ of his general employer, the appellant, and that his special employer, the Wm. Fox Studio, had no direction or control over him in respect to the particular services out of which the accident arose, then the question as to liability for his negligence was not one for the jury. Appellant relies in support of its contention that the trial court erred in refusing its proposed instruction upon the case of Peters v. United Studios, Inc., 98 Cal. App. 373, 277 P. 156. It was there held under the facts in that case that it was error for the court to instruct the jury that as a matter of law the defendant, Kenneth Daum, the driver of a tractor that struck and injured the plaintiff in said action, was the agent and employee of the United Studios, the owner of said tractor and the general employer of Daum, and which company had hired said tractor and its driver to the Christie Company for the use of the latter company in filming a picture then being made by it. But we think that case can be readily distinguished from the present action. In that case the plaintiff was injured by the tractor driven by Daum during the very time when the picture was being taken. Daum was told just when and where to drive his tractor by the director of the Christie Company, his special employer. He followed explicitly these directions, which were to drive the tractor through a doorway and then across the stage. He drove the tractor in the manner directed four or five times and on the last time the tractor struck an obstruction and veered into the plaintiff, inflicting upon him the injuries for which he sought damages against his general employer, the United Studios. The court very properly held under the facts in that case that the general employer, the United Studios, was not as a matter of law liable for the negligence of Daum, but that the question of its negligence was one of fact to be determined by the jury. The facts we think in the present case are radically different. Here the plaintiff was injured by the falling of the howdah from the elephant's back while she was waiting for the elephant to be called into action at the proper time in the filming of the picture. The howdah slipped and fell from the elephant by reason of some defect in the equipment which secured it in place, or by reason of some defective use of this equipment in harnessing or fastening the howdah to the back of the elephant. The evidence does not show which of these two conditions caused the howdah to slip and fall from the elephant's back, but it is apparent from the evidence that either one or the other of them was the direct cause of plaintiff's fall. The negligence in this case, which was the proximate cause of plaintiff's injury, was the failure to securely and firmly fasten and fix the howdah to the elephant's back. This duty was solely that of the trainer, Nance. He was employed by appellant on account of his peculiar skill and knowledge in the handling of elephants. He had had before this occasion five years' experience as a trainer of elephants, and had been in the employ of the appellant in that capacity during a large part of that time. The Wm. Fox Studio gave the trainer no directions as to how he should place the howdah upon the elephant's back, nor did any representative of that company assume to know anything about the handling of elephants, or how they should be "harnessed" for the purpose of carrying passengers. Not only were no directions given to the trainer by the Wm. Fox Studio as to the mode or manner he should equip the elephant for carrying passengers, but we think it is evident from the facts in the case that no right or authority had been given the Wm. Fox Studio by the general employer to direct or control the trainer as to his duties in that respect. The trainer, therefore, in the performance of these duties was the servant of employee of the general employer, the appellant herein. This conclusion we think finds full support in the decisions of this court.

In the case of Stewart v. California Improvement Company, 131 Cal. 125, 131, 63 P. 177, 179, 724, 52 L. R. A. 205, the city of Oakland had hired from the California Improvement Company a steam roller together with an engineer to operate the same. The steam roller was used by the city in rolling and leveling its streets. While the engineer was in charge of said steam roller, steam escaped from its engine through the safety valve in front of plaintiff's horse. The horse became frightened, "wheeled short around and tilted over plaintiff's cart, and the plaintiff, without any fault on his part, was thrown out and dashed violently upon the ground." In an action to recover for the in-

juries so sustained, the question arose as to whether the engineer at the time of the accident was in the employ of the city or of the defendant, California Improvement Company. In deciding that question this court held as follows: "The test in all these cases is, Who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine; this was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. We think the conclusion of law deduced by the court below from the facts found that the defendants are liable, and not the city of Oakland, is correct."

In the later case of Billig v. Southern Pacific Company, 189 Cal. 477, 209 P. 241, the plaintiff's decedent was a passenger on the train of the defendant Southern Pacific Company and was killed in a collision between said train and an auto truck, owned by a defendant named Harris and driven by his employee, Pratt, at the time of the collision. Harris had rented his auto truck and the driver, Pratt, together with a helper to one Geiger for the purpose of transporting from Los Angeles to San Pedro harbor a quantity of gasoline which Geiger had purchased from the Gilmore Petroleum Company, and at the time of the collision said truck with the driver and other employee was engaged in transporting gasoline under said contract of hiring. The court instructed the jury that Pratt, the driver of the auto truck on the occasion in controversy, was the agent of the defendant Harris and any negligence on his part was imputed to the said Harris. This court, in affirming the judgment against Harris, sustained the action of the trial court in the giving of said instruction. In so holding the court said (page 485 of 189 Cal., 209 P. 241, 244): "While the evidence in the instant case shows that Geiger, under the implied terms of the claimed contract of hiring, possessed and exercised authority to control the conduct of Pratt in the work of loading and unloading, nevertheless, so the evidence shows, Geiger never assumed the right to direct and control Pratt in his operation of the truck while in transit, and there is no evidence showing, or tending to show, with respect to the operation of the truck while in transit, that the defendant relinquished unto Geiger the right to control Pratt. The fact is undisputed that Pratt was the general paid employee of the defendant Harris, and while it was shown in evidence that Geiger was employed by Harris to send to the barn inefficient helpers, who were engaged in loading and unloading, still the only inference to be deduced from the undisputed evidence is that the right to hire and discharge the men rented to Geiger by Harris rested finally in Harris, and that Harris alone discharged them. The evidence does not show that Pratt for any cause might have been discharged by Geiger and replaced by a driver of Geiger's own selection. Retaining in himself, as Harris did, the right to hire and discharge Pratt, and there being no evidence showing, or tending to show, that Harris, either expressly or impliedly, relinquished control of Pratt in the operation of the truck, there was no possible basis upon which the jury could have found that Pratt was, as a matter of fact, the servant of Geiger, and therefore the trial court was justified in charging the jury as a matter of law that, under the established facts of the case, Pratt was agent of Harris at the time of the collision." (Citing authorities.) In a previous portion of said opinion the court discussed the case of Stewart v. California Improvement Company, supra, and pointed out its applicability to the facts in the Billig Case. In this connection, the court on page 484 of 189 Cal., 209 P. 241, 244, said: "Whatever the rule and its variations may be in other jurisdictions, it is the settled rule of law in this state, applicable to cases of the character under consideration here, that a general employer is not freed from responsibility for the negligent acts of an employee merely because the employee has been hired out by the employer to a third person, to be used by the latter in the performance of his work. Stewart v. California Improvement Co., 131 Cal. 125, 52 L. R. A. 205, 63 P. 177, 724. The case last cited is in fact and principle strongly analogous to the case at bar. In that case it appeared that the defendant company had hired out, to a municipality, a steam roller, together with an engineer, one of the company's general employees, to be used in the rolling and leveling of a city street, which work was being done under the direction of the city's superintendent of streets. The plaintiff in that case suffered injuries cause by the negligent operation of the engine by the defendant company's engineer, and said company was held liable for the resultant damages, upon the theory that the facts showed, as a matter of law, that the relation of master and servant existed between the defendant company and its engineer, and that no such relation existed between the municipality and the engineer. This was held to be so primarily because of the undisputed facts that the city had merely hired from the defendant company, at a stipulated per diem, the serv-

ices of the engineer and the use of the instrumentality employed in the performance of the municipality's work, and that its agent had authority only to direct and supervise the work in hand, and did not have the authority to control the engineer in his operation and management of the engine."

We think the principles of law declared in these decisions are controlling in the present action, and that the language quoted above is strikingly applicable to the facts in the instant case. The undisputed facts here show that while the Wm. Fox Studio had hired from the Alliance Investment Company the elephant and its trainer at a stipulated per diem for the purpose of producing certain portions of the picture then being made, and that while the Wm. Fox Studio had authority to direct the trainer as to the part the elephant should take in the making of said picture and as to the time and manner of its performance, yet the Wm. Fox Studio had no authority to control the trainer in his preparation of the elephant for said performance, and particularly as to the adjustment of the howdah and other equipment upon the elephant in order that it might be safe for plaintiff to ride therein. The proper performance of these duties required peculiar and special skill and knowledge which the trainer Nance alone possessed. He was employed for that purpose by his general employer, and the latter never surrendered to the special employer any right or authority to perform these duties, or to direct or control Nance in the performance of them. Nance, therefore, in that respect and to that extent, remained the employee of the Alliance Investment Company, and if negligent this negligence was imputed to his general employer, the Alliance Investment Company. It might also be recalled that Nance's wages were paid by his general employer and that the special employer had no authority to discharge him. While these additional facts are not controlling in all cases, when the other facts mentioned and discussed herein are considered in connection with them, and that all are supported by the uncontradicted evidence in the case, we think the conclusion is irresistible that the general employer was as a matter of law responsible for the acts of Nance, and accordingly it was liable for his negligence.

[2-5] Appellant makes the further objection to the second paragraph of the instruction given by the court and first-quoted above. Appellant contends that the court, in effect, thereby instructed the jury that the doctrine or rule of res ipsa loquitur applied to the facts in this case. Granting that the appellant is right in this contention, we are not prepared to say that it was error for the court to apply said doctrine to the facts before it. The instrumentality, the elephant and its equipment, was in charge of appellant through its employee, the trainer, and it was the trainer's duty to securely adjust the equipment and keep it so in order that respondent might ride upon the elephant in safety. The equipment in some way became loose, causing the howdah to slip and fall to the ground carrying the respondent with it to her serious injury. The howdah would not in the ordinary course of things have slipped and fallen had the trainer used proper care in strapping it on the elephant's back. It was not incumbent upon the respondent to either allege or prove the particular acts of the trainer which constituted negligence on his part. It is true that respondent pleaded negligence both generally and specially. It is settled, we think, beyond question in this state that the doctrine of res ipsa loquitur applies when negligence is pleaded both generally and specially. Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 P. 519, 527; Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 181 P. 669; Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Seney v. Pickwick Stages, 82 Cal. App. 226, 255 P. 279.

From the foregoing it is apparent that appellant was not prejudiced by the giving of the instruction complained of, nor was it error for the court to refuse to give the instruction proposed by appellant. It follows that no sufficient showing has been made by appellant for a reversal of the judgment.

Respondent has moved the court to dismiss the appeal on the ground that appellant's opening brief does not meet the requirements of the rules of this court. While said brief is subject to many of the criticisms made of it by respondent, we do not feel that these defects are sufficient to compel a dismissal of the appeal. Respondent's motion, therefore, is hereby denied.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; TYLER, Justice pro tem.

215 Cal. 675

THOMAS v. LAVERY et al.

L. A. 11544.

Supreme Court of California.

June 23, 1932.

Rehearing Denied July 22, 1932.

1. Brokers ⇐50.

Seller's waiver of strict compliance with contract to sell lots and parties' understanding regarding resales extended term of contract, and was binding on parties.

Facts disclosed that seller agreed that contract calling for sale of three lots per month by broker meant an average of three lots per month or 36 lots per year, and that it was understood that resales of lots should be counted as new sales in measuring terms of contract, and that by so counting the resales the term of the contract was extended beyond the date when seller rendered herself incapable of performing the contract by conveying the lots to her daughter.

2. Appeal and error ⇐1008(1).

Supreme Court construing contract for sale of lots *held* bound by trial court's findings that resales were to be counted in computing terms of contract.

3. Brokers ⇐63(1).

Conveyance by owner to daughter of lots which broker undertook to sell constituted breach of broker's contract of employment.

Such conveyance constituted a breach of broker's contract of employment to sell lots, because, regardless of whether daughter held record title lawfully or by fraud practiced on the owner by daughter's husband, broker could not perfect title in purchasers without daughter's consent, and daughter had repeatedly asserted to both broker and owner's attorney that she would refuse to execute or recognize contract procured by broker after a certain date.

4. Brokers ⇐61(1).

Real estate agent is absolved from continuing efforts to sell where ownership is in litigation and it appears certain he cannot complete title in purchasers without legal action.

5. Brokers ⇐87.

Broker, receiving as commission sums for which lots sold over listed price, could not recover as damages for lost commissions more than twice amount seller would receive for lots unsold when broker's contract was breached.

Broker under such circumstances could not recover over $30,000 as damages for lost commissions for seller's breach of contract where seller would have received approximately $14,000 for lots unsold at time of breach, because there was no showing of any great increase in value to account for the great discrepancy between amount seller was to receive for lots and broker's commissions, and because broker's testimony as to price for which lots could be sold was based upon their value when completely improved, whereas seller did not agree to furnish such improvements until she had received $14,000 for lots, and broker had already received cash sums which in many cases exceeded a reasonable commission on the listed price.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by J. D. Thomas against Jessie E. Lavery and others. From a judgment for plaintiff, defendant Jessie E. Lavery appeals.

Reversed.

Superseding 6 P.(2d) 531, which superseded 4 P.(2d) 973.

Paul Friedman and Earl D. Killion, both of Los Angeles, for appellant.

E. A. Kline and C. C. Caswell, both of Los Angeles, for defendants W. C. Barnett and Emma L. Barnett.

Charles E. Hobart, of Los Angeles, for respondent.

SEAWELL, J.

Defendant Jessie E. Lavery appeals from a judgment awarding plaintiff J. D. Thomas damages in the sum of $30,856 for breach of a contract executed on November 12, 1925, whereby he was given the exclusive right to sell 57 lots in a subdivided tract in the city of Los Angeles owned by said Jessie E. Lavery. Plaintiff sued to recover for loss of future profits or commission which he alleged he would have earned from the sale of lots unsold on August 1, 1927, had he not been wrongfully prevented from selling said lots. Emma L. Barnett, a daughter of Mrs. Lavery to whom she conveyed the property by deed after entering into the contract with plaintiff, and W. C. Barnett, husband of Emma L. Barnett, were named as parties defendant. A judgment of nonsuit was entered in their favor, from which no appeal has been taken.

Mrs. Lavery filed an answer wherein she denied that plaintiff had performed the terms and conditions of said contract, and also denied that he had been damaged in any sum whatever. We are of the view that the evidence fails to sustain plaintiff's right to damages in the sum allowed, and on that ground must reverse the judgment. Plaintiff is entitled to the decision on the other points raised. For the reason that an understanding of said issues is necessary to a considera-

tion of the plaintiff's right to damages, we will discuss them first.

The contract involved was executed on November 12, 1925, by plaintiff and W. C. Barnett, as agent and trustee for Mrs. Lavery. Following the main agreement is Mrs. Lavery's authorization to Barnett to execute the sales agency contract, signed by her at the same time the main contract was executed. Mrs. Lavery was then eighty-five years of age. Thomas had dealt with Barnett in the preliminary negotiations, and it was contemplated that future transactions should be conducted with him. The agreement provided that Thomas should sell said lots at prices ranging between $560 and $885, as set forth in a schedule annexed to the agreement, and that all sums over and above said prices for which lots should be sold were to be retained by him "as his commission or compensation for selling said lots." Mrs. Lavery was to receive a down payment of $25, and to enter into a contract of sale with the purchaser by which the balance, with interest thereon, was to be paid in monthly installments agreed on between Thomas and the purchaser. The monthly payments of principal were to be divided equally between Thomas and Mrs. Lavery, and interest payments apportioned according to the amount due each. That is, the monthly payments of principal were to be divided equally until either Mrs. Lavery had received the scheduled price to her in full, or Thomas had received the full amount of his commission, and thereafter whichever of the two was not paid in full would be entitled to the entire amount of monthly payments.

By the original contract Thomas agreed to sell three lots each month commencing with January, 1926. On January 8, 1926, Barnett signed the following memorandum at the request of Thomas: "With addition to a certain contract for the sale of fifty-seven lots Tract 8304 dated November 12, 1925, it is understood and agreed that the term of 3 lots per month to be sold is meant an average of 3 lots per month to be sold or 36 lots per year, or any amount of lots sold over and above the required quota is to apply on the next preceding month's quota."

Difficulties and disagreements soon arose between Barnett and Thomas. A controversy as to whether Thomas was entitled to his full commission on sales where the purchasers defaulted and forfeited their contracts was resolved with the understanding that Thomas should resell such lots, and, as testified by Thomas and found by the court, that resales should be counted in computing the term of the contract. Resales made during 1926 and 1927 were accepted by Barnett and after June 1, 1927, by Mrs. Lavery personally. Additional down payments of $25 were not made to Barnett or Mrs. Lavery upon resales, but the amount of the down payment and the total of monthly payments received on the prior contract were deducted from the list price to her, and the balance, with interest from the date of the last payment, represented the amount due the seller under the resale contract.

[1, 2] By the written addition of January 8, 1926, to the contract, Barnett, on behalf of Mrs. Lavery, waived strict compliance with the requirement of three sales each month on condition that Thomas sell at the rate of thirty-six lots a year, or an average of three a month. Said waiver, which was accepted and acted upon by Thomas, bound Mrs. Lavery on principles of estoppel. No attempt was ever made by her to withdraw said waiver. The contract contained no express provision authorizing Thomas to make resales. It gave him the option to pay the balance due on defaulted contracts himself, but it is silent as to whether the right to sell all lots in the tract was to include the right to sell lots upon which contracts had been forfeited. The court below found in favor of Thomas that it was the understanding between him and Barnett that he should make resales and count them in estimating the time for completion of the contract. The contract had no fixed date of expiration. Under the written waiver of January 8, 1926, lots were required to be sold at the rate of thirty-six a year, which meant that if resales were not to be counted the 57 lots were required to be sold by August 1, 1927. If, as we must hold, in view of the findings of the trial court, resales were to be counted, each lot upon which a contract was forfeited increased the number to be sold, and the term of the contract was extended one month beyond August 1, 1927, for every three such lots. The number of forfeitures shown was sufficient to extend the contract several months beyond August 1, 1927.

This construction placed upon the contract by the parties was binding, although not reduced to writing. It was not a true alteration, but an interpretation placed on a contract of doubtful import and confirmed by subsequent dealings. Kales v. Houghton, 190 Cal. 294, 212 P. 21; Smith v. Blodget, 187 Cal. 235, 201 P. 584; Yule v. Miller, 80 Cal. App. 609, 252 P. 733; Katz v. Bedford, 77 Cal. 319, 19 P. 523, 1 L. R. A. 826.

[3] We pass now to consider the facts upon which plaintiff relies to prove a prevention of performance and wrongful termination of the contract. A deed dated May 26, 1926, from Mrs. Lavery to her daughter Emma L. Barnett, was recorded in March or April, 1927. Between November 10, 1926, and February 10, 1927, in transactions involving three purchasers, Barnett had delivered to Thomas a deed and five contracts signed by Mrs. Barnett as seller and owner, rather than by Mrs Lavery. Thomas accepted said contracts, but requested Barnett to procure a written authorization from Mrs. Lavery for contracts to

be executed by Mrs. Barnett and payments made to her. Barnett gave as an excuse for his failure to procure this statement that Mrs. Lavery was ill and unable to go to an attorney's office to have it prepared. In March, 1927, Mrs. Barnett refused to sign an agency agreement similar in form to the original agreement, except that it contained more specific resale provisions. This is the first indication given Thomas, so far as the record shows, that the Barnetts would not recognize the understanding previously had between Barnett, as agent for Mrs. Lavery, and Thomas that resales should be counted in computing the term of the contract.

On June 17, 1927, in confirmation of previous oral notice, Mrs. Lavery gave Thomas written notice revoking Barnett's authority to represent her. On June 3, 1927, she had filed an action against Mr. and Mrs. Barnett for cancellation of the deed to Mrs. Barnett and for an accounting, alleging that Barnett, her trusted agent, had secured her signature to the deed at the same time she signed a number of other papers by concealing from her that it was a deed. She further alleged that she first learned it was a deed on May 20, 1927; and that her said daughter claimed to be the owner in fee, denied that her mother had any interest in the property, and refused to account for moneys received on contracts.

Between June 11 and August 1, 1927, Thomas procured purchasers for eleven lots, and Mrs. Lavery signed contracts of sale with said purchasers. During this period Thomas called upon the Barnetts, who claimed title and the right to execute contracts to be in Mrs. Barnett, at least twice, in an effort to reach some understanding, but was unsuccessful. Mrs. Lavery's attorney informed him in July, 1927, that the suit between Mrs. Lavery and her daughter was to be dismissed, and that Mrs. Lavery was not to sign any more contracts. On July 27, 1927, Thomas presented contracts for the sale of three lots, accompanied by a check for $75 as a down payment, to the Barnetts, but Mrs. Barnett refused to execute said contracts. On August 6, one Fleming, at the request of Mrs. Barnett, wrote to Thomas as follows: "Mrs. Emma Barnett, of Santa Monica, has directed me to notify you that the sales agreement entered into by and between you and Jessie E. Lavery on November 12, 1925, for the sale by you of the then unsold lots in Tract 8304, City and County of Los Angeles, has expired and terminated by its own limitations, and in so far as said agreement concerns Mrs. Barnett and the present unsold lots in said tract 8304 is null and void and at an end."

The merits of the suit for cancellation between Mrs. Lavery and Mrs. Barnett, which was dismissed before trial in October, 1927, were not developed in the action herein. The evidence shows that the Barnetts consistently maintained that Mrs. Barnett was the owner in fee under the deed of May 26, 1926, and that Mrs. Lavery had no right, title, or interest therein, and they so alleged in their answer filed in the action brought by Mrs. Lavery. Although denying Mrs. Lavery's allegations in her complaint, the Barnetts in their said answer offered no affirmative explanation of the transaction, nor did they allege that any consideration was given for the deed. Furthermore, it would not follow that because Mrs. Lavery intended to transfer title to the property, that she also intended to assign the right to execute contracts and receive payments thereunder. There is absolutely no showing of an assignment of payments due under contracts executed or to be executed, yet subsequent to May 26, 1926, all payments were deposited by Barnett in the joint account of himself and wife.

[4] Whether Mrs. Barnett held the record title lawfully or as the result of fraud practiced by her husband, Thomas could not perfect title in purchasers procured by him without her consent, and she had unequivocally and repeatedly asserted both to Thomas and to her mother's attorney, in the course of correspondence preceding settlement of the cancellation suit, that she would refuse to execute or recognize contracts procured after August 1, 1927. That Mrs. Barnett took with notice of plaintiff's rights there can be not the slightest doubt. Mrs. Lavery's conveyance would not have prevented performance had Mrs. Barnett recognized Thomas' rights. But in the circumstances before us, Mrs. Lavery had disabled herself from transferring title to purchasers and performing her contract with plaintiff when, according to the allegations of her answer herein, she refused to sign any more contracts because of the dispute and litigation as to ownership. A real estate agent in the circumstances shown is absolved from continuing his efforts to sell when ownership is in litigation, and it appears certain that he will not be able to complete title in purchasers secured by him without legal action. See Alderson v. Houston, 154 Cal. 1, 96 P. 884. We do not here find it necessary to pass on the liability of the Barnetts for damages to plaintiff, as no appeal has been taken from the nonsuit in their favor.

[5] The court below awarded plaintiff damages in the sum of $30,856. By reason of the provision that he was entitled to retain as "compensation or commission" all sums for which lots should be sold over and above the prices to Mrs. Lavery as listed in the contract, he contends that his damages are the difference between the list prices of the lots unsold on August 1, 1927, and the market value of said lots. There were nineteen lots upon which there were no contracts outstanding on August 1, 1927. The list of twenty-four lots given by plaintiff erroneously includes four of the lots for which Mrs. Lavery signed contracts, although there is no evidence that

said contracts had been canceled, and also lot 52, which had been deeded to a purchaser. The contracts signed by Mrs. Lavery were not void. Had all of said nineteen lots been sold the seller would have realized but $14,375. By the judgment of the court, plaintiff recovers $30,856, more than twice this amount as commission, an unconscionable sum in the circumstances of the case.

There is absolutely no showing of any great increase in values to account for the great discrepancy between the amount Mrs. Lavery was to receive for lots in the tract, and the values of said lots upon which the testimony of plaintiff and the judgment of the court were based. No claim is made that plaintiff was to render any services except as a real estate broker. The lots had frontages of 25, 40, 45, 50, and 54 feet. Upon an examination of the record, however, it becomes apparent that the testimony given by plaintiff and his witnesses as to the price for which lots could be sold was expressly based upon their value completely improved with facilities for water, gas, lights, and curbs and sidewalks, while the values upon which the contract was based excluded said improvements. It was provided by the contract that Mrs. Lavery should install improvements when $14,000 had been paid to her. This provision is reiterated in a statement addressed to Thomas and signed by Mrs. Lavery and Barnett on March 1, 1926, when Thomas himself purchased two lots. Nevertheless, early in 1926 Thomas stated that purchasers to whom he had sold for building purposes were defaulting because provision was not then being made for an immediate water supply, and that if their contracts were forfeited he intended to hold Mrs. Lavery personally liable for his full commission. The conclusion is inescapable that Thomas had made sales to purchasers without disclosing to them that improvements were not to be made until the owner had realized $14,000 from the tract. The proportion of contracts forfeited for nonpayment was very large. Of the nineteen lots upon which there were no outstanding contracts on August 1, 1927, seven were lots upon which contracts had been forfeited. With a down payment of only $25 and the balance in small monthly installments, Mrs. Lavery would not receive $14,000 for a number of years. There was absolutely no showing that the number who desired to pay immediately for their lots and to build was so large as to assure payment of $14,000 in the near future.

It is true that on November 29, 1926, Barnett, as agent for Mrs. Lavery, agreed that if the purchasers of lots 53 and 22 paid their unpaid balances in full the money would be used for improvements, but the amount thus received would fall far short of the sum required to improve the entire tract. Furthermore, it does not appear that the purchasers of both of said lots paid in full. Plaintiff himself testified that Barnett accepted a deed of trust for the balance due on one of the lots. Plaintiff's testimony as to Barnett's statement that moneys received from purchasers who had bought lots before the plaintiff's contract would be used for improvements, falls far short of establishing an unconditional obligation, contrary to the express terms of the contract, to install improvements throughout the tract immediately.

Plaintiff failed completely to show a reasonable probability that these nineteen lots in an unimproved tract, for which the owner was to receive $14,375, could be sold for prices sufficient to net him the commission of $30,856 allowed by the court. Under the terms of the contract his commissions were payable only from payments made by purchasers. Lind v. Huene, 205 Cal. 569, 271 P. 1087; Dunne v. Colomb, 192 Cal. 740, 221 P. 912; Margolis v. Los Angeles First Nat. Trust & Sav. Bank (Cal. App.) 9 P.(2d) 526. The seller assumed no general liability therefor. The fact that a large number who had purchased at prices fixed by Thomas had defaulted and forfeited their contracts, and that in some cases there had been a default upon resales, demonstrates the utter improbability of plaintiff ever receiving commissions on said nineteen unsold lots in any sum approaching the judgment of the court. See Alderson v. Houston, 154 Cal. 1, 96 P. 884. Plaintiff testified that he had made fifty-six sales, yet on August 1, 1927, there were no outstanding contracts on nineteen of the fifty-seven lots in the tract.

There is a further circumstance we wish to note. In all cases where the details of sales appear, either from copies of deposit receipts and contracts given purchasers or otherwise, the purchasers made down payments of between $50 and $412, yet in no case was the seller allowed more than $25 of the down payment, and in case of resales she received no part of the down payment. Under no fair construction of the contract was plaintiff entitled to the entire amount of the down payment over $25, but he was under obligation to divide it with the seller. The result is that plaintiff has already received in cash sums which in many cases far exceed a reasonable commission on the list price. In cases where resales are involved, it is fairly inferable that plaintiff has collected a cash payment twice. On the resale of lot 26, listed at $885, plaintiff received and retained $412 as a down payment. The contract of resale has been forfeited.

It appears that copies of the deposit receipts were given Mrs. Lavery, from which it appeared that plaintiff was retaining the amount of the down payment over $25, or the entire amount in cases of resale, and there is no evidence that she raised any objection thereto. However, plaintiff was over eighty-five years of age. The contract had been

been negotiated by Barnett, and until the controversy as to ownership he seems to have had entire management without supervision or control from Mrs. Lavery. Although she consulted an attorney, upon the development of said controversy, she nevertheless appears as an aged woman confused and bewildered as to the course she should have pursued. This confusion persisted through the trial of the action herein, and accounts for Mrs. Lavery's failure to put on a defense. Her daughter and son-in-law, who occupied a position adverse to her during at least a portion of the period covered by the transaction, and who by their wrongful refusal to recognize plaintiff's rights have placed her in a position of liability to him, appear to have been exclusively concerned in defeating their own liability, and thus to have left her without the aid and counsel which a woman of advanced years may normally expect from her children. We have given thorough and careful consideration to the record, and are of the view that the case must be reversed on the weakness of plaintiff's showing of damages.

Judgment reversed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem; PRESTON, J.

215 Cal. 639

BLACK et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 13113.

Supreme Court of California.

June 22, 1932.

Rehearing Denied July 22, 1932.

Insurance ⇐665(2).

Evidence, consisting of letters, receipts, and telegrams, established that contractor doing work for mining company was covered by workman's compensation insurance.

In Bank.

Proceeding under the Workmen's Compensation Act by Jimmie Johnston, claimant, against R. S. Black, employer, and Constitution Indemnity Company and others, as alleged insurance carriers. To review an order of the Industrial Accident Commission in favor of claimant, against employer only, and discharging insurance carriers on the ground that employer was not insured, employer and claimant bring certiorari.

Order dismissing named insurance company from proceeding and discharging and releasing it from liability annulled and vacated, and award, as to amount, affirmed.

Lemuel P. Mathews, of Phœnix, Ariz., and F. Britton McConnell, of Los Angeles, for petitioners.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

George H. Moore and Hubert Starr, both of Los Angeles, for respondent Constitution Indemnity Co.

Claude F. Weingand and Reginald I. Bauder, both of Los Angeles, for respondents Pacific Indemnity Co. and American Mine Owners' Casualty Corporation.

SEAWELL, J.

Petitioner R. S. Black prays for an order annulling certain awards made against him by the Industrial Accident Commission in favor of Jimmie Johnston, copetitioner herein, and also in favor of the dependents of Douglas Holpa and Frank Smith. Johnston was badly injured and Holpa and Smith were killed by a powder explosion which occurred at a mine about which they were working as employees of Black. The dependents of Holpa and Smith appear by separate petitions (Cal. Sup.) 12 P.(2d) 645, but, as the complaints of all the parties arise out of the same industrial casualty, they will be considered together. R. S. Black, the employer, prays for an annulment of all of said awards on the ground that the commission erroneously adjudged that he was not insured, and therefore his liability to each employee was a personal liability. This issue will be considered latterly. Neither Jimmie Johnston nor the dependents of Holpa and Smith make complaint as to the amount of the respective awards, but each does attack that part of the respective findings and orders which find that none of the respondent insurance companies was the insurance carrier of the employer Black, and therefore directs that said respondents be discharged from liability.

The background and history of the casualties are briefly told. The Ballarat mine is located some ninety miles from Barstow, in a mining district, and twenty-five miles distant from Trona, the nearest hamlet. It is owner by the Ballarat Mining Corporation. Three ladies, Mrs. Hart, Mrs. Thompson, and Miss Thompson, appear to have been the owners of the majority, if not all of the stock of the corporation. Mr. Black was a contractor engaged in doing road and mining assessment work, and resided at Clifton, Ariz. He contracted with said ladies to do assessment and road work at the mine. He brought with him from Arizona, Jimmie Johnston, Douglas Holpa, and Frank Smith. The last-named two were Apache Indians who were wards of the government, living at the San Carlos Indian Reservation. They had worked for him before in Arizona. J. B. Kitch, superintendent of the San Carlos Indian

Reservation, was present at the hearing representing the interests of the dependents of said wards. The crew of men Black was to assemble to do the work numbered about thirty, and the job was estimated to require approximately thirty days to complete it.

Respondents Constitution Indemnity Company of Philadelphia, Pacific Indemnity Company, and American Mine Owners' Casualty Corporation are all corporations engaged in writing contracts insuring against liability for compensation, as provided by the Workmen's Compensation, Insurance and Safety Act of this state (St. 1913, p. 279, as amended), with offices in the city of Los Angeles. The Barstow Finance & Investment Corporation, doing business at Barstow, is the accredited agent of said Constitution Indemnity Company. Michael J. Ochoa is the manager of said Barstow Finance & Investment Corporation.

Swett and Crawford are the general agents of the Pacific Indemnity Company. Both occupy offices at 621 South Hope street, city of Los Angeles, and are on the same telephone exchange. The Pacific Indemnity Company pays the office rent of Swett & Crawford. M. J. Johnson, vice president of the Pacific Indemnity Company, was in charge of its offices. William F. Gaynor was manager, and L. Clyde Paine was in charge of the casualty underwriting department of Swett & Crawford, a subsidiary of the Pacific Indemnity Company. Compton Johnson was an underwriter in the employ of Swett & Crawford. What connection or working agreement the American Mine Owners' Casualty Corporation had with the other allied insurance companies cannot be satisfactorily determined from the record. It is left in a vague and uncertain state. Each insurance company and party in interest was represented at the hearing by at least one attorney, while Black, who appeared to have no knowledge as to the law or procedure, and who was most in need of an attorney to protect rights involved in a technical branch of the law, was without the aid of counsel. It is very apparent from an inspection of the record that he suffered from the want of advice and assistance of counsel, both in the preparation and presentation of his case. He sat mute during the proceeding, except when called as a witness by his adversaries.

It would seem that Swett & Crawford, who were connected with, if not subsidiary to the Pacific Indemnity Company, represented the American Mine Owners' Casualty Corporation in placing insurance. The interrelation of the Pacific Indemnity Company, the American Mine Owners' Corporation, Swett & Crawford, and Paine and Compton, underwriters, all of whom practically officed together, are so entwined and confused that it is practically impossible to separate their business participation in the transaction. The Constitution Indemnity Company stands out in the proceeding as a definite entity. We are only interested in this proceeding as to whether any one of said companies was Black's insurance carrier, and not with any cross-demands that might exist between said companies growing out of agreements between themselves which could affect the right of one to recoup from the others.

Black, the employer, and Johnston, the injured employee, and the dependents of the deceased employees based their claim for a reversal on the erroneous finding that Black did not carry compensation insurance at the time the explosion occurred.

On June 26, 1930, Ochoa, the manager of the Barstow Finance & Investment Corporation, met Black in Barstow. Black had gone to Barstow upon the business of obtaining compensation insurance, as the owners of the mine required that he obtain coverage. He had considered going into Los Angeles, but Ochoa told him that it was unnecessary; that he could get the insurance from his company and save him the trip to Los Angeles. There are some divergences as to the conversations which occurred between Ochoa and Black, which ended with Black procuring a certified or cashier's check in the sum of $360 with the assistance of Mrs. Thompson and her daughter, owners of the mine, and delivering it to Ochoa in payment of the premium. These divergences are unimportant and do not raise any doubt as to the purposes and object of the Ochoa negotiations. Black tells a very natural story as to his negotiations with Ochoa. It was distinctly understood by Ochoa that Black and the mine owners who accompanied him to Barstow required immediate coverage. Work was to begin at the mine at once. Black testified that Ochoa made a memorandum of the kind of work that Black had contracted to perform. Ochoa took up the matter in accordance with his business custody, by phone, with the Los Angeles office. Mrs. Emily Dyer, an experienced employee in compensation insurance business, was in charge of the telephone information department for the Constitution Indemnity Company. Inasmuch as industrial accident insurance from its nature requires quick action, much of the business is transacted by the use of the telephone. She was invested with responsible duties.

That Mrs. Dyer was in a position of business authority cannot be questioned. Ochoa, in the presence of Black and Mrs. Thompson and her daughter, called up the Constitution Indemnity Company on the afternoon of June 26, 1930, and Mrs. Dyer responded for her company. Mr. Black heard Ochoa say to Mrs. Dyer that Black was to be covered at once; that it was a "rush job." At the conclusion of the conversation he told Black that the insurance would be granted provided

ne put up the amount of the premium, which was $350, evidenced by a certified check. The business was not finally concluded on Friday the 26th, and Black remained in Barstow until the afternoon of the following day. Black and Mrs. Thompson and daughter were present when Ochoa talked with Mrs. Dyer on both occasions, but did not hear what she said. The postponement of negotiations with the Los Angeles office to the next day was made to give Mrs. Dyer time to give a final decision as to whether Mr. Black would be granted coverage. On the following day, June 27th, she called up Ochoa, and at the conclusion of the conversation Ochoa said to Black that insurance would be procured provided he put up a certified check for $350. This he had prepared to do on the strength of what Ochoa had said on the day before. Mr. Ochoa's version of the transaction was that he met Mr. Black at about 3 o'clock on the afternoon of June 26th; that Ochoa told him that he had no application blanks and that he was not experienced in mining insurance, but that he would get in touch with his company and see what he could do. Mr. Black was accompanied by Mrs. Thompson and her daughter. Ochoa said that he had talked with Mrs. Dyer and she told him that the Constitution Indemnity Company was not handling mining insurance, which, to use his words, "I emphatically impressed upon Mr. Black and the ladies." (Mr. Black denies that Ochoa explained to him or mentioned to him anything about the Constitution Indemnity Company not handling mining insurance.) He said that while he was holding the line Mrs. Thompson said, "Well, I wonder if they can't place it for us somewhere else." Ochoa, continuing, said: "They seemed to be in a hurry and anxious to get the insurance as quickly as possible; as a matter of accommodation and in order to probably get some profit for the company, I asked Mrs. Dyer if she could possibly place the insurance with someone else. She told me she did not know, but she would find out, and let me know later on; so I just hung up the phone * * * and in about thirty minutes Mrs. Dyer telephoned again; Mrs. Dyer says, 'I can place the insurance for him.' I said, 'All right, how much is the premium,' and I asked details of it and she told me what amount. I told Mr. Black and the ladies. I do remember one thing and that is Mr. Black was very anxious to know whether the insurance would take effect upon the delivery of the money, and Mrs. Dyer had explained there had to be a certified check for the amount, which was $350. I asked Mrs. Dyer if the insurance would take effect; she said, 'Yes.' So I so explained to Mr. Black and the thing was finished right there."

Ochoa further testified that he did not recollect whether Mrs. Dyer told him the name of the company which was to write the insurance, but he said he was sure that she made the statement that the Constitution Indemnity Company could not take the insurance because they did not take mining insurance. It appears that that company did formerly accept mining insurance, but the claim was made by its officers that that line of insurance had latterly been discontinued. It is not claimed that the public had any knowledge on the subject. Asked as to what Mrs. Dyer said as to the time the insurance would become effective, his reply was, when the money was paid to him (Ochoa) in Barstow. On the afternoon of June 26th, the witness, having heard from Mrs. Dyer, told Black that the Constitution Indemnity Company had been able to obtain the insurance somewhere, and Black replied that he would give him the money. On the following day, Saturday, June 27th, Black, Ochoa, Mrs. Thompson, and daughter went to the bank. Mr. Black wanted to make the check payable to Ochoa, but Ochoa said he did not wish him to do so, and suggested that he make it payable to the Constitution Indemnity Company, and it could indorse it and give it to the proper party, whoever issued the policy. Black, by mistake in procuring the check, had it made for $360 instead of $350. When Ochoa made remittance of the check to the Constitution Indemnity Company, he requested that it remit the $10 excess to Mr. Black at Trona.

Mrs. Emily Dyer testified that she was a clerk in the office of the Constitution Indemnity Company during June of 1930, and her special duties were taking orders by means of the telephone in the underwriting department. She had been engaged in the insurance brokerage business for several years. Her employment with the Constitution Indemnity Company ceased August 1, 1930. She testified that Ochoa called her by phone on the 26th of June, and asked her if the company wrote mining insurance, and she replied that it did not take mines; mines were on the prohibited list. Ochoa asked her if she could place it, as he had a man who was going to work on a mine and he wanted coverage. She told him she did not know, as it was a very hard risk to place, and she would see what she could do. Ochoa told her that the insurance should cover thirty men for thirty days—fifteen of the men were to work on the mine. She called him back later, and said she had called up a number of companies which declined to accept mining risks, but lastly she called up the Pacific Indemnity Company, and Mr. Johnson, the vice president, said his company did not accept mines, but "we have a company in our office, the American Mine Owners' Casualty Corporation, which does." She said to him, "Well, I have a risk for you." He replied, "We can't take it unless we have a certified check in our

office for $350." He stipulated that a check for $350 certified must be in their office before coverage could take effect. She then called Mr. Ochoa and told him she had found a company that said it would take the risk, but a certified check in the sum of $350 must be in the office of the Pacific Indemnity Company (Mr. Johnson's company) before coverage would be effective. Ochoa, mindful of the urgency of action, inquired of Mrs. Dyer if the coverage would be effective upon the receipt of the check at the Barstow office of the Constitution Indemnity Company or at its Los Angeles office. Mrs. Dyer's best recollection was that she replied, "Well, Mr. Ochoa, all I can say is, they said they would take it."

Black delivered his certified check to Ochoa, payable to the Constitution Indemnity Company, and was given a receipt unambiguous and absolute in form into which was written, at the special instance of Mrs. Thompson, the precise hour the check was delivered. It reads as follows, omitting the caption:

"Barstow, Calif. June 27, 1930

"Received of Mr. R. S. Black Three Hundred Sixty Dollars no/100 ($360.00) for workmen's compensation for 30 men at Ballarat, California. This amount is minimum deposit on policy to be delivered to Mr. R. S. Black upon its issuance at Los Angeles. It is understood that this workmen's compensation insurance for protection of the 30 men doing contract work for said Ballarat Mining Corporation takes effect upon delivery of certified or cashier's check hereby acknowledged.

"Dated at Barstow, Calif. June 27, 1930, 12:45 p. m.

"Barstow Finance and Investment Corp., Barstow, Calif.

"M. V. Ochoa, Manager."

(Underscoring of "12:45" is ours.)

On the same day, two hours later, Ochoa sent the following telegram to the Constitution Indemnity Company at Los Angeles:

"Have certified check from R. S. Black Three Hundred Sixty Dollars deposit workmen compensation mailing tonight.

"Barstow Finance and Investment Corporation."

Again on the same day he wrote and mailed the following letter:

"Barstow, California, June 27, 1930.

"Constitution Indemnity Co. of Philadelphia, Los Angeles, Calif.

"Gentlemen: According to our telephonic conversation and my telegram of even date, I am enclosing certified check No. 1 from Mr. R. S. Black, amounting to $360 (Three Hundred Sixty and no/100) to cover minimum premium on workmen's compensation insurance which you advised you were able to place for Mr. Black, as per date I gave you over the telephone. I am enclosing *copy of the reccipt* given by us to Mr. Black. Due to an error, Mr. Black made the check for $360.00, instead of $350.00, and we will appreciate if you will kindly return the $10.00 to Mr. Black direct to Trona, Calif. Also please mail *us check for our commission on this deal*, obliging,

"Yours truly,

"Barstow Finance and Investment Corporation

"Per: M. V. Ochoa."

(Italics supplied.)

It will be noticed that the ample receipt, which contained the elements of a contract within itself, also contained many of the details furnished by Black to Ochoa as to the kind of and place of employment, number of men to be covered, amount of premium, and the exact time of payment. This receipt was brought to the *direct* attention of the Los Angeles and San Francisco offices. The $360 check was cashed by the Constitution Indemnity main office, and the proceeds were disposed of pursuant to its own plan.

With the foregoing assurance that he had received coverage, Mr. Black returned to the mine, and his employees were set to work. Three days thereafter, to wit, June 30th, the explosion occurred, with the result already described. On the following day, July 1st, Black telegraphed from Trona to Barstow Finance & Investment Corporation, as follows:

"Have accident to report wire name of company that carries my compensation give to me by you June twenty-seventh.

"R. S. Black."

On July 2d Barstow Finance & Investment Corporation sent the following wire to the Constitution Indemnity Company:

"Have telegram from R. S. Black. Reads: 'Have accident to report. Wire name company carrying my compensation arranged June twenty-seventh.' Wire information desired to Black, Trona, Calif."

In reply to Black's first inquiry, the Barstow Finance & Investment Corporation sent to him the following telegram:

"Have wired Los Angeles requesting give you information desired. Address further inquiries or reports E. Dyer Constitution Indemnity Company of Philadelphia, 314 West Ninth Street, Los Angeles."

On the same day Black sent another telegram to the Barstow office as follows:

"Wire immediately collect name of company carrying my workmen's compensation insurance," to which the Barstow agency replied:

"Don't know name of company. Have asked Los Angeles to wire you name."

Black, in compliance with the Barstow agent's instructions to consult the Los Angeles

office, immediately sent to Mrs. E. Dyer the following telegram:

"Wire me name of company carrying my workmen's compensation insurance. Also state what disposition was made of my policy."

He received from said office the following telegram of inquiry:

"If accident serious telephone report Vandyke seven eight nine two. Constitution Indemnity."

When Black went to the bank to procure his certified check, he made inquiry at the bank concerning the Constitution Indemnity Company.

If the foregoing facts, which rest almost entirely upon written documents consisting of letters, receipts, and telegrams, do not constitute a contract of insurance between the Constitution Indemnity Company and Black, as a matter of law, it would be difficult to explain the meaning of the long list of cases which hold that a contract may be proved by this method. The liability of the Constitution Indemnity Company is shown independent of the parol testimony. As a matter of fact the portions of the parol testimony which comport with reasonable probability as to what the conduct of the parties engaged in such a transaction would have been, tend strongly to corroborate the written evidence.

Whether the Constitution Indemnity Company intended to place the insurance with some other company is of no consequence in the light of the fact that it took the matter of indemnity insurance into its own hands, and accepted the premium, and assured Black that he was covered. Neither does it matter that it had as a part of its business policy decided not to take mining risks. No such prohibition was contained in its written contract with its Barstow agent. It had the authority to write such insurance, and it could have done so if it desired. It was engaged in general compensation insurance, and if it had elected not to further include this class of insurance in its risks it should have refused to entertain the proposition ab initio. Instead, said company undertook to furnish the coverage sought. It fixed the premium at $350 for coverage of thirty men for thirty days, only fifteen of whom were to engage in mining work. This sum amounted to $11.66 for each man employed on the job, or $11 per day for the entire crew. Not only did the Constitution Indemnity Company accept Black's money and carry him along until it was too late for him to protect himself against the hazard, as provided by the Industrial Accident Act, but it caused him and the owners of the mine to believe that he was protected by insurance. The transaction so strongly bore the aspect of business regularity that the Barstow Finance & Investment Corporation asked its principal for its share of the commissions arising out of the insurance transaction. See Ochoa letter, dated June 27, 1930, to Constitution Indemnity Company.

The written evidence, which is sufficient to establish the contract, is not shaken by the oral testimony as to the conduct of the officers and employees of the three insurance companies in their efforts to avoid liability after it had become known that the accident had occurred. Aside from the inherent improbabilities of much of the parol evidence offered to rebut the plain import of written documents, the testimony given by Black finds corroboration in certain material portions of the testimony of his adversaries, and it is corroborated by incontrovertible proven facts. There is nothing startlingly strange, in the circumstances which counsel stress, that Black, who was a stranger in California, and who seemed not to be a man of wide business experience or information, should have been unable to recall, in the stress of his sudden misfortune, the name of the company that had guaranteed him against loss occasioned by industrial hazards. These incontrovertible facts cannot be laid out of the case: First, that Black would have had the check made in favor of Ochoa, but that Ochoa himself, as he testified, instructed him to make it payable to the order of the Constitution Indemnity Company; secondly, Ochoa accepted it as thus made out, and so did his principal. Neither would it have defeated Black's claim, in the light of subsequent facts developed by the evidence, if the check had been signed in blank and Black had not known at the moment who the insurer was to be. Black wanted coverage. He had no interest in insurance companies except as to the extent of financial responsibility. The entire matter was handled by the Constitution Indemnity Company through its authorized officers, and they led him and the mine owners to believe, as they were told, that when Black drew his check in favor of the Constitution Indemnity Company they were protected. Any other reasonably prudent person would have been similarly deceived.

On July 3d, three days after the accident and two days after it had been reported to the Constitution Indemnity Company, Mrs. Dyer, in charge, who had been negotiating with both Pacific Indemnity Company and with the American Mine Owners' Casualty Corporation, both of which, according to Mrs. Dyer, had agreed to issue a policy of coverage, sent the following wire to Black: "Swett and Crawford will not accept compensation coverage. However, they are making an inspection Monday. Suggest you report accident to them immediately, Pacific Finance Building, Los Angeles so as to have claim on record." To this telegram Black answered that he had

had no dealings with Swett & Crawford. He also stated that he had ordered his men to stop work, and asked if the company had canceled his policy. If so, he demanded a return of his money. Beyond a reasonable doubt, both the Pacific Indemnity Company and the American Mine Owners' Casualty Corporation, through Swett & Crawford, as well as L. C. Paine and C. Johnson, underwriters, had knowledge of the explosion before the above telegram was sent. Mrs. Dyer admittedly had received such knowledge at least two days prior thereto. That the others had such knowledge is shown by their refusing to complete their negotiations with the Constitution Indemnity Company to take the matter over after they had gone as far as to accept from the Constitution Indemnity Company the amount of the Black check. The sudden change of attitude and the preparation made to escape liability on the part of the Pacific Indemnity Company and the American Mine Owners' Casualty Corporation, can be explained on no other rational theory than that they had received knowledge of the occurrence of a casualty which threatened to involve them in an indemnity loss.

We will not pursue further the open question existing between the Constitution Indemnity Company on the one side and the Pacific Indemnity Company and the American Mine Owners' Casualty Corporation on the other, as to whether or not the first-named company may maintain an action against both of the latter companies or against either of them for damages arising out of their participation in the transaction, as that controversy may properly be determined in a suitable forum. That substantial grounds exist in favor of the Constitution Indemnity Company cannot be doubted, but it is sufficient for this proceeding to determine the question as to who was the primary insurer of petitioner Black. The letter and the receipt for the paid premium sent by Ochoa to the Constitution Indemnity Company on June 27, and heretofore set out, are sufficient without resorting to much other convincing evidence to establish a contract of insurance. Said letter and receipt without question received the sanction and indorsement of the company. Either was sufficient in form and substance to constitute a cover note, the office of which is correctly stated in 14 California Jurisprudence, page 430, as follows: "It is not uncommon for an insurer to issue a cover note, binding slip, certificate or memorandum of insurance which may answer the purpose of a more formal policy or operate as a temporary expedient until the policy itself can be issued. Such an instrument does not constitute a policy of insurance as that term is generally understood, but usually presupposes the issuance of a policy and puts the insured upon inquiry to ascertain the terms of the policy in order to determine his rights thereunder. It has long been established that a cover note is a present contract of insurance" —citing many authorities. See, also, 32 Cor. Jur. p. 1099.

That portion of the Industrial Accident Commission's order dismissing the Constitution Indemnity Company from the proceedings and discharging and releasing it from liability is annulled and vacated. As to the amounts of the awards and the persons in whose favor they were respectively made, no serious contention is made, and said awards as to amounts and persons will therefore remain undisturbed. That portion of the findings and order which exempts said Constitution Indemnity Company from liability is by this order annulled. It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.; SHENK, J.

215 Cal. 774

Amy ANDREWS, Clinton Smith and Ernest Smith, Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION of the State of California, R. S. Black, Constitution Indemnity Company (a Corporation), Pacific Indemnity Company (a Corporation), and American Mine Owners' Casualty Corporation, Defendants.

Calvin HOLPA, Petitioner, v. R. S. BLACK, Constitution Indemnity Company (a Corporation), Pacific Indemnity Company (a Corporation), and American Mine Owners' Casualty Corporation, Defendants.

L. A. 13112.

Supreme Court of California.

June 22, 1932.

Rehearing Denied July 22, 1932.

Application for certiorari to annul an order of the Industrial Accident Commission awarding compensation for injuries and death. Affirmed and annulled.

Ignatius F. Parker and Lewis M. Andrews, both of Los Angeles, Lemuel P. Mathews, of Phoenix, Ariz., and F. Britton McConnell, of Los Angeles, for petitioners.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

George H. Moore and Hubert Starr, both of Los Angeles, for respondent Constitution Indemnity Co.

Claude F. Weingand and Reginald I. Bauder, both of Los Angeles, for respondents Pacific Indemnity Co. and American Mine Owners' Casualty Corporation.

PER CURIAM.

The above-entitled proceedings were consolidated under one number, L. A. 13112, but separate and appropriate orders were entered in each proceeding. Inasmuch as said proceedings and the proceeding entitled R. S. Black and Jimmie Johnston v. Industrial Accident Commission et al., L. A. 13113 (Cal. Sup.) 12 P.(2d) 640, arose out of the same casualty, the Industrial Accident Commission, by its order, joined them and applied the evidence and proceedings given and taken in each case, so far as they were pertinent and material, to each of said other cases. Case L. A. 13113 contains the evidence upon which the awards were made in each case.

Upon the authority and the grounds stated in said case, L. A. 13113, those portions of the orders and awards made in each of the above-entitled causes, which discharged the Constitution Indemnity Company from liability on the theory that it was not the insurer of employer, R. S. Black, are annulled and vacated.

An order of annulment of said orders and awards is hereby ordered entered in each of said proceedings contained in record L. A. 13112.

124 Cal.App. 444

JONES v. PIER et al.

Civ. 4563.

District Court of Appeal, Third District, California.

June 22, 1932.

Rehearing Denied July 22, 1932. Hearing Denied by Supreme Court Aug. 19, 1932.

1. Judgment ⇐679.

Decree in suit by two of four landowners canceling oil lease *held* void as to other owners and their successor in interest (Civ. Code §§ 1431, 1442).

Decree in such suit did not bind either the owners who were not parties thereto or their successor in interest, in view of provision in lease whereby right to terminate lease for breach of covenants was specifically conferred on lessors jointly and not severally.

2. Mines and minerals ⇐74.

Agreement between landowners ostensibly canceling oil lease jointly executed by them *held* ineffectual to impair validity of two landowners' assignment of share in oil.

The two landowners in question could not, by agreement with other owners, terminate vested interest of their assignee without his knowledge or consent.

3. Mines and minerals ⇐77.

Oil lease remained effective notwithstanding breach of covenants; termination being optional with lessors.

4. Mines and minerals ⇐73.

Oil and gas lease created vested right in "property" although unaccompanied by physical possession of subterranean deposit.

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

5. Mines and minerals ⇐74.

Any oil leases on land involved subsequent to lessors' assignment of part of their share under original lease *held* subject to assignment.

6. Mines and minerals ⇐74.

Under oil assignment obligating assignee to pay percentage of tax increase resulting from discovery of oil, assignee *held* not obligated for taxes; there being no production, and no evidence of tax increase.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Suit by C. A. Jones against W. F. Pier and others. Judgment for defendants, and plaintiff appeals.

Reversed.

L. F. Coburn, of Orange, and Clayton L. Howland, of Los Angeles, for appellant.

Harry L. Cohn, of Long Beach, Merriam, Rinehart & Merriam, of Pasadena, Rohe & Freston, Rohe, Dottenheim & Weikert, C. LaV. Larzelere, and Gordon G. MacDonald, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff brought this suit to quiet title to 1 per cent. of the oil produced from lots 63 to 72, inclusive, and lots 87 to 96, inclusive, of North Long Beach tract in Los Angeles county. From a judgment which was rendered in favor of the defendants, this appeal was perfected.

As a foundation for his title to an undivided 1 per cent. of the oil produced from said tracts of land, an oil lease was offered and received in evidence. This lease was executed October 10, 1922, for the term of twenty years, to Cal-Mex Oil & Refining Company. The consideration therefor was the agreement to deliver to the lessors one-fourth of all oil, gas, and other hydrocarbon substances which were produced. The lease recited that W. F. and Ellen I. Garrison, then husband and wife, owned lots 87 to 96, inclusive, and that W. F. and Agnes Pier, husband and wife, owned lots 63 to 72, inclusive. The lease was executed jointly by the four

owners. It require the lessee to sink several wells within a specified time, at designated points on both tracts of land, and detailed the manner of the performance of the work. It was finally provided that if the lessee, after ten days' notice of default, failed to perform any of the covenants of the lease, that the lessors, at their option, might terminate the instrument.

The plaintiff then offered in evidence the written assignment upon which he relies for his claim of title to 1 per cent. of the oil produced from said tracts of land. The consideration for this assignment was the payment of $6,000. This instrument was executed April 3, 1923, and reads in part: "We, W. F. Pier and Agnes Pier, his wife, owners by virtue of a community lease dated October 10, 1922, of * * * 12½% of the total production of oil, gas and other hydrocarbon substances extracted * * * (from the lots above mentioned) do hereby sell, assign, transfer and set over unto C. A. Jones, of Long Beach, California, one per cent. (1%) of said total production; this assignment to remain effective so long as the assignee or his successors in interest, contributes one per cent. (1%) of the increase of taxes upon said land resulting from the discovery of oil or gas thereon."

Without further evidence, the plaintiff rested his case.

[1] The defendants offered in evidence the judgment roll in a suit prosecuted in 1924 by W. F. and Ellen I. Garrison, the owners of lots 87 to 96, inclusive, against the Cal-Mex Oil & Refining Company. The court found, in that case, that the defendant was guilty of breach of the covenants of his oil lease of October 10, 1922, and thereupon decreed that, "The same is hereby canceled * * * so far as the same may in any way cover or pertain to Lots 91, 92, 93, 94, 95 and 96. * * *" This decree was rendered and entered December 12, 1924. No appeal was taken from this judgment, and it became final. Neither this plaintiff, C. A. Jones, nor the other joint lessors, W. F. and Agnes Pier, were parties to that suit.

The decree in that suit did not terminate the lease. Neither W. F. and Agnes Pier, nor their successor in interest, is bound by the judgment, for the reason that both original lessors did not join in the action. The lease created a common interest in the lessors to the undivided one-fourth of all oil and gas produced from the land therein described. The interests of the lessors are not separate and distinct. The right to terminate the lease for breach of covenants therein contained is specifically conferred upon the lessors jointly and not severally. The language of the lease in that regard is that, "If the lessee shall fail for a period of ten (10) days after written notice given to it, * * * by the lessors to comply with provisions of this lease, the lessors may at their option terminate this lease." This precise question was determined by the Supreme Court in Jameson v. Chanslor-Canfield Midway Oil Company, 176 Cal. 1, 167 P. 369, 370. In that case, except for the fact that the lessors were joint owners of undivided interests in the tract of land which was involved, it is exactly like the case at bar. That was a suit to quiet title. The three owners joined in executing a thirty-year oil lease of the premises in consideration of an undivided interest in the oil which should be produced therefrom. The lease contained a clause authorizing the termination thereof for breach of covenants, in almost the exact language of the present lease. It provided: "It is especially agreed by said parties of the second part that failure upon their part to perform any of the conditions embodied herein for a period of thirty days after notification by the parties of the first part to perform such conditions shall render this agreement null and void if said first parties shall so elect." The court held that: "A right given to several lessors, by a contract of lease, to declare a forfeiture for breaches of the character here involved must be exercised by all and cannot be exercised by less than all."

In that case a suit to terminate the lease was maintained by two of the three owners. The third owner did not participate in that suit. The decree quieted title in the two plaintiffs to their undivided three-fourths of the land. That decree was reversed. The reasons for this reversal are assigned by the court. The court said that, by the very terms of the lease, the right to terminate the instrument for breach of covenants therein contained was specifically conferred upon the lessors jointly; that by the terms of section 1431 of the Civil Code: "An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several."

And that section 1442 of the same Code provides that: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."

The court concludes that this right to terminate the lease amounts to a forfeiture which is specifically created by the terms of the lease, and that it did not exist except for the presence of that clause in the contract, and that the lease could therefore be terminated "only by the joint action of all of the lessors." Upon the authority of that case, the decree which purports to terminate the lease in the present action as to lots 91 to 96, inclusive, upon the suit of but one of the joint lessors is ineffectual. That decree is therefore void so far as W. F. and Agnes Pier and their successor in interest is concerned.

There is nothing in the case of Black v.

Solano Co., 114 Cal. App. 170, 299 P. 843, relied upon by the respondents, which is in conflict with the foregoing decision. All that the Black Case determines relative to that question is that the royalties derived from an undivided interest in the production of oil under the terms of a lease constitutes potential personal property which is subject to sale.

The case of Merrill v. California Petroleum Corporation, 105 Cal. App. 737, 743, 288 P. 721, upon which the respondent also relies, is readily distinguishable from the Jameson Case, supra. The Merrill Case did not involve the termination of a lease for breach of the covenants thereof. The forfeiture of a contract was not involved in that suit. It was an action to recover the purchase price of oil. It is therefore not in conflict with the Jameson decision.

[2] Over the objection of the plaintiff, a subsequent written agreement between W. F. and Agnes Pier and W. F. and Ellen I. Garrison, dated January 19, 1925, was received in evidence. It provided that: "The parties of the first part and the parties of the second part mutually agree with each other that said community oil and gas lease may be cancelled, annulled and rescinded so far as the same relates to said lots 91 to 96 inclusive." No suit to cancel the lease was thereafter instituted pursuant to this agreement. Mr. and Mrs. Pier could not thus terminate the vested interest of the plaintiff which they conveyed to him for the consideration of $6,000, without his knowledge or consent. That agreement was ineffectual and void. It did not impair the validity of their former conveyance to the plaintiff.

[3, 4] The Cal-Mex Oil & Refining Company lease of October 10, 1922, remains in full force and validity, in spite of the admitted breach of covenants thereof. It is immaterial that oil was not actually produced on the property. This suit was commenced in May, 1928. The lease does not expire until October 10, 1942. The right to terminate the lease for breach of covenants is optional on the part of the lessors. They have seen fit to waive the breach thereof, except for the ineffectual effort on the part of one of the lessors with relation to lots 91 to 96, inclusive. By the terms of his assignment of April 3, 1923, the plaintiff acquired an undivided 1 per cent. interest in common with the lessors in all oil, gas, or other hydrocarbon substances produced from the land therein described, for the term of twenty years from the date of the original lease regardless of who produced the same. The lease created a vested right in property even though it was not accompanied by actual physical possession of the subterranean deposit of gas or oil. In the case of Merrill v. California Petroleum Corporation, 105 Cal. App. 737, 288 P. 721, 723, it is said: "It appears that the deposit of oil involved was a part of the land in which it was found; that Lake's right to extract the oil was 'private property,' a 'claim to land, although not accompanied by actual physical possession of the subterranean deposit'; that such claim was 'founded on a right' vested in him by the terms of the lease, a right 'coupled with an interest.' While the oil in its natural deposit was a part of the land, it was in actual existence as part of the land, and was potentially personal property under the terms of the lease, and actually became personal property to the extent of the amount thereof involved in this action when the lessee exercised his right to extract it."

The plaintiff is therefore entitled to have quieted in him his undivided 1 per cent. of all oil, gas, and other hydrocarbon substances which may be developed or produced from the property during the term prescribed in the original lease or until that instrument is lawfully terminated.

[5] Any oil leases with relation to the land described in the Cal-Mex Oil & Refining Company lease of October 10, 1922, which may have been subsequently executed by the lessors, are subject to the plaintiff's prior vested right which was acquired by means of his assignment of interest as above related.

[6] The respondent claims that the plaintiff is not entitled to quiet his title to his undivided interest in the oil, for the reason that he failed to prove that he had paid certain taxes for which he became liable under the provisions of his assignment. That instrument contained the following clause: "This assignment to remain effective so long as the assignee, or his successors in interest, contributes one per cent (1%) of the increase of taxes upon said land resulting from the discovery of oil or gas thereon." The record contains no evidence that there was an increase of taxes on account of the production of oil or gas, or otherwise. In fact, the defendants admitted, "there was never any production (of oil or gas) under the Cal-Mex lease." It thus appears no obligation to pay taxes was imposed on the plaintiff.

The judgment is reversed.

We concur: PLUMMER, Acting P. J.; PARKER, Justice pro tem.

124 Cal.App. 303

PACIFIC GAS & ELECTRIC CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8466.

District Court of Appeal, First District, Division 2, California.

June 15, 1932.

Rehearing Denied July 15, 1932.

1. Statutes ⇐217, 225.

In case of ambiguity in statute, intention may be ascertained by comparing language thereof with other laws on same subject, by looking, if necessary, to public history of time and other legitimate aids.

2. Statutes ⇐231.

Slight changes in verbiage effected by revising statute does not indicate material modification (Pol. Code, § 325).

3. Statutes ⇐231.

In ascertaining intention of language used in statute revision, reference may be had to prior statute (Pol. Code, § 325).

4. Statutes ⇐231.

Upon revision of statutes, different interpretation is not to be given them without substantial change of phraseology (Pol. Code, § 325).

5. Master and servant ⇐386(5).

Industrial Commission *held* authorized to apportion death benefits to provide for partially dependent mother of deceased employee, notwithstanding employee left surviving him wholly dependent minor child (St. 1917, p. 844, § 14(d, e), as amended by St. 1919, p. 917, § 5).

Such apportionment was authorized as against contention Industrial Accident Commission's authority to "apportion" death benefits had been destroyed by St. 1919, p. 917, § 5, amending St. 1917, p. 844, § 14(e), substituting the words "set apart or reassign" in place of "apportion" with reference to apportionment of death benefits, since such change in wording did not manifest an intention to take away the power of apportionment and other changes manifesting legislative intention to vest in discretion of Industrial Commission the power to apportion the benefit when making its award and thereafter to reassign such award as stated in section 14(e).

Proceeding under the Workmen's Compensation Act by James Franklin Fugitt, a minor, by his guardian ad litem, Amanda C. Fugitt, and another, for the death of James L. Fugitt, claimants, opposed by the Pacific Gas & Electric Company, employer. To review an order of the Industrial Accident Commission awarding compensation, employer applies for certiorari.

Award affirmed.

T. J. Straub and John J. Briare, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, J.

This is an application for a writ of review. The petitioner seeks to have an award amended as to form, but does not challenge the amount of the award. The facts may be briefly stated. On September 15, 1931, James L. Fugitt was killed while performing his duties as an employee of the petitioner. At the time of his death he was divorced from his wife. He left him surviving a minor son, James F. Fugitt, and aged mother, Amanda C. Fugitt. After proceedings duly had the commission made an award as follows:

"1. James L. Fugitt, deceased, while employed as a wireman on September 15, 1931, at Oakland, California, by Pacific Gas and Electric Company, sustained injury occurring in the course of and arising out of his employment, proximately causing his death on September 16, 1931. At said time said employer was a self-insurer, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917.

"2. Said employee left surviving him, wholly dependent, his minor child James Franklin Fugitt.

"3. Said employee left surviving him Amanda C. Fugitt who was partially dependent upon him for support. The annual amount devoted for the support of said Amanda C. Fugitt was $240.00, entitling the said Amanda C. Fugitt to a death benefit of $720.00.

"4. The death benefit in this case amounts to $5,000.00, and the total dependent James Franklin Fugitt is entitled to the sum of $4,280.00, plus an award for the sum of $150.00 for burial expenses, payable direct to Amanda C. Fugitt as guardian ad litem and trustee of the minor James Franklin Fugitt. Said payments are based upon earnings of $180 a month; payments made none. The above death benefit is payable at the rate of $25.00 a week.

[1-4] As recited above, the petitioner does not complain of the amount of the award; however, it does complain of any portion of the award being made in favor of the surviving mother, and asserts that the entire amount of the award, to wit, $5,000, should have been made in behalf of the dependent child, James Franklin Fugitt. The petitioner quotes section 14, subdivision (d) of the Workmen's Compensation Act (as amended by St. 1919, p. 917, § 5) as follows: If there is one

or more persons wholly dependent for support upon a deceased employee, such person or persons shall receive the entire death benefit, and any person or persons partially dependent shall receive no part thereof." Thereupon it contends that the statute is free from ambiguity and that when such is the case there is no room for construction, and the statute should be followed exactly as written. The respondent board replies that it makes no contention to the contrary, but it asserts that the passage quoted is only a small part of the statute and that the entire statute must be read before one is entitled to apply the rule above contended for. In support of its claim, the commission quotes subdivision (e) of the same section as follows: "The commission may, anything in this act contained to the contrary notwithstanding, set apart or reassign the death benefit to any one or more of the dependents in accordance with their respective needs and as may be just and equitable, and may order payment to a dependent subsequent in right, or not otherwise entitled, upon good cause being shown therefor. * * *" In its reply the petitioner asserts that subdivision (e) relied upon by the respondent Commission has no application to this case. It contends that the sentence quoted by it is free from ambiguity, and that, when a statute is free from ambiguity, there is no occasion for interpretation. In taking this position we think the petitioner assumes a position that is too narrow. It predicates its point on one sentence. That sentence is only one of many contained in one section. That section is only one of many comprising the entire statute. We are unable to say that the statute under consideration is free from ambiguity. We must proceed therefore in an endeavor to clear up that ambiguity. When an ambiguity exists, the intention of the lawmakers may be arrived at by comparing the language of the act with other laws upon the same subject, by looking, if necessary, to the public history of the time in which it was passed, and by resorting to other legitimate aids to construction. 23 Cal. Jur. 731. The first act was chapter 399, Statutes of 1911 (page 796). It was repealed. The next act was chapter 176 of the Statutes of 1913 (page 279). To that act some few amendments were made by chapter 607 of the Statutes of 1915 (page 1079). An entire revision took place by virtue of chapter 586 of the Statutes of 1917 (page 831). Section 19 of the act of 1913 (page 289) in general covered the subject matter before us. Section 19 of the act of 1915 (page 1087 [section 7, amending section 19 of act 1913]) did the same thing. But in the act of revision of 1917, the subject-matter of section 19 of the earlier statutes became section 14 of the latter statute. Section 19 of the act of 1913 is divided into five major divisions: (a) defining those wholly dependent; (b) those partly dependent; (c) those not dependent; (d) division of benefit; (e) apportionment of benefit. The two divisions last referred to are as follows:

"(d) 1. If there is one or more persons wholly dependent for support upon a deceased employee, such person or persons shall receive the entire death benefit, and any person or persons partially dependent shall receive no part thereof, unless otherwise ordered by the commission.

"2. If there is more than one such person wholly dependent for support upon a deceased employee, the death benefit shall be divided equally among them, unless otherwise ordered by the commission.

"3. If there is more than one person partially dependent for support upon a deceased employee, and no person wholly dependent for support, the amount allowed as the death benefit shall be divided among the persons so partially dependent in proportion to the relative extent of their dependency, unless otherwise ordered by the commission.

"(e) The death benefits shall be paid to such one or more of the dependents of the deceased, or to a trustee appointed by the commission, or a commissioner, for the benefit of the person or persons entitled, as may be determined by the commission, and the commission may, anything in this act contained to the contrary notwithstanding, apportion such benefits among the dependents in proportion to their respective needs and as may be just and equitable, and may order payment to a dependent subsequent in right, or not otherwise entitled, upon good cause being shown therefor. The person to whom the death benefit is paid for the use of the several beneficiaries shall apply the same in compliance with the findings and directions of the commission."

Pausing to look at that statute, we think it is beyond debate that it designated prima facie who should receive benefits, but that it also vested in the commission a discretion to change or vary from the statutory rule as the circumstances might demand. In 1917 that section was amended and became section 14 as the statute appears to-day. In this state the rule is statutory that when a part of a statute is amended the portions that are not altered are to be considered as having been the law from the time when they were enacted and the new provisions are to be considered as having been enacted at the time of the amendment. Pol. Code, § 325. The amendments of 1917 consisted of striking the words "unless otherwise ordered by the commission" from each of the subdivisions 1, 2, and 3 of paragraph (d). The amendment also transposed some of the words from the middle of paragraph (e) to the front of that paragraph. The word "apportion" was left out, and in its place there were inserted the words "set

apart or reassign." As so amended, it is clear that the commission is given the power to apportion in the first instance; that is, "to set apart." It is further given the power to "reassign." If the award in the instant case had been made in 1913, or at any time thereafter down to and including the enactment of the act of 1917, there is no question but that the award would be regular. Therefore the sole question is, Did the amendment of 1917 take away the power to apportion as that power had formerly existed? Certainly dropping the words "unless otherwise ordered by the commission" did not necessarily have that effect, because a part of subdivision (e) was the specific passage which stated that the "commission may apportion benefits." The amendment to that specific subdivision was to change the word "apportion" to "set apart or reassign." It is obvious that such change does not necessarily show that the power to apportion was taken away. In form the act of 1917 is an act of revision. Sponogle v. Curnow, 136 Cal. 580, 584, 69 P. 255. But when such is the case slight changes in verbiage will not be taken as indicating a material modification.

In 1805 in a case entitled Taylor v. Delancy, 2 Caines Cas. 143, the Supreme Court of Error of the state of New York was called upon to determine who was entitled to letters of administration. An early statute of the state of New York adopted certain statutes of England. Both in 1787 and 1801 statutes of revision were adopted. In considering those statutes of revision, on page 151 of 2 Caines Cas., Mr. Justice Spencer, writing the opinion, says: 'My opinion is founded on this proposition, that where the law, antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change. A contrary construction might be productive of the most dangerous consequences. The quaintness of expression in some of the ancient British statutes, the circumstance of there being several statutes on the same subject, required, in many cases, an entire change of language, but it has never, until now, been contended, that thereby an alteration of the law was to be inferred." That seems to be the leading case in America. The doctrine has been copied into the several text-books. 2 Lewis' Sutherland. Statutory Construction, § 401; Endlich on Interpretation of Statutes, § 378; 36 Cyc. 1168.

In Hyatt v. Allen, 54 Cal. 353, the Supreme Court was called upon to determine its jurisdiction. The court examined the provision of the Constitution of California as adopted in 1849, as amended in 1862, and as adopted in 1879. On page 356 of 54 Cal., the court said: "If, on the other hand, there has been no substantial change effected in the meaning of the two clauses, the mere change in the phraseology will not be deemed to alter the law. The rule was laid down by Chief Justice Kent and Mr. Justice Spencer as follows: 'Where a law, antecedently to a revision of the statute, is settled, either *by clear expressions in the statutes* or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention to work a change.' (Taylor v. Delancy, 2 Caines Cas. [N. Y.] 143, 151; Yates' Case, 4 Johns. [N. Y.] 317, 359.) This statement of the rule has been cited and approved by nearly all the eminent jurists of New York, and by many of the highest courts of other States." (Italics ours.)

In State v. Prater, 48 N. D. 1240, 189 N. W. 334, at page 337, the Supreme Court of North Dakota made an exhaustive study of the cases, and stated the rules as follows: "Upon the facts thus stated what principles of statutory construction apply? The general presumption obtains that the codifiers did not intend to change the law as it formerly existed. Braun v. State, 40 Tex. Cr. R. 236, 49 S. W. 620, 622; U. S. v. Ryder, 110 U. S. 729, 740, 4 S. Ct. 196, 201, 28 L. Ed. 308. Changes made in the revision of statutes by alteration of the phraseology will not be regarded as altering the law unless there is a clear intent so to do. McDonald v. Hovey, 110 U. S. 619, 4 S. Ct. 142, 28 L. Ed. 269; Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243; Inhabitants of St. George v. Rockland, 89 Me. 43, 35 A. 1033; Taylor v. Caribou, 102 Me. 401, 67 A. 2, 4, 10 Ann. Cas. 1080; Schmidt v. U. S., 133 F. 257, 66 C. C. A. 389; Brown v. Randolph County Court, 45 W. Va. 827, 32 S. E. 165; East Boyer Tel. Co. v. Vail (Iowa) 129 N. W. 298; Piper v. Railroad, 75 N. H. 435, 75 A. 1041; Stearns v. Graham, 83 Vt. 111, 74 A. 486; State v. Holland, 117 Me. 288, 104 A. 159; King v. Smith, 91 N. J. Law, 648, 103 A. 191; Greenfield v. Plumbing Co., 17 Ga. App. 637, 87 S. E. 912; State v. Bushnell, 95 Ohio St. 203, 116 N. E. 464, 466; Investment Co. v. Railway (D. C.) 226 F. 976; Jones v. State, 10 Ala. App. 152, 65 So. 411; Dennis v. School Dist., 166 Iowa, 744, 148 N. W. 1007; 36 Cyc. 1168. In ascertaining the intention of language used in a code revision, reference may be had to the prior statute for the purpose of ascertaining the legislative intent. Becklin v. Becklin, supra; Stevens v. Bridge Co., 115 Me. 402, 99 A. 94."

Schmidt v. United States, 133 F. 257, decided by the Circuit Court of Appeals, Ninth Circuit, is directly in point. At page 260 of 133 F., the court said:

"The Supreme Court, in construing the Revised Statutes, has repeatedly affirmed the settled rule that a change of phraseology in a revision will not be regarded as altering the law, where it had been well settled by plain

language in the statutes, unless it was clear that such was the intent. Said the court in McDonald v. Hovey, 110 U. S. 619, 629, 4 S. Ct. 142, 146, 28 L. Ed. 269:

" 'So upon a revision of statutes a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law.'

"And the court cited with approval In re Murphy, 23 N. J. Law, 180, where, in construing several statutes which had been consolidated, a proviso in one of them broad enough in its terms to affect the whole consolidated law was held to affect only those sections with which it had been originally connected. In United States v. Ryder, 110 U. S. 729, 740, 4 S. Ct. 196, 201, 28 L. Ed. 308, the court said:

" 'It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.'

"To the same effect is Logan v. United States, 144 U. S. 263, 302, 12 S. Ct. 617, 36 L. Ed. 429. A case in point is Doyle v. Wisconsin, 94 U. S. 50, 24 L. Ed. 64, in which it was held that section 1007 of the Revised statutes (U. S. Comp. St. 1901, p. 714 [28 USCA § 874]), which provides that, where a writ of error may operate as a writ of supersedeas, execution shall not issue until ten days after the rendition of the judgment, has reference only to the courts of the United States. This conclusion was reached upon a consideration of the statutes as they stood before the revision. The court, by Chief Justice Waite, said, 'The Revised Statutes are a revision and consolidation of the old statutes, rather than an enactment of new;' and, after quoting section 5600 (page 3751), he added, 'This makes it proper that we should look to the original act to ascertain the legislative intent in cases of doubt.' In the recent case of United States v. Severino (C. C.) 125 F. 949, Thomas, District Judge, in a carefully considered opinion, held that, notwithstanding the changes in revision, section 5395 still conferred on the federal courts jurisdiction of a perjury committed in naturalization proceedings in a state court in the procedure prescribed by Congress.

"Again, it is an established canon of construction that, in finding the meaning of an ambiguous statute in the revision, the courts are permitted to refer to the original statute from which the section was taken, to ascertain from its language and context to what class of cases the provision was intended to apply. The Conqueror, 166 U. S. 122, 17 S. Ct. 510, 41 L. Ed. 937; United States v. Bowen, 100 U. S. 508, 25 L. Ed. 631; Myer v. Car Company, 102 U. S. 11, 26 L. Ed. 59; United States v. Lacher, 134 U. S. 626, 10 S. Ct. 625, 33 L. Ed. 1080. In the case last cited the court said:

" 'If there be any ambiguity in section 5467 (U. S. Comp. St. 1901, p. 3691), inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged, and consolidated, resort may be had to the original statute from which the section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law.' "

[5] As shown above, the power of the commission to apportion the award was expressly stated in the statutes prior to the act of 1917. The power to reapportion or to reassign was not so stated. In the act of 1917, so far as has been called to our attention, no single factor of jurisdiction was taken from the commission. However, several new factors, quite out of the ordinary, were added. By subdivision (d) of section 20 (St. 1917, p. 850) it was provided: "The commission shall have continuing jurisdiction over all its orders, decisions and awards. * * *" That grant of power is repeated in subdivision (b) of section 65 (St. 1917, p. 874). Commencing with the act of 1913 certain hospitalization was required to be furnished an injured employee and disputes often arose. By subdivision (b) of section 17 of the act of 1917 (as amended by St. 1919, p. 918, § 6) jurisdiction over such disputes was vested in the commission. In the light of these changes we think it is obvious that, in framing section 14, the Legislature intended to vest in the discretion of the commission the power to apportion the benefit when making its award and thereafter to reassign such award as stated in said section.

Finally, both the title of the act and the preamble thereof are very broad and strongly point to the conclusions expressed above.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 780

PACIFIC GAS & ELECTRIC COMPANY v. INDUSTRIAL ACCIDENT COMMISSION of the State of California, Maud E. La Rivere, Frances V. McElhany, and Melvina La Riviere, Respondents.

Civ. 8468.

District Court of Appeal, First District, Division 2, California.

June 15, 1932.

Rehearing Denied July 15, 1932.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for death. Award affirmed.

T. J. Straub and John J. Briare, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, J.

The petitioner has applied for a writ of review to obtain a judgment directing the modification of an award theretofore made by the respondent commission. The petitioner does not complain of the amount of its liability as fixed by the award, but contends that the award should not have been apportioned.

On September 8, 1931, Z. La Riviere, while employed by the petitioner and in the course and arising out of his employment, met with an accident from which he died. He left surviving and wholly dependent Maud E. La Riviere, his wife, and Melvina La Riviere, his mother, who was partially dependent, and Frances V. McElhany, his mother-in-law, who was a member in good faith of his household. The commission determined that the total benefit was $5,000. Among others, the commission made a finding as follows: "That said death benefit should be apportioned between Maud E. La Riviere and Melvina La Riviere. That said Melvina La Riviere was partially dependent upon said deceased for support. The annual amount devoted for her support was $120.00 entitling said applicant to a death benefit in the sum of $360.00, payable at the rate of $10.00 a week. That Frances V. McElhany, was the mother-in-law of said deceased and was a member of his household in good faith. However, the Commission finds that said applicant will be supported and maintained by said applicant, Maud E. La Riviere and no specific award is made in favor of said Frances V. McElhany. The balance of said death benefit in the sum of $4,640.00 shall be payable to Maud E. La Riviere, payable at the rate of $14.94 a week until the sum of $360 shall have been paid to Melvina La Riviere and thereafter said balance of said death benefit shall be payable to said Maud E. La Riviere at the rate of $24.94 a week."

The petitioner contends that the entire sum should have been awarded to the surviving wife. It is manifest that the legal principles involved are exactly the same as those discussed in Pacific Gas & Electric Co., a Corporation, v. Industrial Accident Commission of State of California et al. (Cal. App.) 12 P.(2d) 649, this day filed.

For the reasons stated in that opinion, the award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 439

COKER & TAYLOR, Inc., v. PRUITT et al.

Civ. 7280.

District Court of Appeal, Second District, Division 1, California.

June 22, 1932.

1. Bills and notes ⇐527(1).

In action upon order, accepted by bank, for payment for plumbing supplies, finding that order was unpaid *held* sustained by evidence.

2. Appeal and error ⇐1011(1).

Evidence being conflicting and there being evidence to support finding, sufficiency of evidence cannot be questioned on appeal.

3. Bills and notes ⇐501.

In action against bank upon order, accepted by bank, for payment for plumbing supplies, where bank received funds for payment, excluding evidence showing condition of account existing between bank and drawer *held* not error.

There was no error in court's ruling, since evidence offered would have been immaterial, because bank's liability under order was fixed as to payee at time it accepted order in payee's favor and received funds upon which order was made contingently payable; no question involving rescission or fraud being presented.

4. Appeal and error ⇐534.

Order settling transcript and affidavits used in hearing had upon matters involved therein *held* not properly part of judgment roll (Code Civ. Proc. § 670).

5. Appeal and error ⇐544(1).

Order settling transcript *held* not reviewable, absent bill of exceptions or reporter's transcript of proceedings leading to order (Code Civ. Proc. §§ 670, 953a).

6. Banks and banking ⇐258.

National bank's acceptance of order to be paid from moneys of another *held* not ultra

vires, especially in absence of plea of such defense.

Evidence, viewed in light most favorable to bank, showed that it received upon what might be termed a special deposit agreement certain moneys, and that it failed to disburse them in accordance with its agreement, and was not extending credit for another's benefit.

7. Corporations ⇨518(1).

Where contract is not, upon face, beyond corporation's authority, corporation must plead and prove ultra vires defense.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by Coker & Taylor, Inc., against R. F. Pruitt, the Altadena National Bank, and others. From a judgment in favor of plaintiff against named defendants, last-named defendant appeals.

Affirmed.

Stick, Moerdyke & Gibson, of Los Angeles, for appellant.

James F. McBryde, of Glendale, for respondent.

TAPPAAN, Justice pro tem.

The Altadena National Bank appeals from a judgment entered as against it and its codefendant Pruitt. Pruitt's default had been entered before the trial was had below. The complaint herein alleges, in three counts, a cause of action arising from or under the terms of a certain order made by defendant Pruitt in favor of plaintiff and directed to and accepted by defendant Altadena National Bank. The three counts of the complaint merely state the same cause of action in three different forms. The answer of the Altadena National Bank is in the form of a general denial of the material allegations of the complaint. The order, a copy of which was set up in the complaint, reads as follows:

"December 2nd, 1926.

"Altadena National Bank, 769 E. Mariposa, Altadena, Calif.

"Gentlemen: "You are hereby authorized to pay to the order of Coker & Taylor, Inc., plumbing contractors, the sum of $2,459.00 for plumbing materials and labor furnished and used in the construction of 4—8 apt and 2—2 apt buildings situated on Lot 2, Blk 31, Town of Glendale, and charge same to moneys received from the Sun Lumber Company out of Third Payment.

"R. F. Pruitt.

"Accepted: Altadena National Bank,
"C. N. Newhall,
"Title Cash."

The facts as disclosed by the record presented here show that plaintiff and defendant Pruitt entered into a contract whereby plaintiff agreed to install certain plumbing in building to be constructed by Pruitt. The contract price for this work was agreed to be paid by three certain orders made and executed by Pruitt in plaintiff's favor. Two of these orders in the same amount were drawn upon defendant Altadena National Bank and accepted by it. One of these orders upon the bank was paid, and it is alleged that the other order was not paid, and it is the basis of this action. The plumbing contract was fully completed by plaintiff, and no question arises thereunder. The evidence discloses that defendant bank received from the Sun Lumber Company and collected six checks aggregating the sum of $36,381.60. These checks in each instance were noted by defendant bank as credited to R. F. Pruitt building loan. The checks were received by defendant bank over a period of some five months; each separate check being in a sum more than sufficient to pay plaintiff's orders. The Sun Lumber Company had been authorized and directed by defendant Pruitt to pay the proceeds of the building loan made in connection with the property here involved to defendant Altadena National Bank.

[1, 2] The first specification of error made is, quoting the language used, "Appellant first claims the payment of the order sued on herein." This contention of appellant amounts in effect to an attack upon the finding made by the trial court that the order in question was unpaid, and must be predicated upon the theory that there is no evidence presented by the record sufficient to support the finding. This position, assumed by appellant, and under the circumstances here presented, is somewhat anomalous. Appellant's answer amounts to a general denial of the transaction as alleged by the complaint. It does not plead payment as an affirmative defense. The evidence upon which appellant relies is all of a negative nature. There is direct evidence to support all of the allegations of the complaint, including as well evidence of the issuance of the two orders upon appellant, their change in form at appellant's request, the payment of one of the orders, and the nonpayment of the other order. Appellant failed to produce any evidence directly tending to prove payment. Appellant introduced a check drawn by its codefendant Pruitt, upon appellant and paid by it, made payable to respondent, in an amount equal to the sum named in each of the two orders issued to respondent in this transaction. Appellant contends that this check, when considered in conjunction with certain entries in the account as introduced by respondent, tends to support its theory of payment. As to these entries it may be said that, though the dates

that appear therein may have a tendency to confuse the issue, the fact stands out that from this acount it appears that there was payment of but one of the two orders issued respondent in the transaction. Though demand was made by respondent for the production of this paid order, appellant disclaimed any knowledge of it whatsoever. The fact that the check produced by appellant was signed by appellant's codefendant and not appellant would not seem irregular in view of the fact that the checks received from the Sun Lumber Company were all credited to some account of Pruitt, as the checks themselves show. There is presented by the record here evidence to support the finding made by the trial court that the order in question was unpaid. At best, there can be said to exist but a conflict in the evidence. The sufficiency of the evidence may not be questioned here.

[3] Under the general heading of "Error of Court" appellant first complains of the ruling of the court by which it was prevented from showing the condition of the account existing between it and its codefendant Pruitt. In this there was no error. The evidence offered would have been immaterial. The appellant's liability under the order was fixed as to respondent at the time it accepted the order in respondent's favor and received the funds upon which the order was made contingently payable. No question involving rescission or fraud was presented.

[4, 5] The second question presented under the caption "Error of Court" involves an order made by the trial court settling the transcript. The validity of this order is not properly subject to attack here. There is no notice of appeal from this order included in the record, nor notice to prepare transcript under the provisions of section 953a of the Code of Civil Procedure. Said section provides in part as follows: "If the judgment, order or decree appealed from, be not included in the judgment-roll, the party desiring to appeal shall, on the filing of said notice, specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required and the same shall be included." The judgment herein is dated August 22, 1929, and was filed on August 23, 1929. The notice of appeal and notice to the clerk to prepare transcript under section 953a of the Code of Civil Procedure are dated September 5, 1929. The order complained of is dated January 28, 1930. The order and affidavits used in the hearing had upon matters involved therein are not properly a part of the judgment roll. Sec. 670, Code Civ. Proc. The order in question was one made subsequent to the judgment, and in the absence of a bill of exceptions or a reporter's transcript of the proceeding leading to an order there is no record upon which the appeal can be considered. Brown v. Canty, 31 Cal. App. 183, 184, 159 P. 1056; Jansen v. Jansen, 209 Cal. 666, 667, 290 P. 25.

[6, 7] Appellant's last point is "Nonliability of Bank." From a careful reading of appellant's brief filed herein, it would seem that appellant's contention in this regard is that the acts of appellant, a national bank, in reference to the order sued upon, are ultra vires, and so it is absolved from all liability in regard thereto. With this contention we cannot agree. "When a corporation seeks to avoid its contract on the ground of its want of power to contract, where the contract is not upon its face necessarily beyond the scope of its authority, it will in the absence of proof be presumed to be valid, and the corporation must make good its defense of ultra vires by plea and proof." Todd v. Temple Hospital Ass'n, 96 Cal. App. 42, 48, 273 P. 595, 598. Appellant did not plead the defense of ultra vires, and there is no evidence in the record to support such contention. The evidence, viewed in the light most favorable to appellant, shows that it received upon what may be termed a special deposit agreement certain moneys, and that it failed to disburse them in accord with its agreement. The authorities cited by appellant are to the effect that a national bank may not agree to extend credit under certain specified circumstances, and are to be distinguished from the instant case, in this, that here the evidence shows that the bank was contracting to pay from moneys of another and was not extending credit for another's benefit.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; YORK, J.

124 Cal.App. 412

PEOPLE v. ABBEY.

Cr. 235.

District Court of Appeal, Fourth District, California.

June 21, 1932.

1. Criminal law ⇨404(3).

Extent of identification of gun used in crime necessary to justify admission thereof as exhibit varies with circumstances.

2. Criminal law ⇨404(3).

Mere fact that gun was kept in accused's coat pocket during commission of offense does not preclude all other proof of identification thereof.

3. Criminal law ⇐404(4).

In prosecution for attempted extortion, identification of revolver used *held* sufficient to authorize admission in evidence of revolvers found in accused's apartment 11 days after offense.

4. Criminal law ⇐404(4).

Revolvers found in accused's apartment 11 days after attempted extortion *held* admissible to show means available to commit crime.

5. Criminal law ⇐404(4).

Revolvers found in accused's apartment 11 days after attempted extortion *held* admissible to corroborate testimony that accused was carrying gun at time of alleged extortion.

6. Criminal law ⇐1169(1).

Admitting evidence of defendant's possession of two revolvers 11 days after attempted extortion *held* not prejudicial.

The admission of such evidence was not prejudicial because accused's possession of revolver at time of alleged attempted extortion was so thoroughly proved by testimony of prosecuting witness and virtual admission thereof by accused in letters addressed to prosecuting witness that admission of such evidence could not have resulted in miscarriage of justice.

7. Witnesses ⇐391.

Admitting deputy sheriff's testimony that accused had stated that accused would tell story on stand that would make every one listen *held* not error.

Admitting such testimony was not error as against objection that it was not responsive, that no proper foundation had been laid, and that it was not proper impeachment.

8. Criminal law ⇐1169(1).

Admitting deputy sheriff's testimony that accused had stated that he would tell story on stand that would make every one listen *held* not prejudicial.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Howard J. Abbey was convicted of attempted extortion and possession of forbidden firearms after conviction of a felony, and he appeals.

Affirmed.

Edward L. Davin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, P. J.

On or about January 30, 1932, James N. Crofton received a letter reading as follows:

"It is your time to make a donation to us. You can take the easy way if you are smart. The hard way may not be good for you. You do as we tell you and no one will get hurt. Otherwise you can blame yourself for what happens. You have been on the list quite a while but don't know it. You've been lucky. Get $7,500.00 Dollars in 100 Dollar Bills, and have ready to deliver when we tell you to. When you are ready to pay put ad in the Evening Tribune, 3 days straight, reading.

"In Personal Column

"William that deal is OK with me. Signed Roy.

"A Mr. Houston will phone you where to deliver money. Give envelope containing money to your negro butler but tell him nothing. For this consideration your safety will be assured. We will move away. No frame goes. Try to frame us and May God help you. A bad move and you will pay with something besides money. Report this to the police or any of your friends your lights will go out. We warn you to make no false moves.

"Houston."

Both the letter and its envelope were written with printed letters. About 9 o'clock on the evening of February 2, 1932, Crofton received a telephone call from a man who said he was Houston, asking if he received "my letter" and, "What are you going to do about it?" Upon being told that he was not going to do anything, the man replied, "Well, you better do something because if you don't we are going to fix you up." After a little discussion Crofton agreed to meet the man at 10 o'clock that night in the depot in San Diego, the man stating that he could be recognized by certain wearing apparel. Crofton went to the depot at 10 o'clock and by arrangement a number of his friends, including a deputy sheriff of San Diego county and the San Diego fire chief, were also in the room. Shortly after Crofton arrived, the appellant entered the waiting room of the depot, dressed as the man had said over the telephone he would be dressed. The appellant asked Crofton, "Did you bring it with you?" Crofton testified that as they sat down to talk the appellant jabbed him with something which he had in his coat pocket and said, "I have a gun on me, and if you try to do anything I am going to let you 'have' it." He then testified: "And I told him—'Well,' I says, 'I have got a gun on me; and if you do anything I am going to let you have it, too.' So I had it in my coat, and I let him feel of it just like he let me feel of his gun." A conversation ensued during which the appellant referred to the letter and to the telephone conversation above men-

tioned and asked Crofton what he was going to do about it, and when he replied that he was not going to do anything, the appellant answered, "You better." During this conversation the appellant called Crofton's attention to the deputy sheriff who was in the room, saying he looked like a "bull" and that "if he makes a move and comes toward us I'm going to let you have it." After some discussion, during which Crofton said he was unable to pay $7,500, the appellant finally agreed to accept $2,000, which was to be paid two days later at the same place and the same hour. After the conversation, the appellant left the waiting room and entered an automobile, but upon this car being followed by Crofton's friends, the appellant left the same and disappeared.

The fire chief and the deputy sheriff both testified that they were present at the depot on the occasion in question and saw the appellant talking to Crofton. The deputy sheriff had heard none of the conversation and the fire chief had only heard a portion thereof, in which Crofton asked the appellant if he was looking for him, in which Crofton told the appellant that he was unable to pay $7,500, and in which he heard some suggestion of the sum of $2,000. A few days later Crofton received a letter which had been mailed at Long Beach on February 6, reading as follows:

"Feb. 1932.

"Crofton you have started something, now. I am not there now, but will be there very soon. But my men are there and will be there until its done. I kept my word, you did not keep yours. I had a feeling you wouldn't. The only thing that saved you is no move was made. Now you will pay and it won't be no $2,000 either. It went up a few for putting us through all that trouble. Your going to pay some time so the quicker the better. If you want to do business Put ad in Los Angeles Examiner Reading John come home your mother is ill. Harry. And keep it there for five days. Then you will hear from me. You were just lucky that nothing went wrong. So think and think fast. You can get as many guards as you want, that don't mean a thing to me. I guess by now you know that.

"Houston.

"Put that ad in Personal Column."

This letter was written in printed letters, but its envelope was addressed in longhand. A handwriting expert testified, comparing the handwriting of the envelope in which the second of these letters was mailed with exemplars of the proved handwriting of the appellant, giving his opinion that all of these were written by the same person, with his reasons therefor, and being thoroughly cross-examined in relation thereto. He also pointed out that both letters were printed by the same person. On February 13, 1932, the appellant was arrested at his apartment in Los Angeles, at which time and place the arresting officers found two .38-caliber Colt revolvers loaded with dumdum bullets, together with other cartridges; the revolvers being found under the appellant's hat. The appellant was charged in one count with attempted extortion and in another count with the possession of a forbidden firearm after conviction of a felony. The appellant admitted the prior conviction, stating that on September 25, 1931, he was released from San Quentin after serving ten years for robbery. He was found guilty on both counts, and has appealed from the judgment and from an order denying a motion for a new trial.

[1-5] Two points are raised by the appellant, the first of which is that the court erred in admitting in evidence the two revolvers and cartridges found in his room. It is contended that the possession of these articles by the appellant has no tendency to prove any material fact in either count of the information and that such possession constituted a separate and distinct offense. The last part of this contention is immaterial if the articles in question were properly admissible as evidence in this case, which is the only question that need be here considered. While appellant concedes that under established rules these guns would have been admissible in evidence if Crofton had seen a gun in the hands of the appellant at the depot that night, even though the identity of the gun was not positively established, he contends that since Crofton did not see a gun in his possession there is nothing in the record to furnish any means of identification, even a general one, and therefore it was error to admit the guns in evidence. It is well settled that in such a case a gun need not be positively identified as the one used. The amount or degree of the identification of a gun used in the commission of a crime necessary to justify the admission of such an exhibit in evidence varies with the circumstances in particular cases. The mere fact that a gun is kept in a coat pocket should not, as a matter of law, preclude all other proof. There is evidence here that the appellant was armed with a gun on the occasion in question and some evidence of its size and shape. Crofton testified that the appellant told him he had a gun and threatened to use it; that he jabbed him with something he had in his coat pocket; that "he let me feel of his gun"; that "it looked like a gun in his pocket and he told me it was a gun"; that "I could see through his coat. I did not see the gun, but I know the size of the object that was in his coat * * * it was about the size of that gun"; and that "he told me it was a gun and it looked a little like it." He also testified that the guns offered in evidence were about the size of the object which the appellant had in his pocket. We think this identification was sufficient, under the circumstances of this case, to justify the admis-

sion of the guns in evidence. People v. Peete, 54 Cal. App. 333, 202 P. 51; People v. Gilman, 43 Cal. App. 451, 185 P. 310; People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Stoerkel, 87 Cal. App. 336, 262 P. 825. The evidence in question was admissible for the purpose of showing that the appellant had the means available to commit the crimes in the manner described by the witnesses (People v. Hale, 81 Cal. App. 734, 254 P. 639), and also for the purpose of corroborating the testimony of Crofton that the appellant was carrying a gun on the occasion in question and that this fact was at that time admitted by the appellant.

[6] Even if it could be held that the admission of this evidence was error, it could not be held sufficiently prejudicial to require a reversal. In reference to the charge of attempted extortion, the possession of a gun by the appellant, although a proper element of the proof was not an essential one, but the fact remains that the same was completely proved and positively brought home to the appellant. In relation to the charge that the appellant was in possession of a gun at that time, this fact was so thoroughly proved that even the wrongful admission of this evidence could not have resulted in a miscarriage of justice. Not only is such possession at the time shown by the testimony of Crofton, and his testimony as to the admission of that fact by the appellant, but we have a virtual admission of the same by the appellant in the letter subsequently addressed by him to Crofton in which, in speaking of what took place at the depot that night, he said: "The only thing that saved you is that no move was made" and "you were just lucky that nothing went wrong."

[7, 8] The second point urged is that the court erred in permitting the prosecution to cross-examine the appellant as to an alleged statement made by appellant to a deputy sheriff during a recess of the trial. The appellant took the stand and testified at length as to all of his actions on the afternoon and evening preceding and during his meeting with Crofton at the depot on the night in question. While he denied having attempted to get any money from Crofton, he admitted that he was in the depot that night. He testified that he had been told by two strangers to go there and get some liquor from some man; that when he asked this man if he had "brought it with him," he referred to this liquor; that he sat and talked to this man about ten minutes; and that: "Well, I sensed there was something wrong when this man, supposed to be Crofton, started to talk to me about '7,500' and '3,500' and '2,000.' I didn't know what he was talking to me about." On cross-examination he was asked whether he had not that day told a deputy sheriff that "you thought things looked pretty tough for you and you were going to blow on the whole gang." He at first denied he had talked with the deputy sheriff at all and then admitted that he had talked with him but denied that he had made such a statement. Thereafter, the deputy sheriff in question was called and testified that the appellant had not made such a statement but that "he remarked that in case of his conviction he would tell a story that would make everyone listen, and that he would tell it from the witness stand." The court had sustained several prior objections to questions by which it was sought to bring out this evidence. When the final question was asked, which was answered, the only objection made was that no proper foundation had been laid and that it was not proper impeachment. The objection was not then made that it was not proper cross-examination, and after the question was answered, counsel for the appellant asked that the answer be stricken on the ground that it was not responsive. The court denied the motion but instructed the jury that it was not evidence on any fact in the case. In view of the direct testimony of the appellant, a fair argument could be made that this was proper cross-examination, but conceding appellant's contention that it was not, it neither appears that proper objection was made at the time nor that any prejudicial error has resulted.

No prejudicial error appearing, the judgment and order appealed from are affirmed.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 373

KARSH v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8162.

District Court of Appeal, Second District, Division 1, California.

June 17, 1932.

1. Judgment ⇐331.

New judgment made on plaintiff's motion to enter different judgment superseded original judgment (Code Civ. Proc. §§ 663, 663a).

2. Appeal and error ⇐346(2).

Where court, on plaintiff's motion, entered different judgment for plaintiff, time for appeal together with incidents of appeal ran from date of new judgment (Code Civ. Proc. §§ 663, 663a).

3. Appeal and error ⇐607(1).

One making arrangement personally with stenographic reporter for compensation when

filing notice of appeal with clerk complied with statute, thus giving trial court authority to certify transcript (Code Civ. Proc. §§ 953b, 953c).

Application for writ of mandate to Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for writ of mandate by Charles Karsh against the Superior Court of the State of California in and for the County of Los Angeles, and another.

Writ granted.

See also (App.) 4 P.(2d) 619; (App.) 8 P.(2d) 518.

Hiram T. Kellogg, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Dep. Co. Counsel, both of Los Angeles, for respondents.

HOUSER, J.

Petition for writ of mandate.

As far as are deemed material to a decision of the principal point of law involved in this proceeding, the pertinent facts are that, following the rendition of a judgment for the sum of $2,500 in favor of the plaintiff in the case of Laykin v. Karsh (the latter of whom being the petitioner herein), the entry of such judgment and the service of notice thereof on the defendant, the plaintiff (the successful party in the litigation) served on the defendant a notice of motion under the provisions of sections 663 and 663a of the Code of Civil Procedure to correct the conclusions of law theretofore signed by the trial judge, and, after such correction, to enter "another and different judgment" in the action. Thereafter and in pursuance of said motion, by order of the trial court, the said conclusions of law were "corrected" and the judgment theretofore made and entered by it was ordered vacated, new conclusions of law were signed, and "another and different judgment" was rendered by said court, again in favor of the plaintiff, but for the sum of $5,000, instead of the former sum of $2,500. Thereupon and following a notice by plaintiff to defendant of the entry of said "different" judgment, the defendant gave notice of appeal from said new judgment. Following a denial by the trial court of the defendant's motion for a new trial, in the course of his attempted perfection of an appeal from such new judgment, although the reporter's transcript of the trial of the proceedings was prepared and presented to the trial judge for his approval and certification within the statutory period following the service on the defendant of a notice of the entry of the new judgment, for the reason that the said reporter's transcript had not been presented to the trial judge for his approval within the statutory period after the notice of entry of the first judgment had been served on the defendant, as well as for the asserted reason that arrangements had not been made by appellant "with the stenographic reporter for his compensation" (section 953b, Code Civ. Proc.), the trial judge refused to approve or to certify such transcript. The instant proceeding is by way of an alternative writ of mandate issued out of this court for the purpose of determining the respective rights of the parties in the premises.

[1, 2] Construing the provisions of sections 663 and 663a of the Code of Civil Procedure, the appellate tribunals of this state heretofore have rendered certain decisions relative to the effect which procedure taken thereunder may have upon the rights of an appellant who is the moving party for the relief authorized by such statutes. In that connection the general rule would seem to be that by moving to set aside the judgment theretofore rendered against him, and in lieu thereof to have "another and different judgment entered," the unsuccessful party to the litigation may not thereby extend the time within which he may lawfully appeal from the judgment. Alvarado v. Stanton, 204 Cal. 173, 267 P. 313. It also has been judicially determined that any order made on the hearing of the motion is appealable. California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097, and authorities there cited. But none of the decisions to which attention has been directed directly deal with the exact point here presented; that is to say, where upon motion by the successful party to the litigation the original judgment has been vacated, and in its stead "another and different" judgment has been entered, and notice of its entry has been served by the successful party upon the defeated party, whether the time within which an appellant may lawfully present to the trial judge for his approval and certification the reporter's transcript of the proceedings at the trial of the action starts to run from the date of the notice of the entry of the new and "different" judgment, or whether, in any event, and irrespective of the fact that the original judgment has been ordered set aside and vacated, any appeal which may be taken necessarily is from the original judgment, carrying with such appeal all incidental matters and questions relating thereto.

Although not only by the terms of section 663a, but as well in accordance with the decisions made by the Supreme Court and the courts of appeal of this state, as hereinbefore has been indicated, "an order * * * granting such motion may be reviewed on appeal," in the instant case the defeated party in the action in the lower court apparently was not so much concerned with the "order of the court granting such motion," as he was with the consequences thereof, to wit: The "dif-

ferent" judgment which was entered against him. Accordingly, his notice of appeal was not from the "order" by which the original judgment was vacated, but rather from the "different" judgment which resulted from that order.

It is conceivable that had the defeated party appealed from the order only, and had his appeal in that regard resulted in a reversal of such order, probably the result would have been that the original judgment, not having been the subject of appeal, would have remained in force. On the other hand, had the appeal from the order been unsuccessful the necessary result would have been that the new and "different" judgment would have taken effect.

As far as concerned the respective rights of the parties to the action, the new judgment was the final order of the trial court. It was intended to, and by its terms it did, vacate the original judgment. The new judgment superseded and took the place of the original judgment and operated just as though the new judgment had been the only judgment rendered by the court. As far as the respective rights and liabilities of the parties to the action in anywise were affected, the new judgment furnished the sole guide. The mere fact that the pecuniary liability of the defendant was doubled by the new judgment was of no materiality as far as concerned its legality, or its existence as a judgment entirely separate and distinct from the judgment which was originally entered; the only important principle of law being as to whether the final pronouncement by the trial court, rather than its earlier declaration, became the proper subject of attack as far as concerned the aggrieved party to the action. In the case of California Delta Farms v. Chinese American Farms, 201 Cal. 201, 203, 255 P. 1097, 1098, it is said: "* * * Section 663a of the Code of Civil Procedure declares that an order 'granting such motion may be reviewed on appeal in the same manner as orders made on motions for a new trial.' This was intended either to authorize a review of such an order on appeal from of it, or to authorize a direct appeal from the of it, or to authorize a direct appeal from the order itself. * * *"

Considering the language employed in sections 663 and 663a of the Code of Civil Procedure, as well as viewing the question from what would seem to be a reasonable standpoint, after the entry of the new and "different" judgment, it became the only judgment in the action by which the parties thereto were bound; from which it follows that it was from the date of the entry of such judgment that the time for appealing therefrom, together with the incidents of such appeal, started to run.

[3] It is conceded by the respondent that in all respects each of the several statutory steps in connection with the perfection by petitioner herein of the appeal from the judgment were substantially taken. One exception to the foregoing statement should be noted, to wit: At the time when the judge of the lower court was requested to approve and to certify the reporter's transcript of the proceedings which took place on the trial of the action it was contended by the respondent in the action that since it did not appear that "at the time" when the appellant gave his notice of appeal from the judgment the appellant had either filed an undertaking to cover the cost of preparing such reporter's transcript, or that he had arranged personally with the stenographic reporter for his compensation (section 953b, Code Civ. Proc.), in the absence of an order of court by which the appellant was relieved from his assumed default in either of such particulars, the trial court was without authority to approve and to certify said transcript.

The record herein shows, and the respondent admits, that, as required by the provisions of section 953c of the Code of Civil Procedure, within ten days after the determination by the trial court of a motion interposed by the appellant for a new trial, the petitioner herein served on the respondent in the action and filed with the clerk of the court his notice of appeal from the judgment, and also at the same time "made arrangements personally with the stenographic reporter for his compensation." It follows that the "arrangements" were made "at the time," within the meaning of the provisions of the statute.

It is ordered that the alternative writ hereinbefore issued by this court be, and the same is, made peremptory.

We concur: CONREY, P. J.; YORK, J.

124 Cal.App. 422

KING v. LEAVY, Controller (SAN FRANCISCO BUREAU OF GOVERNMENTAL RESEARCH Intervener).

Civ. 8461.

District Court of Appeal, First District, Division 2, California.

June 22, 1932.

1. Municipal corporations ⇐220(8).

Salary standardization, prepared almost two years before charter contemplating such standardization took effect, and never approved by ordinance, *held* inchoate and properly excluded.

2. Municipal corporations ⇐220(8).

Whether salary ordinances, having been introduced before charter took effect, complied therewith, *held* immaterial.

3. Municipal corporations ⇐58.

Charter provisions *held* not "self-executing" where provisions were to be carried into effect by numerous ordinances.

[Ed. Note.—For other definitions of "Self-Executing," see Words and Phrases.]

4. Municipal corporations ⇐48(2).

Where provisions of new charter are not self-executing but are to be carried into effect by numerous ordinances, it will not be held that ordinances passed under old charter will be superseded until ordinances contemplated by new charter take their place.

5. Municipal corporations ⇐58.

There being nothing on face of charter to contrary, its provisions are prospective, not retroactive.

6. Municipal corporations ⇐48(2).

Ordinances adopted under old charter, if conflicting with self-executing provisions in new charter, would be repealed, but not if provisions were not self-executing.

Appeals from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Petition by Daniel I. King for a writ of mandate against Leonard S. Leavy, to compel respondent, as Controller of the City and County of San Francisco, to audit a salary demand. From a judgment granting the writ, respondent and the San Francisco Bureau of Governmental Research, intervener, appeal.

Affirmed.

John J. O'Toole, City Atty., of San Francisco, and Frank L. Fenton, for appellant Leavy.

Robert M. Searls, Francis V. Keesling, and Jesse H. Steinhart, all of San Francisco, for appellant and intervener.

John J. Dailey, of San Francisco, for respondent.

STURTEVANT, J.

This is an appeal from the judgment of the trial court granting to the petitioner a writ of mandate. The petitioner is, and for some years has been, a boiler maker employed in the fire department of San Francisco. On the 15th of January, 1932, he applied for his pay, $96.19, and believing that the demand was higher than authorized by law the defendant, as controller, refused to audit the demand. Thereupon this proceeding was commenced. The San Francisco Bureau of Governmental Research intervened.

There is no claim that prior to January 8, 1932, the date the new charter took effect, the appointment or compensation of the petitioner was irregular. However, the defendant claims that for the period subsequent to January 8, 1932, and prior to January 15, 1932, the pay of the petitioner was governed by the provisions of the new charter and ordinances enacted in accordance with the provisions of said charter. In reply the petitioner denies that he is asking anything prohibited by the charter and asserts that the charter is silent on the subject and that his claim does not conflict with the ordinances which have been enacted since the charter took effect. Ordinance 9001, the budget ordinance, was approved June 3, 1931, and deals with the year June 30, 1931, to July 1, 1932. Ordinance 9019 was approved June 30, 1931, and provides for the conversion of per diem compensation into a monthly compensation and also provides for a five-day week. Ordinance 9135 was approved January 6, 1932. It is an appropriation ordinance and among other things it appropriated $103,540 for the fire department. Ordinance 9136 was passed by the supervisors on January 6, 1932. It was approved by the mayor on the 13th day of January, 1932. It is designated "Annual Salary Ordinance." Section 11 deals with the fire department. It purports to set forth the monthly compensation of the employees. The position of boiler maker appears as one of the items and the compensation is stated at $202.50.

[1] Under section 141 of the charter it is provided that the civil service commission will propose a salary standardization. On April 9, 1930, almost two years before the charter took effect, a document of that character was prepared. No ordinance approving it was ever passed. On the trial of this case the intervener nevertheless tendered said document in evidence. An objection was made and was sustained. We see no error in the ruling. The document was inchoate. In that form it was not evidence in this case for either party.

[2] It is contended that Ordinances 9019 and 9136 provided for compensation to petitioner in excess of that allowed by sections 71 and 151 of the charter. When those ordinances were introduced the charter had not taken effect. It is therefore quite immaterial whether the ordinances complied with the provisions of the charter. It is not claimed that said ordinances were in any respect in violation of the provisions of the charter that was in effect at the time said ordinances were introduced.

The next claim made is that all ordinances in conflict with the new charter were automatically repealed as to conflicting provisions when the new charter took effect. McQuillan on Municipal Corporations, vol. 2, § 940; 43 C. J. 567. The same rule is implied by the sentence in section 2, which is that: "All ordinances or resolutions in force at the time this charter takes effect and not inconsistent therewith shall continue in force until amended or repealed." Conceding the contention to be a sound rule of law, nothing is called to our attention showing any conflict. No passage in the charter purports to abolish the position which the petitioner holds nor to fix nor alter the amount of his compensation. But, adverting to facts which do not appear on the face of the ordinances, it is argued that, when such facts are taken into consideration, then the ordinances conflict with the charter. Thus it is asserted that the sum of $2,430 inserted in the budget was based on a 270-day year; that the monthly wage was set at $202.50 by dividing $2,430 by 12; and that later a five-day week and a 254-day year was provided for. And that, in making the latter changes, Ordinance 9019 "automatically increased petitioner's compensation beyond that which he received January 1, 1931, by some $12.00 per month." We do not understand the appellants to claim that any one of the ordinances was invalid when enacted. Their claim is that after the new charter took effect on January 8, 1932, the ordinances operated in such a manner as to be in conflict with the charter. Again, we do not understand the appellants to claim that any one of the ordinances conflicted with any express provision in the charter. However, we do understand them to contend that the theory of the charter is such as to prohibit the objections complained of. Among others the charter contained the following passages which we have rearranged for the purpose of clearly presenting the plan of the framers. The letters are our own.

(A) "Sec. 141. The civil service commission shall be the employment and personnel department of the city and county and shall determine appointments on the basis of merit and fitness, as shown by appropriate tests. The commission shall classify, and from time to time may reclassify, in accordance with duties and responsibilities of the employment, and training and experience required, all places of employment in the departments and offices of the city and county not specifically exempted by this charter from the civil service provisions thereof, or which may be created hereafter by general law and not specifically exempted from said civil service provisions."

(B) "Sec. 151. * * * In fixing schedules of compensation, as in this section provided, the board of supervisors, through the civil service commission, shall cause a schedule of compensations to be proposed, based upon the classification as provided in section 141, under which like compensation shall be paid for like service, with due regard to the seniority of the personnel included in each class, and with regard also to other compensations in the city and county service not subject to salary standardization. Such compensation shall be not higher than prevailing rates for like service and working conditions in private employment or in other comparable governmental organizations in this state."

(C) "Sec. 151. * * * The board of supervisors may approve, amend or reject the schedule of compensations proposed by the civil service commission; * * *"

(D) "Sec. 151. The board of supervisors shall have power and it shall be its duty to fix by ordinance from time to time, as in this section provided, all salaries, wages and compensations of every kind and nature, except pension or retirement allowances, for the positions, or places of employment, of all officers and employees of all departments, offices, boards and commissions of the city and county in all cases where such compensations are paid by the city and county."

(E) "Sec. 71. * * * No compensation shall be increased so as to exceed the salary or wage paid for similar services and of like character and for like service and working conditions in other city departments or in private employments, nor so as to exceed the rate fixed for such service or position in the proposed schedule of compensations issued by the civil service commission under date of April 9, 1930, except as such proposed schedule or compensation is amended as provided in this charter, or extended by the civil service commissions to include classifications not included therein."

(F) "Sec. 9. * * * The supervisors shall determine the maximum number of each class of employments in each of the various departments and offices of the city and county and shall fix rates and schedules of compensation therefor in the manner provided in this charter. On the recommendation of the mayor and the chief administrative officer, the board of supervisors may create or abolish departments which are now or may here-

after be placed under the chief administrative officer or under commissions appointed by the mayor."

(G) "Sec. 72. Not later than the first day of May in 1932, and in each year thereafter, the mayor shall transmit to the board of supervisors a consolidated budget estimate for all departments and offices of the city and county for the ensuing fiscal year, * * *"

(H) "Sec. 72. * * * The mayor shall submit to the board of supervisors, at the time that he submits the annual budget estimate, a draft of the annual appropriation ordinance for the ensuing fiscal year, which shall be prepared by the controller. This shall be based on the proposed budget and shall be drafted in such detail as to furnish an adequate basis for accounting control by the controller of each appropriation item for the ensuing fiscal year. Upon submission it shall be deemed to have been regularly introduced and together with the proposed budget shall be published as required for ordinances."

(I) "Sec. 151. * * * Where compensations for services commonly paid on an hourly or a per diem basis are established on a weekly, semi-monthly or monthly salary basis for city and county service, such salary shall be based on the prevailing hourly or per diem rate, where this can be established, and the application thereto of the normal or average hours or days of actual working time, in the city and county service, including an allowance for annual vacation. Every person employed in the city and county service shall, after one year's service, be allowed a vacation with pay of two calendar weeks, annually, as long as he continues in his employment."

(J) "Sec. 71. * * * Pending the adoption of salary standards as in this charter provided, the salary and wage rates for positions subject to such standardization shall be as recommended by the officer, board or commission having appointing power for such positions and fixed by the budget and annual salary ordinance; provided that any compensation paid as of January 1, 1931, to an incumbent who legally held a position in the city and county service at that time shall not be reduced so long as such incumbent legally holds such position."

(K) "Sec. 151. * * * Pending the adoption of salary standards as provided in this section, no increases in compensation shall be allowed other than as authorized in section 71 of this charter."

(L) "Sec. 2. * * * All ordinances or resolutions in force at the time this charter takes effect and not inconsistent therewith shall continue in force until amended or repealed."

(M) "Sec. 13. Action of the board of supervisors shall be by ordinance or resolution introduced in writing and passed or adopted by at least a majority of all the members at each reading."

[3-6] It appears at once that the provisions of the charter are to be carried into effect by numerous ordinances. Therefore the provisions of the charter are not self-executing. 5 Cal. Jur. 579; San Pedro, etc., R. R. Co. v. Los Angeles, 180 Cal. 18, 21, 179 P. 393; Older v. Superior Court, 157 Cal. 770, 780, 109 P. 478; Spinney v. Griffith, 98 Cal. 149, 151, 32 P. 974; Bailey, etc., Iron Co. v. Goldschmidt, 33 Cal. App. 661, 663, 166 P. 363. Under such circumstances it will not be held that ordinances passed under the old charter will be superseded until the ordinances contemplated by the new charter take their place. The effect of adopting the Constitution of 1879 on the legislation that had been enacted under the Constitution of 1849 and the Constitution as amended in 1862, furnishes a close parallel. As above noted, section 2 of the charter provides: "All ordinances or resolutions in force at the time this charter takes effect and not inconsistent therewith shall continue in force until amended or repealed." Section 1 of article 22 of the Constitution contains a provision almost identical: "That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature. * * *" As early as 1866 a special act (St. 1865–66, p. 66) was adopted fixing the fees of officers in San Francisco. Such legislation was prohibited by the Constitution of 1879 (art. 4, § 25, subd. 29), which contained a provision that legislation on the subject of fees should be contained in a general law. The Constitution like the charter contains a passage that its provisions are mandatory and prohibitory unless otherwise stated. In 1895 a general law was adopted (St. 1895, p. 267) establishing fees. In Miller v. Curry, 113 Cal. 644, 45 P. 877, it was held that the special act continued in force and effect until the general act was adopted; and that thereupon the general act superseded the special act. Many similar cases may be cited. Another rule is also pertinent. There being nothing on the face of the charter to the contrary, its provisions are prospective and not retroactive. Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273, 284, 149 P. 560, 9 A. L. R. 597. If any provision contained in any ordinance adopted before the charter took effect was in conflict with any self-executing passage in the charter it would stand repealed. If, however, the provisions in the charter were not self-executing, but required legislation to put them into effect, then they did not operate to repeal existing ordinances on such subjects. In re Stuart, 53 Cal. 745, 749. Under any other ruling it would necessarily follow that there would be a hiatus between the old ordinances and

the new. That would create a chaotic condition in public affairs. There is nothing on the face of the charter showing that such a condition was intended or desired. 5 Cal. Jur. 566. It is clear, however, that the objectionable conditions above specified were to be prevented in the future; but that such prevention would be accomplished by the enactment of the ordinances provided for in the sections of the charter hereinabove quoted from.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 398

KLARQUIST et al. v. CHAMBERLAIN & PROCTOR et al. (two cases).

Civ. 7169.

District Court of Appeal, Second District, Division 2, California.

June 21, 1932.

Rehearing Denied July 20, 1932. Hearing Denied by Supreme Court Aug. 19, 1932.

1. Pleading ⇐34(7).

In action for injuries to pedestrian by automobile, plaintiff's pleadings *held* sufficient, where sufficiency was not raised by demurrer.

Complaint alleged, in substance, that in course of construction of building upon southerly side of street a sidewalk was being installed along northerly side of building within space estimated at fifteen feet in width between building and line of east-bound motor vehicle traffic, and that deceased, while walking in westerly direction along southerly side of street, was compelled by obstructions and new payment to enter main highway in path of east-bound traffic, and that defendant driver, proceeding easterly, struck deceased, inflicting injuries from which he died.

2. Negligence ⇐62(1).

If after cause in question has been in operation some independent force produces injury not its probable effect, author of cause is not responsible.

3. Municipal corporations ⇐800(5).

Contractor obstructing sidewalk while building new sidewalk *held* not liable, where truck driver struck pedestrian compelled to walk in street because of obstruction.

Appeals from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Blanche Klarquist and others against Chamberlain & Proctor, Bavin & Burch Company, and others. From the judgment, plaintiff and defendant Bavin & Burch Company took separate appeals, and the appeals were consolidated. Judgment against the appealing defendant reversed, and judgment in favor of the other defendant named affirmed.

Redwine & Redwine, of Hollywood, for plaintiffs and appellants.

Joe Crider, Jr., of Los Angeles, for defendant and appellant corporation.

CRAIG, J.

The plaintiff and appellant Blanche Klarquist, individually and as guardian ad litem of certain minors, instituted an action for damages alleged to have arisen from the wrongful death of one Edward N. Klarquist upon a public thoroughfare. The defendant and appellant, hereinafter designated as the contractor, was joined with the defendant and respondent, admittedly the owner of certain abutting real property upon which said contractor constructed a building and sidewalk, and the defendant who was driving an automobile which collided with the deceased. From a judgment entered upon the verdict of a jury in favor of the plaintiff and the owner, the plaintiff and the contractor each appealed. Said appeals were consolidated and presented by the same transcript and briefs.

The principal facts as alleged in the complaint are not controverted. In the course of construction of a building upon the southerly side of said thoroughfare, a sidewalk was being installed along the northerly side or front of said building, within a space estimated at fifteen feet in width between the building and the line of east-bound motor vehicle traffic. The deceased, while walking in a westerly direction along said southerly side of the street, was compelled by obstructions and new pavement at respondent's premises to enter the main highway in the path of east-bound motor traffic. The defendant driver, proceeding easterly, struck Klarquist, inflicting injuries from which he lost his life.

[1] It is here complained that the pleadings of the plaintiffs were insufficient. We think in the instant case, since no question as to the sufficiency of the complaint was raised by demurrer, that this contention is untenable. May v. Farrell, 94 Cal. App. 703, 271 P. 789.

[2, 3] The most serious contention presented for decision involves the question of liability of the contracting corporation. This subject will now be considered, not as matter of pleading, but as one of fact and substantive law. It appeared that the new cement walk was constructed along the front of the building, 14½ feet in width, to a 6-inch curbing,

and in accordance with municipal restrictions. No temporary walk was provided above the cement work or beyond it, in the line of traffic, for passing pedestrians. The defendant driver's truck apparently approached in an unlawful and negligent manner, and ran against a delivery car which stood at the curbing, after or simultaneously with its contact with the deceased. The evidence tended to show that Klarquist had passed, and was behind, the delivery car before the accident, and that the moving truck "seemed to come in kind of diagonally" until the impact. The plaintiffs invoke the familiar rules applicable to concurrent and negligent causes of injury, under which liability of the defendant contractor herein would be said to arise from the fact that it could have anticipated that the intervening act, the negligence of the driver in leaving his regular course, might in natural and ordinary sequence follow the original act of illegally constructing the sidewalk and excluding the public therefrom. But their argument fails to convince us that liability of one legally constructing a necessary public way, under the authority of a municipality, who cannot be said to have anticipated the reckless act of a third party, should be predicated upon or measured by the same rules. As stated with approval upon a review of numerous authorities in a cited case of the respondents: Even if the negligent act is succeeded by a disconnected act of negligence of another person, and which results in injury to a third person, if the original negligence was such that in the ordinary and natural course of events the second negligent act should have been anticipated as reasonably likely to happen, the proximate cause of the injury may be laid in the first negligent act. Sawyer v. Hooper, 79 Cal. App. 395, 249 P. 530; Feeney v. Standard Oil Co., 58 Cal. App. 587, 209 P. 85; 12 R. C. L. 913; Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53. A case directly in point is not asserted by either of the parties to have been decided in this state. But the rule as above mentioned in this jurisdiction has in others been applied to facts strikingly similar to those here presented. In Storey v. City of New York, 29 App. Div. 316, 51 N. Y. S. 580, 584, a pedestrian was compelled to walk into the street, around a mound of earth which extended from the curb to a car track, and in so doing was injured by a passing vehicle. In affirming a judgment in favor of the defendants, it was said: "It is urged with much force that in the present case there were two efficient causes,—the presence of the mound of earth, which prevented the boy from seeing the horse and cart; and the other, the horse and cart themselves,—and that both were proximate causes of the accident. As we have already said, if the boy had tripped and fallen because of the mound, and then had been run over, this reasoning would be sound. But the mere presence of the mound, and the fact that it compelled the boy to pass around it, without the intervention of some other cause, would not have produced the accident. We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former a defendant may be liable; for the latter he will not. This is well expressed by Kelly, C. B., in Lord Bailiffs, etc., v. Trinity House, 39 Law J. Exch. 163: 'In order to make the defendant liable, his negligence must be the causa causans, and not merely a causa sine qua non.' And as said in Roberton v. Mayor, 7 Misc. Rep. 648, 28 N. Y. S. 13, 15: 'The negligence of the defendant, if any there be, was not the proximate or efficient cause of the injury. If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible.'" Other decisions of like import are in harmony with the foregoing. Jones v. City of Ft. Dodge, 185 Iowa, 600, 171 N. W. 16; Setter v. City of Maysville, 114 Ky. 60, 69 S. W. 1074; Lambel v. City of Florence, 115 Kan. 111, 222 P. 64. From these observations it results that the defendant contractor cannot be held liable for the injuries resulting from the negligent acts of the driver.

The judgment against Bavin & Burch, a corporation, is reversed, and the judgment in favor of Chamberlain & Proctor, a corporation, is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 430

METROPOLITAN CASUALTY INS. CO. OF NEW YORK v. STONE et al.

Civ. No. 8413.

District Court of Appeal, First District, Division 2, California.

June 22, 1932.

Rehearing Denied July 22, 1932. Hearing Denied by Supreme Court Aug. 19, 1932.

1. Reformation of instruments ⊂⊃16.

Under statute, court of equity may reform written instrument so as to express intention of all parties (Civ. Code, §§ 3399–3402).

2. Reformation of instruments ⊂⊃43.

In exercise of equity court's jurisdiction to reform written instruments, it must be presumed that all parties thereto intended to make equitable agreement (Civ. Code, § 3400).

3. Reformation of instruments ⇐16.

Court reforming written instrument is not confined to inquiry what language was intended to be, but may inquire what instrument was intended to mean (Civ. Code, § 3401).

4. Reformation of instruments ⇐45(2).

In suit for reformation of indemnity contract on ground of mistake, evidence did not show negligence on part of plaintiff precluding relief (Civ. Code, §§ 3399–3402).

5. Principal and surety ⇐175.

Bond which plaintiff executed *held* not penal obligation, as respects liability on indemnity contract sued on.

Bond was executed in connection with contract for purchase of land, providing that purchase price was to be paid at rate of $1,500 per month, and that purchaser would, within six months from June 10, 1927, install improvements in certain sum, and, if it did not do so, it was then provided that purchaser was to pay seller $2,500 on account of purchase price thereof, in addition to monthly payments therein stated, and terms of bond for $25,000 were identically the same. The covenant merely hastened due date on part of purchase price, and did not impose penalty.

6. Principal and surety ⇐119.

Under contract executed by principal in bond to purchase land, vendor had right after terminating contract to demand and receive from bondsman amount of bond as due on purchase price.

7. Payment ⇐82(4).

Payments under valid contracts are not considered as voluntary.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Metropolitan Casualty Insurance Company of New York against J. C. Stone and others. From a judgment for defendants, plaintiff appeals.

Reversed and remanded.

Bronson, Bronson & Slaven, of San Francisco (Harold R. McKinnon, of San Francisco, of counsel), for appellant.

Byron Coleman, of San Francisco, for respondents.

STURTEVANT, J.

This is an action to recover on an indemnity contract. In its amended complaint the plaintiff pleaded two counts. In the first count it pleaded a mutual mistake; in the second count it pleaded the mistake of the plaintiff and that such mistake was known or suspected by the defendants, and it prayed to have the instrument reformed and for judgment on the instrument as so reformed. The trial court made findings in favor of the defendants. From the judgment entered thereon, the plaintiff has appealed.

For many years prior to the year 1927, a tract of land located at Winehaven in Contra Costa county was owned by Calwa Company, a corporation. In 1927 Oswald Wilson conceived the idea of acquiring said property and erecting thereon an industrial alcohol plant. He interested the other defendants as associates. Each is a prominent business man and of such standing that the use of his name was supposed to be a drawing card in making sales of stock. To each of the defendants was allotted 3,000 shares, or more, of class B stock in consideration of his services as a promoter. Each expected to make large earnings on his portion of the stock so to be issued. A tentative agreement to buy and sell was arranged with Calwa Company. The promoters commenced to form a corporation under the laws of Delaware to be named Winehaven Chemical Company; but, the corporation not having been formed, and desiring to proceed, it was arranged that title be taken in the name of Pacific Corporation Company, a California corporation, having an office in San Francisco and engaged in promoting enterprises. By the terms of the purchasing agreement, the Calwa Company agreed to sell for $600,000 as follows: $450,000 in cash, $100,000 par value of bonds, and 2,000 shares of the class A stock of the corporation so to be formed. It was further provided that $1,500 should be paid monthly for five months, which sum would be credited on the $450,000 above mentioned. It was further agreed that the purchaser would within six months install improvements at a cost of not less than $200,000. For the faithful performance of the covenant last named, it was agreed that the purchaser would furnish a surety bond in the sum of $25,000. To induce this plaintiff to execute said bond, the defendants called on the plaintiff's agent, Mr. D. Elmer Dyer. After many interviews, the plaintiff at its demand received the indemnity contract sued on, and the plaintiff executed its bond in favor of the Calwa Company. Thereupon the Calwa Company executed and delivered its contract of sale to the Pacific Corporation Company. Thereafter, and within the six months designated in the bond as the time within which the improvements would be installed on the Winehaven property, said improvements had not been installed, and the Calwa Company started proceedings to enforce the bond. The plaintiff notified the defendants, and later paid the $25,000. Thereupon this action was commenced.

The bond executed by the plaintiff is as follows:

"Know all men by these presents:

"That the undersigned, The Metropolitan Casualty Insurance Company of New York, a corporation organized under the laws of the State of New York, is held and firmly bound unto Calwa Company, a corporation organized under the laws of the State of California, in the sum of twenty-five thousand dollars ($25,000.00), gold coin of the United States, well and truly to be paid, for payment whereof the undersigned hereby binds itself and its successors and assigns firmly by these presents. The condition of the above obligation is such that whereas said Calwa Company has this day entered into an agreement with Pacific Corporation Company for the sale by said Calwa Company to said Pacific Corporation Company of certain real property therein described upon the terms and conditions therein set forth:

"Now, therefore, if within six (6) months from the date hereof said Pacific Corporation Company shall install upon the said real property improvements, free and clear of all liens and other charges, at a cost to Pacific Corporation Company of not less than two hundred thousand dollars ($200,000.), or if within six (6) months from the date hereof Pacific Corporation Company shall pay to Calwa Company twenty-five thousand dollars ($25,000.) on account of the purchase price of said real property in addition to any monthly payments required under said agreement, then the above obligation shall be void, otherwise the same shall remain in full force and effect."

The indemnity contract sued upon contains, among others, the following passages:

"Know all men by these presents, That whereas, at the request of the undersigned hereinafter referred to as indemnitors, and upon condition that this instrument be executed, The Metropolitan Casualty Insurance Company of New York, hereinafter referred to as the Company, a corporation of the State of New York, has executed, or procured the execution of, or is about to execute or procure the execution of, a bond or bonds on behalf of Oscar Krenz, F. M. Edwards, Oswald Wilson, P. C. Salterbach, A. J. Uren, J. C. Stone, hereinafter referred to as principal, and in favor of Calwa Company, copy or copies of which may be hereto attached.

"And whereas, the indemnitors have a substantial, material and beneficial interest in the obtaining of the said bond or bonds.

"Now, therefore, in consideration of the premises and the sum of one dollar ($1.00) this day paid by the company to each of the indemnitors, receipt of which is hereby acknowledged, the indemnitors, and each of them, for themselves, their and each of their heirs, executors, administrators, successors and assigns, jointly and severally, do hereby covenant and agree: * * *

"In testimony whereof, the indemnitors have hereunto set their hands and affixed their seals this 14th day of June, 1927.

"J. C. Stone [Signed] [Seal]
"P. C. Salterbach [Signed]
"Oswald Wilson [Signed] [Seal]
"F. M. Edwards [Signed]
"A. J. Uren [Signed] [Seal]
"Oscar R. Krenz [Signed]."

Except as set forth, no other person, natural or artificial, is named therein.

The contract of sale by the Calwa Company contained a paragraph as follows: "Tenth: Contemporaneously herewith the Buyer shall deliver to the Seller the undertaking of a surety company satisfactory to the Seller in the sum of twenty-five thousand dollars ($25,000.) conditioned upon the failure by the Buyer within six (6) months from the date hereof either to install upon the premises improvements, free and clear of all liens and other charges, at a cost to the Buyer of not less than two hundred thousand dollars ($200,000.), or else to pay to the Seller on account of the purchase price hereof in addition to the monthly payments hereinabove stated the sum of twenty-five thousand dollars ($25,000.). All remedies of the Seller for any default by the Buyer in the performance of any obligation hereof shall be restricted to the option granted to it by paragraph Eighth hereof and to the enforcement of said undertaking without recourse against the Buyer either for the specific performance of this contract or the recovery of the purchase price or damages for the breach hereof."

[1-3] On the hearing in the trial court, Mr. Dyer, the agent of the plaintiff, and all but one of the defendants, were called and examined, and the deposition of the remaining defendant was read. The evidence so produced contains no conflict on the following elements: There was one sole indemnity contract discussed by the parties; there was one sole liability to be protected against; there was no thought expressed that the plaintiff would, or that it should, assume the burden of bearing the default of the promoters or of the corporation which the promoters were in the act of forming; there was no thought that the Pacific Corporation Company was financially responsible or that it was willing to assume any responsibility except to act as a dummy purchaser; the question of its responsibility was never discussed nor inquired into; and the one thing discussed and being arranged for was the sole matter of obtaining the contract of sale from the Calwa Company for the Winehaven Chemical Company (which was in process of being created), and which was to take and hold the properties to be acquired as the agent of the defendants and their associates. One of the

principal considerations flowing to the plaintiff for the execution by it of the bond to the Pacific Corporation Company was the indemnity contract. Without adequate indemnity, the plaintiff would not have executed said bond. Without the giving of said bond, the sale by the Calwa Company would have fallen, and the defendants' enterprise would have earned nothing, whereas each defendant anticipated and looked for large returns. As shown by the evidence, each defendant anticipated that from the proceeds of sales of stock the $200,000 in improvements would be paid, and no claim for $25,000 would be made, and that there would be no liability on the contract in suit. To protect this plaintiff against the possible claims of the Calwa Company for the payment of $25,000 under section 10 of the sales contract was the sole subject of the conversations held. As to the phraseology of that contract of protection these defendants never spoke nor asked to speak. But Mr. Dyer told them what was needed, and all of the defendants left it to him to write the agreement. When the plaintiff's agent attempted to do so, the instrument as written did not clearly portray the intention of the parties. Instead of the condition as written, "a bond or bonds on behalf of Oscar Krenz, F. M. Edwards, Oswald Wilson, P. C. Salterbach, A. J. Uren, J. C. Stone," the instrument should have been "a bond conditioned on the performance by Pacific Corporation Company of certain covenants contained in an agreement of date June 10, 1927, by and between Calwa Company and Pacific Corporation Company being," etc. As so changed, the instrument would have expressed the intentions of all of the parties as portrayed by the evidence which is fully set out in the record. That a court of equity may so reform a written instrument is provided by statute. Civ. Code, §§ 3399–3402. In the exercise of that jurisdiction, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement. Civ. Code, § 3400. The court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be. Civ. Code, § 3401; F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 P. 163.

The case of Gillanders v. Da Silva, 212 Cal. 626, 299 P. 722, is closely parallel in principle. Da Silva desired to operate a jitney. Before doing so, the provisions of an ordinance required that he should execute a bond. He applied to the Zurich Insurance Company for a bond insuring him in the operation of a Haynes automobile. The insurance company issued a policy covering the operation of an Oldsmobile automobile. The driver met with an accident, and Grace Gillanders was injured. She commenced an action to have the bond reformed and to obtain judgment thereon. Judgment was rendered in her favor, and on appeal the judgment was affirmed. In Oatman v. Niemeyer, 207 Cal. 424, 278 P. 1043, the facts showed that the plaintiff agreed to care for an aged man by the name of Garrison. In consideration for her services he agreed to convey to her his real estate. He executed a document purporting to be a grant, bargain, and sale deed, but did not insert a description of the land. It thus appears that as a conveyance the purported deed was void. By appropriate pleadings the plaintiff sought to have the deed reformed. The trial court gave her judgment, and on appeal, at page 427 of 207 Cal., 278 P. 1043, 1044, the court said: "The instrument may be void in such a case because of the mistake, but there is still a valid contract; and, the contract being valid, equity will reform the instrument to make it what it should be, and would have been except for the mistake. There is no making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect. Civ. Code, § 3399; House v. McMullen, 9 Cal. App. 664, 100 P. 344; Merkle v. Merkle, 85 Cal. App. 87, 258 P. 969." To the same general effect are Murphy v. Lacey, 204 Cal. 94, 266 P. 535; Starr v. Davis, 105 Cal. App. 632, 288 P. 706; Wolfe v. Morgan, 95 Cal. App. 656, 273 P. 64; Merkle v. Merkle, 85 Cal. App. 87, 258 P. 969; Burton v. Curtis, 91 Cal. App. 11, 266 P. 601.

[4] The defendants contend that the plaintiff should not be given any relief because the mistake, if any, arose by reason of the plaintiff's negligence. To that contention there are two answers. In the first place, the trial court made no finding that the plaintiff was guilty of negligence. Mahony v. Standard Gas Engine Co., 187 Cal. 399, 407, 202 P. 146. In the second place there is some evidence that, when the bond was originally discussed, these defendants were to be required to execute it, that thereafter it appeared the better plan was to act through the Pacific Corporation Company and that the fault in the execution of the indemnity contract, if any, was as much the neglect of the defendants as it was of the plaintiff.

[5-7] The defendants assert that the bond is a penal obligation, and that in paying the sum of $25,000 the plaintiff acted as a volunteer. An examination of the record discloses that neither point was made in the trial court. However, neither is well founded. Under the terms of the contract between the Pacific Corporation Company and the Calwa Company, the sales price was fixed at $600,000. The contract contained no provision whereby under any circumstances that price was to be augmented by any penalty. The

purchase price was to be paid at the rate of $1,500 per month, which sums were to be credited on the purchase price. It was further covenanted that the purchaser would, within six months from June 10, 1927, install improvements in the sum of $200,000. If it did not do so, it was then provided that the purchaser was to pay the seller $25,000 "on account of the purchase price hereof in addition to the monthly payments hereinabove stated." The terms of the bond were identically the same. The covenant hastened the due date on a part of the purchase price. It imposed no penalty. On December 30, 1927, the purchaser was in default in not paying the $25,000 so due on the purchase price. Under paragraph 8 of its contract, the seller had the option of terminating the contract because the $25,000 had not been paid. But by the terms of the tenth paragraph of the contract its termination was no waiver of its right to receive the $25,000. After terminating the contract, whether in possession or out of possession, the Calwa Company still had the right to demand and receive from this plaintiff $25,000 as due on the purchase price. Adams v. Anthony, 178 Cal. 158, 172 P. 593. In asserting that the plaintiff acted as a volunteer in making the payment, the defendants cite and rely on United States Fidelity, etc., Co. v. More, 155 Cal. 415, 101 P. 302. It is not in point. The bond in that case, as determined by the court, was void. Payments under void contracts may be said to be voluntary, but payments under valid contracts are not so considered. 31 C. J. 440. It is therefore clear that the plaintiff was neither a volunteer nor was the bond a penal obligation.

The defendants claim that the principal in an undertaking is not bound, and, unless the principal is bound, the surety cannot be bound. This point is made on the assertion that the Pacific Corporation Company was not obligated to pay to the Calwa Company the sum of $25,000. As recited in the last paragraph, it is our view that it was so obligated.

Finally, it is contended that the so-called bond was exonerated by the election of the Calwa Company to terminate its contract. It will not be controverted but that under some circumstances the termination of a contract to buy and sell would exonerate the bondsmen. However, these are matters involving the terms of the contract. Under the clear terms of the contract involved in this case, the bondsmen were not exonerated.

It follows that the judgment should be reversed, and that the case should be remanded for further proceedings not inconsistent with what has been said above. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 395

SAN MATEO COUNTY BANK v. DUPRET et al.

Civ. 8424.

District Court of Appeal, First District, Division 1, California.

June 21, 1932.

1. Municipal corporations ⇐519(6). Taxation ⇐510.

Liens for taxes and assessments are paramount to rights created by mortgages and trust deeds.

2. Mortgages ⇐200(3).

Mortgagee, trustee, or beneficiary may pay taxes and assessments on property to protect security and add amount to debt secured.

3. Mortgages ⇐315(1), 378, 588.

Mortgagee paying taxes on mortgaged property, either before or after discharge of mortgage by foreclosure or release, cannot recover amount paid in independent suit after discharge.

4. Mortgages ⇐372(2).

Purchaser at sale under trust deed takes subject to all prior rights, interests, and titles, including tax liens.

5. Banks and banking ⇐116(1).

Notice to mortgagee bank's agent, who bid in property at sale under tax deed, that taxes thereon were unpaid, was notice to bank.

6. Appeal and error ⇐1010.

Trial court's conclusion, reasonably supported by testimony, that purchaser at sale under trust deed bid fair market value of property, less unpaid taxes, and intended to purchase subject thereto, will not be disturbed on appeal.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by the San Mateo County Bank against Joseph Dupret, Jr., and another. From a judgment for plaintiff in part, it appeals.

Affirmed.

Ross & Ross, of Redwood City, for appellant.

A. J. Stebenne, of Redwood City, for respondents.

PER CURIAM.

On August 19, 1925, defendants executed to plaintiff their promissory note for $1,000, payable one year after date with interest, and secured the same by a deed of trust to certain real property in San Mateo county, plaintiff being named in the deed as bene-

ficiary of the trust. The deed provided that defendants should pay at maturity all taxes and assessments which should become liens upon the property, and that in default thereof the beneficiary might pay the same; further, that defendants should repay to the beneficiary the amounts expended pursuant to the above provision, and that the deed should be and continue as security therefor. In July, 1930, default was made in the payment of the debt secured, and the notice of sale was filed by the trustees named in the deed. A sale was had on August 1, 1930, at which time there was unpaid of the principal and interest $915.83. The costs of sale, including attorneys' fees, were $124.29; the total amount due being $1,040.12. The property was bid in by plaintiff for $810, leaving a deficiency of $230.12. On the date of the sale unpaid city and county taxes upon the property amounted to $578.93, and these plaintiff paid some time after the sale. The present action was brought to recover the amount of these taxes, together with the deficiency mentioned. The trial court entered judgment for the latter amount and no more.

Plaintiff, which has appealed, claims that it was also entitled to judgment for the taxes paid.

[1-3] Liens for taxes and assessments are of course paramount to the rights created by mortgages and deeds of trust (18 Cal. Jur. "Mortgages," §§ 435, 436, pp. 132, 133), and, in order that the security may be protected, a mortgagee, trustee, or beneficiary is permitted to pay such liens and add the same to the debt secured (41 Cor. Jur. "Mortgages," §§ 375, 619, pp. 470, 639; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922. But according to the weight of authority a mortgagee who pays taxes upon the mortgaged property, either before or after the discharge of the mortgage by foreclosure or release, is not entitled to recover the amount so paid in an independent suit instituted after such discharge, 15 Ann. Cas. 525, note. It has been held that, after a transfer of the property through a sale under a deed of trust, the deed ceases to exist, and there is no incumbrance on the property by virtue thereof (25 Cal. Jur., Trust Deeds, § 78, p. 94), and that, where a sale is made upon foreclosure of a mortgage, the functions of the instrument have been performed (Hitchcock v. Merrick, 18 Wis. 357).

The case last cited was an action upon a covenant by the mortgagor to pay taxes which the mortgagee, who was the purchaser at the foreclosure sale, subsequently paid. In denying a recovery, the court said: "The mortgagee holds no longer as such, but as purchaser, the functions of the mortgage being already fully performed. As purchaser he stands upon the same footing with any other purchaser not previously connected with the foreclosure proceedings, and must be supposed to have purchased with reference to the value of the mortgaged premises subject to all valid existing incumbrances, whether for taxes or otherwise. Having it in his power, by proper steps before judgment and sale, to protect himself against the taxes, but choosing not to take them, but to proceed to a sale subject to the taxes, and to bid the amount of the debt, he says, in effect, that the mortgaged premises are a sufficient security notwithstanding the taxes, and that he is content to take them subject thereto."

[4-6] The same rule should in principle apply where a sale is had under a deed of trust. The purchaser at the sale under such a deed takes subject to all prior rights, interests, and titles (Bateman v. Kellogg, 59 Cal. App. 464, 211 P. 46); and here the testimony shows without dispute that the agent of the bank who bid in the property at the sale was apprised that the taxes mentioned were unpaid. Notice to him was notice to plaintiff (Atkinson v. Foote, 44 Cal. App. 149, 186 P. 831), and the testimony reasonably supports the inference not only that the sum bid was the fair market value of the property less the amount of the taxes, but that plaintiff intended that its purchase should be subject thereto. Such appears to have been the view of the trial court, and no reason has been shown for disturbing its conclusion.

The judgment is affirmed.

124 Cal.App. 469

DREHER v. SUPERIOR COURT OF RIVERSIDE COUNTY et al.

Civ. 418.

District Court of Appeal, Fourth District, California.

June 23, 1932.

1. Contempt ⇐67.

On certiorari for purpose of discovering whether court exceeded jurisdiction in adjudging petitioner guilty of contempt, evidence which was before court may be examined by reviewing tribunal.

2. Contempt ⇐2.

Contempt committed outside presence of court is "constructive contempt" (Code Civ. Proc. §§ 1211, 1212, 1217, 1218).

[Ed. Note.—For other definitions of "Constructive Contempt," see Words and Phrases.]

3. Depositions ⇐71.

Disobedience of witness to subpœna requiring him to give deposition in pending action before notary constitutes "constructive contempt" (Code Civ. Proc. §§ 1209, 1211, 1212, 1217, 1218).

4. Contempt ⇐54(4).

In proceedings for constructive contempt, affidavit constitutes complaint, and, unless it contains statement of facts showing that contempt has been committed, court is without jurisdiction to proceed, and any judgment of contempt based thereon is void (Code Civ. Proc. §§ 1211, 1212, 1217, 1218).

5. Depositions ⇐71.

Affidavits in contempt proceedings for disobedience of witness to subpœna requiring him to give deposition in pending action before notary *held* insufficient to show that contempt had been committed (Code Civ. Proc. §§ 1209, 1211, 1212, 1217, 1218).

Affidavits alleged that the notary was present at time and place designated by court for giving of deposition; that no person was present other than affiant and plaintiff in action then pending in court; that witness was not present nor was any person representing witness present; that neither notary nor plaintiff had excused witness from being present as required by subpœnas on file in action. However, there was no allegation that any subpœna had issued out of court requiring attendance of witness before notary, and no allegation that witness had been served with subpœna, or with any process that required his attendance at time and place stated in affidavits.

6. Depositions ⇐71.

That uncontradicted evidence showed witness resided in another county more than 50 miles from place of trial warranted annulment of orders adjudging witness guilty of contempt for disobeying subpœna requiring him to give deposition in pending action before notary (Code Civ. Proc. §§ 1209, 1211, 1212, 1217, 1218, 1989).

Code Civ. Proc. § 1989, provides that a witness is not obliged to attend as a witness before any court judge, justice, or other officer out of the county in which he resides unless the distance is less than 50 miles from his place of residence to the place of trial.

7. Domicile ⇐4(2).

Residence is largely a matter of intention.

8. Domicile ⇐1.

Residence is question of fact to be determined from all evidence.

9. Contempt ⇐67.

Contemnor who paid fine under protest, *held* not foreclosed from seeking to review order adjudging him guilty of contempt by certiorari proceedings.

Application by W. F. Dreher for certiorari to review certain orders of the Superior Court of Riverside County, O. K. Morton, Judge, adjudging petitioner guilty of contempt.

Orders annulled.

William C. Ring, of Los Angeles, for petitioner.

Walter Gould Lincoln, of Los Angeles, for respondents.

JENNINGS, J.

This proceeding in certiorari has been inaugurated to review certain orders of the superior court of Riverside county adjudging the petitioner guilty of contempt and imposing upon him, as a penalty therefor, a fine of $300 in default of payment, of which it was ordered that he be imprisoned in the county jail of Riverside county at the rate of one day's confinement for each $2 of said fine.

The record herein shows that on February 18, 1930, a certain action was pending in the superior court of Riverside county in which petitioner was sued individually and as an officer of various corporations. On the aforementioned date subpœnas were issued out of the superior court ordering petitioner to appear at a designated place on February 28, 1930, then and there to give his deposition in the pending action. Subpœnas duces tecum were likewise issued requiring petitioner to produce certain books and records of the various corporations at the time and place appointed for the taking of his deposition.

The record shows that these subpœnas were served on the petitioner in Riverside county on February 19, 1930. Petitioner did not appear at the time and place designated in the subpœnas. The proceeding for contempt was thereupon initiated against him in the superior court by the filing of two affidavits. One of these affidavits was made by the notary public before whom petitioner's deposition was to have been given. This affidavit recites that affiant was present at the time and place appointed for the taking of the deposition, and that neither petitioner nor any person representing him appeared, and that affiant had not excused petitioner from being in attendance. The second affidavit was made by the plaintiff in the action in which petitioner's deposition was sought. It recites that the affiant therein was present at the time and place designated in the subpœnas, and that the statement in the affidavit of the notary relative to petitioner's nonappearance was correct, and that affiant had not excused petitioner from appearing as he was required to do by the subpœnas. Thereupon, an order issued out of the superior court of Riverside county under the signature of the respondent judge requiring petitioner to appear in said superior court on March 25, 1930, then and there to show cause why he should not be punished for contempt of court in failing, neglecting, and refusing to appear at the time and place designated in the subpœnas. After various postponements the matter came on for hearing before the superior court on April 2, 1930, at which time petitioner was present in court and was examined under oath. The respondent court thereupon made its order adjudging petitioner guilty of contempt, and suspended the imposition of any penalty therefor until April 17, 1930. The order further required petitioner to appear before the notary aforementioned on April 15, 1930, for the purpose of giving his deposition. The record further shows that on the date thus appointed by the court petitioner did not appear before the notary, but that his attorney was in attendance and presented an affidavit signed by petitioner. Petitioner's affidavit recites that on the date of the service of the subpœnas upon him, he was, and for more than a year prior thereto he had been, a bona fide resident of the city of Los Angeles, county of Los Angeles, state of California, and that the said city of Los Angeles is at a distance of more than 50 miles by the most direct route of travel from the city of Riverside, the county seat of Riverside county; that at the time the subpœnas were served upon him he was in Riverside county on business, and shortly thereafter and on the same day he returned to the city of Los Angeles, the place of his residence. On April 17, 1930, the matter again came on for hearing before the superior court of Riverside county, at which time petitioner was present in court and through his counsel moved that the court vacate its order of April 2, 1930, adjudging him guilty of contempt of court. The motion was argued and was by the court denied. The respondent court thereupon made an order in which it is recited that in his answer filed in the action in which his deposition was sought to be taken, personally verified by him, was contained an allegation admitting that he was one of the trustees of a certain voluntary trust and that certain corporations therein named were California corporations having their principal place of business in Riverside county. The order further recites that it appeared from petitioner's testimony that he had not registered in Los Angeles county, although he claimed said county as his residence and that it further appeared from his testimony that a large portion of his time was spent on the properties of various companies and corporations in Riverside county, and, residence being a question of intention, the court was not satisfied that the true residence of petitioner was in fact in Los Angeles county. The order further states that the court had theretofore found that no showing had been made that petitioner had left Riverside county subsequent to the service of the subpœnas upon him and prior to the date specified for his appearance before the notary for the giving of his deposition. The order concludes with the recitation that as a punishment for the contempt theretofore committed petitioner should be punished by the infliction of the penalty heretofore mentioned.

[1] The function of the writ of certiorari which petitioner here seeks is to annul the court's order adjudging him guilty of contempt, on the ground that it was an order made in excess of the jurisdiction of the court. People v. Latimer, 160 Cal. 716, 117 P. 1051. For the purpose of discovering whether the court exceeded its jurisdiction, the evidence which was before the court may be examined by the reviewing tribunal. Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350; Strain v. Superior Court, 168 Cal. 216, 142 P. 62, Ann. Cas. 1915D, 702; Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127.

[2] The contempt of which petitioner herein was adjudged guilty was one that was committed outside the presence of the court, and is denominated "constructive contempt." Gale v. Tuolumne County Water Co., 169 Cal. 46, 145 P. 532; Tripp v. Tripp, 190 Cal. 201, 211 P. 225; Lapique v. Superior Court, 68 Cal. App. 407, 229 P. 1010. Our Code provides that in cases of constructive contempt an affidavit of the facts which are relied upon as constituting the contempt shall be presented to the court (section 1211, Code Civ. Proc.), whereupon an order of commitment may, upon notice or upon an order to show

cause, be granted (section 1212, Code Civ. Proc.). Upon the appearance of the person charged with contempt it becomes the duty of the court to investigate the charge and to hear any answer which the person charged may make to the same and to examine witnesses for or against him (section 1217, Code Civ. Proc.), and upon the answer and the evidence received the court must determine whether or not the person proceeded against is guilty of the contempt charged, and, if adjudged guilty, he may be punished therefor. Section 1218, Code Civ. Proc.

[3-5] The disobedience of a witness to a subpœna requiring him to attend and give his deposition to be used as evidence in a pending action constitutes contempt of court. Section 1209, Code Civ. Proc.; Burns v. Superior Court, 140 Cal. 1, 73 P. 597. In proceedings for constructive contempt, the affidavit which is made the basis for the proceeding constitutes the complaint, and, unless it contains a statement of facts which shows that a contempt has been committed, the court is without jurisdiction to proceed, and any judgment of contempt based thereon is void and will be so declared upon certiorari. Hutton v. Superior Court, 147 Cal. 156, 81 P. 409; Frowley v. Superior Court, 158 Cal. 220, 110 P. 817; Hotaling v. Superior Court, supra; Lapique v. Superior Court, supra. An examination of the two affidavits which served as a basis for the contempt proceeding under review discloses that they set forth the following facts: That the notary was present at the time and place designated by the court for the giving of the deposition; that at said time and place no person was present other than affiant and the plaintiff in the action then pending in the superior court; that petitioner was not present nor was any person representing petitioner present; that neither the notary nor the plaintiff in the action had excused petitioner from being present as required by the subpœnas on file in the action. When these affidavits are measured by the strict rule announced by the authorities, their defectiveness becomes apparent. There is no allegation contained in either of them that any subpœna had issued out of the superior court requiring the attendance of petitioner before the notary. More important, there is no allegation in either affidavit that petitioner had been served with a subpœna or with any process that required his attendance at the time and place stated in the affidavits. The only allegation in the affidavits that contains any reference to the issuance of a subpœna is contained in the final paragraph of each affidavit, where it is said that neither the notary nor plaintiff in the pending action had excused petitioner from being present "as required by the subpœnas and subpœnas duces tecum now on file in the above entitled action." If this be taken as a sufficient showing of the issuance of subpœnas requiring petitioner's attendance before the notary, it cannot be held to be a sufficient statement that petitioner had been served with the subpœnas. Manifestly, petitioner's contumacy consisted in his refusal to present himself at the time and place appointed. But a necessary element in this contumacy is knowledge by petitioner of the court's order requiring his attendance. Frowley v. Superior Court, supra. Nor can it be maintained that this defect was cured by the evidentiary showing made to the court upon the hearing or specified and found by the court in its decree adjudging petitioner guilty of contempt. The affidavits constitute the complaint in proceedings that are distinctly criminal in nature, and must charge upon their face facts that clearly and unmistakably constitute contempt. Hutton v. Superior Court, supra; Hotaling v. Superior Court, supra.

[6-8] Another and equally cogent reason for annulling the judgment of contempt is shown by the record. As heretofore noted, two orders were made by the respondent court in the contempt proceedings. The language of these orders indicates that, taken together, they constitute the court's order adjudging petitioner to be in contempt and providing for his punishment therefor. It is true that the record does not show the testimony given by petitioner when he appeared before the court on April 2, 1930, but it does show that no other evidence was received by the court on this date. The record further shows the presentation of petitioner's affidavit to the notary on April 15, 1930. From the inclusion of this affidavit in the record we are entitled to assume that it was before the court when it made the order of April 17, 1930. This affidavit contains the unequivocal statement that, on the date of the service of the subpœnas upon petitioner, he was a resident of the city of Los Angeles, which is more than 50 miles distant by the most direct route from the city of Riverside, the county seat of Riverside county, the place of trial of the pending action. This affidavit also contains the statement that, on the date of the service of the subpœnas upon him, petitioner was in Riverside county on business, but that shortly after service of the subpœnas upon him, and on the same day, he returned to the city of Los Angeles, the place of his residence. The record is entirely devoid of any evidence which in any manner contradicts petitioner's sworn statement as to his place of residence and its distance from the city of Riverside. Section 1989, Code of Civil Procedure, provides that a witness is not obliged to attend as a witness before any court, judge, justice, or other officer, out of the county in which he resides, unless the distance is less than 50 miles from his place of residence to the place of trial. When the respondent court made its order of April 17, 1930, imposing a penalty upon petitioner for his alleged con-

tempt in disobeying the subpœnas served upon him in Riverside county on February 18, 1930, it had been shown to the court by petitioner's affidavit that his place of residence was in a county other than that in which service of the subpœnas was made, at a distance in excess of 50 miles from the place of trial. The court was not, therefore, justified in imposing upon petitioner a penalty for a contempt which the uncontradicted evidence before the court showed had not been committed. It is true that residence is very largely a matter of intention. Nevertheless, residence is a question of fact and is to be determined from all the evidence presented to the court. Since the only evidence which was received by the court was to the effect that petitioner's residence was in the city of Los Angeles, the court was not justified in disregarding it. In re Estate of Brady, 177 Cal. 537, 171 P. 303; Chambers v. Hathaway, 187 Cal. 104, 200 P. 931.

It is further contended that the order of contempt should not be annulled because, it is said, the record shows that petitioner voluntarily paid the fine assessed against him as a penalty for his contempt, thus satisfying the judgment against him and finally concluding the proceedings. It is apparent that the important feature in this regard relates to the character of payment and necessitates the determination of the question of whether petitioner voluntarily paid the fine or paid it under compulsion. If it is made to appear that he made voluntary payment then under the authority of Morton v. Superior Court, 65 Cal. 496, 4 P. 489, it may well be that the judgment has been satisfied and is impervious to attack by proceedings in certiorari. If, however, the record shows a payment under compulsion, the judgment is not thereby rendered invulnerable to attack by writ of review. Null v. Superior Court, 4 Cal. App. 207, 87 P. 392. The record itself is silent upon this point. The petition for the writ alleges that petitioner paid the fine under protest to avoid confinement. The answer to the petition alleges that, after petitioner had been remanded to the custody of the sheriff, he paid the fine without any protest having been heard or noted by the sheriff. If nothing more than this appeared, we should be constrained to hold under the authority of Null v. Superior Court, supra, that it was incumbent upon respondents to show that payment of the fine was in fact voluntary, and that, in the absence of such showing the court's order was not invulnerable to review. However, it appears that petitioner, in accordance with the provisions of rule XXXVIII of the rules of this court, has presented a petition for leave to file additional evidence and that the petition has been granted by this court. The additional evidence which is thus permitted to be considered consists of a certain document which is in the following language:

"Riverside, Calif. April 17th, 1930.

"Received of W. F. Dreher Three Hundred and No/100 Dollars paid under protest as fine in Re contempt of Court in case of Lincoln vs. Dreher, #20102, Superior Court of State of Calif. in and for the County of Riverside.

"D. G. Clayton, County Clerk and Ex-Officio Clerk of the Superior Court in and for Riverside County, State of California.

"By G. A. Pequeguat, Deputy."

[9] By the presentation of this instrument it conclusively appears that the payment of the fine imposed as a penalty for the contempt charged was not made freely and voluntarily, but that it was made under protest. It was therefore a payment made under what may be regarded as legal compulsion, and petitioner is not thereby foreclosed from seeking to review the order of respondents by proceedings in certiorari. Null v. Superior Court, supra.

The proceedings and orders by which petitioner was adjudged to be in contempt and imposing a penalty therefor are annulled.

We concur: BARNARD, P. J.; SCOVEL, Justice pro tem.

In re THORNTON'S ESTATE. *

GARRY v. CRESWELL et al.

Civ. 8113.

District Court of Appeal, First District, Division 2, California.

June 16, 1932.

Rehearing Denied July 16, 1932. Hearing Granted by Supreme Court Aug. 15, 1932.

1. Domicile ⇐1.

Domicile is mixed question of law and fact.

2. Courts ⇐202(5).

Probate court's finding cannot be disturbed if supported by competent evidence.

3. Courts ⇐202(5).

Where appellant failed to print evidence, and respondent supplied sufficient evidence to support probate court's finding, it will be affirmed (Code Civ. Proc. § 953c).

4. Husband and wife ⇐264.

Evidence as respected disposition of community property supported probate court's finding that when property was acquired deceased husband's domicile was in Montana.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 33 P.2d 1.

5. Domicile ⇐10.

Evidence of actual conduct of spouses for years is stronger evidence of domicile than conflicting oral evidence of one after death of other.

6. Husband and wife ⇐246.

Status of husband's separate property, irrespective of when acquired, was not affected by being brought to California after amendments providing that such property should be community property (Civ. Code, § 164, as amended by St. 1917, p. 827, and St. 1923, p. 746).

Status of husband's separate property was fixed by laws of foreign state where matrimonial domicile was when the property was acquired, and local statutes could not divest husband of it simply because matrimonial domicile was changed to California.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Petition by Joseph A. Garry, as executor of the will of Helen H. Thornton, deceased, for decree of distribution of the estate of William H. Thornton, deceased, which was opposed by Lucy Creswell and others. From order denying petition, Joseph A. Garry, as executor of the will of Helen H. Thornton, deceased, appeals.

Affirmed.

Hearing granted by Supreme Court; SEAWELL, TYLER, and LANGDON, JJ., dissenting.

Joseph A. Garry, of San Francisco, for appellant.

Pillsbury, Madison & Sutro, Frank D. Madison, and Marshall P. Madison, all of San Francisco (Maurice D. L. Fuller, of San Francisco, of counsel), for respondents.

Carey Van Fleet, of San Francisco, for contestants and respondents John T. Thornton, and Edward H., James T., Ann Mary, Sarah F., Alexander McK., David Loyall, and John Crittenden Watson.

Treadwell, Van Fleet & Laughlin, of San Francisco, for respondents Lucy, H. I. T., and Gertrude Creswell.

NOURSE, P. J.

The petitioner sought a decree of distribution upon the theory that all the estate of her deceased husband was community property. From the order denying her petition she has appealed upon typewritten transcripts.

In the year 1885 petitioner and her husband left their home in California and moved to Anaconda, Mont., where deceased took a position in a bank and built a home. They remained in Anaconda until 1899, and during that period deceased voted in Montana and held the offices of mayor of Anaconda and state senator. In 1899 they returned to San Francisco, where they made their home until 1906. In that year they again moved to Montana, locating in the city of Great Falls, where deceased took charge of a bank and purchased a home. In the deed conveying the home property the deceased was designated as a resident of Great Falls. The parties remained in Great Falls until 1919, during which time the deceased was engaged in business and annually filed his income tax returns to the federal government as a citizen of Montana. All the property involved in the petition for distribution was personal property acquired by deceased while engaged in business in the state of Montana.

Under the laws of that state this property would be treated as the separate property of deceased, subject to his disposition by will. The deceased so treated it in the execution of his will which the widow attacks in her petition for distribution. On the appeal the appellant presents but two points—the question of domicile during the time the estate was acquired, and whether the property is community, notwithstanding the question of domicile, because it was brought into this state subsequent to the 1917 amendment of section 164, Civil Code.

[1-5] The question of domicile is a mixed question of law and fact. Estate of Weed, 120 Cal. 634, 638, 53 P. 30. The finding of the probate court that the deceased was domiciled in Montana when the property was acquired cannot be disturbed if there is competent evidence to support it. Estate of Moore, 162 Cal. 324, 326, 122 P. 844. This rule controls the decision of the point in this case because the appellant has not printed the evidence as required by section 953c, Code of Civil Procedure, and because the respondent has supplied sufficient evidence, as outlined in the statement of facts incorporated herein, to support the finding. In the argument appellant stresses her own testimony concerning the expressed intentions of the deceased to return to California; but this testimony merely raised a conflict with the evidence of the actual conduct of the deceased during the period of his absence from California. It is hardly necessary to say that the probate court was justified in resolving this conflict against appellant, and it may be added that our courts have held that the evidence of actual conduct is the "better" evidence. Estate of Damke, 133 Cal. 433, 436, 65 P. 888; Estate of Harkness, 176 Cal. 537, 542, 169 P. 78; Bullis v. Staniford, 178 Cal. 40, 46, 171 P. 1064.

[6] The second point raised by appellant relates to the 1917 amendment (St. 1917, p. 827) to section 164, Civil Code, which declared that personal property "acquired while domiciled elsewhere" should be deemed community property. The basic principle of the

decisions interpreting the Code section is found in the early case of Kraemer v. Kraemer, 52 Cal. 302, 306, where it is said: "The law of the matrimonial domicile has, in this case, already made a disposition of the property of the husband and the wife at the time when the parties were subject to that law. In neither case could the law of the new domicile be admitted without divesting rights which had already been legally acquired." Following this principle it has been held that personal property acquired in another state and brought into this state prior to the 1917 amendment was not affected by that amendment because the respective interests of the husband and wife were controlled by the law of their domicile at the time the property was acquired. Estate of Drishaus, 199 Cal. 369, 372, 249 P. 515, and cases cited. The appellant distinguishes these cases from this case because all the property involved here was brought into this state *after* the Code amendment. Following the principle of the Kraemer Case the District Court of Appeal, in Scott v. Remley, 6 P.(2d) 536, held that personal property acquired in Arkansas prior to the amendment and brought into this state in 1919 was not affected by the Code amendment, but remained the separate property of the husband. In accord are Estate of Buggemeyer's Estate (Cal. App.), 2 P.(2d) 534, and Melvin v. Carl (Cal. App.) 4 P.(2d) 954.

But it would serve no purpose to discuss the numerous cases cited in the briefs. Suffice it to say that they recognize the underlying principle that the property interests of the spouses vest as of the time and place of acquisition and that no state may thereafter by mere fiat divest such rights. If we follow this principle it would seem immaterial whether the property was brought into this state before or after the Code amendment because the parties entered this state at a time when the law of this state was declared to be not retroactive. Hence, since all the property involved here was *acquired* under laws which vested it in the deceased as his separate property irrespective of the time when the owner brought it into this state, the 1917 amendment of the Code section is ineffective in so far as it purports to vest a community interest in the wife.

The case is argued on the general assumption that the property was acquired prior to 1917. As to this the record is not clear; but it does appear that the deceased retired from business in 1918. But, if some of the property was acquired before and some after the 1917 amendment, the rule would be the same. Williams v. Sutphen, 92 Cal. App. 697, 268 P. 946; Melvin v. Carl (Cal. App.) 4 P.(2d) 954.

It is also argued that since the parties entered the state after the 1917 amendment, they must be presumed to have accepted the provisions of the statute and of the 1923 amendment to section 164 (St. 1923, p. 746) which expressly made the section applicable to property "heretofore or hereafter" acquired. But Scott v. Remley, supra, is to the contrary. An interesting comment on the authorities is found in Southern California Law Review, vol. V, No. 4 (1932), pp. 309–312.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

124 Cal.App. 450

SHERWOOD et al. v. THOMAS.

Civ. 584.

District Court of Appeal, Fourth District, California.

June 22, 1932.

1. Damages ⇐186.

Finding husband would be put to expense in procuring medical care for wife and through loss of her services *held* unsupported except as to $100 allowance for future treatments by chiropractor.

2. Trial ⇐397(5).

Where defense was that automobile collision was caused entirely by plaintiff's negligence, failure to make finding as to contributory negligence *held* not error.

3. Evidence ⇐548.

That physician in reporting plaintiff's condition repeated statements made by plaintiff *held* not error.

4. Appeal and error ⇐1050(1).

Error, if any, in physician's repetition of plaintiff's statements *held* harmless, where plaintiff testified to same thing.

5. Judgment ⇐273(2).

That court, entering judgment on day after findings were signed, ordered judgment entered nunc pro tunc as of date case was submitted, *held* error.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Elsie Snyder Sherwood and husband against Marvin Thomas. Judgment for plaintiffs, and defendant appeals.

Judgment modified, and, as so modified, affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

George H. Gobar, of Fullerton, for respondents.

BARNARD, P. J.

This is an action to recover damages for injuries sustained by the plaintiff Elsie Snyder Sherwood, in a collision between an automobile driven by her and another automobile driven by the defendant. The action was tried by the court without a jury, resulting in a judgment for the plaintiff. The court found that the automobile belonging to the plaintiffs was damaged in the sum of $93.90; and that the plaintiff Elsie Snyder Sherwood, by reason of her injuries, pain, and suffering, loss of salary as a school teacher, and amounts expended for doctor bills, has been damaged in the sum of $1,654. In addition, the court found, in finding numbered XII, that the plaintiff Lawrence Sherwood had been put to great expense, and will continue to be subjected to great expense, in procuring medical and surgical care and nursing for his wife, and that he will hereafter be put to great expense through the loss of her services, by reason of which it was found that he was damaged in the additional sum of $1,000. Upon these findings, judgment was entered for $2,747.90, from which judgment this appeal is taken.

[1] The main point urged by appellant is that finding XII, above referred to, is not sustained by the evidence. Respondents support this finding only by the claim that it can be justified as an allowance on account of future loss of wages as a school teacher by the respondent wife. Not only is there no evidence in the record to support such a claim, there being no evidence that the wife would be unable to teach in the future, but the finding in question does not purport to cover any such element of damages, and the preceding finding, in which $1,654 was allowed, does purport to fully cover that element of damages involving the activities of the wife as a school teacher. The only thing covered by finding XII is past expense incurred by the husband for medical attention for the wife, and future expense for such medical attention and future expense caused by loss of her services. The past expense for medical attention was covered in the preceding finding and allowance therefor specifically included in the $1,654 awarded. In relation to future expense for loss of services of the wife, the only evidence in the record is to the effect that the wife, at the time of the trial, was doing her own housework, and there is no evidence that future expense was to be anticipated by reason of the loss of her services. As to future expense for medical attention, the only evidence in the record is that she would still require fifty more "adjustments" by the chiropractor who was treating her, and that she had been paying $2 for each adjustment. At most, the evidence supports an allowance of only $100 for this item, and the remaining allowance of $900 is without support in the record.

[2] It is next urged that the court erred in not making a finding upon the issue of contributory negligence. A complete and final answer to this is that the defendant failed to allege contributory negligence. The only affirmative allegation set up in the defendant's answer was to the effect that the collision in question was caused proximately and entirely by the negligence of the plaintiff. The court found in several findings that the collision occurred as the direct result of the negligence of the defendant alone.

[3, 4] A physician was appointed by the court to examine the respondent Elsie Snyder Sherwood and report upon her condition. In giving his report and his conclusions, this physician repeated statements made to him by this respondent for the purpose of enabling him to understand her condition; the statements including what might be termed a history of how she had felt during the period between the date of the collision and the date of the trial. Error is attributed to the allowing of this testimony by the doctor, on the ground that these statements were hearsay and self-serving declarations. This doctor was appointed to ascertain the present condition of this respondent, and it would appear that most, if not all, of the statements made were necessary to enable him to reach an intelligent conclusion, and that they were properly repeated by him in explaining his conclusion. Davis v. Renton, 113 Cal. App. 561, 298 P. 834. In any event, no harm resulted, as this respondent had herself testified to the same things, and for the further reason that this testimony could not have affected the portion of the judgment which we are affirming, which portion was sustained by evidence as to actual moneys paid out and actual wages lost.

[5] The only other point raised is that the court erred in entering judgment on the day after findings were signed, but ordering the same entered nunc pro tunc as of the date the case was submitted for decision. While the nunc pro tunc portion of this order for judgment is apparently erroneous, the only prejudice to the appellant which is pointed out is the liability for additional interest amounting to $2.50. In order that full and complete justice may be done to appellant, we feel constrained to lend our aid by further reducing the judgment in that amount.

For the reasons stated, the judgment is modified by deducting therefrom the sum of $902.50, and, as so modified, the judgment appealed from is affirmed, the appellant to recover his costs on appeal.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 419

STRANGE v. LOS ANGELES EXAMINER et al.

Civ. 8281.

District Court of Appeal, First District, Division 1, California.

June 22, 1932.

1. Trial ⇐165.

Plaintiff's acts and conduct must be measured in light of attendant circumstances, described in other testimony than his own, in determining whether court erred in sustaining motion for nonsuit at close of plaintiff's case on ground of contributory negligence.

2. Trial ⇐165.

Trial court could not ignore eyewitness' estimate of speed of truck, though distance which witness observed it travel limited his ability to make estimate; such fact raising merely questions of credibility and weight of evidence.

3. Automobiles ⇐245(72).

Whether pedestrian must have seen truck, which struck him, had he looked to left as he testified, *held* for jury.

4. Automobiles ⇐217(5).

Pedestrian struck by truck coming from his left while crossing street was not absolutely bound to look to left when in middle of street.

5. Automobiles ⇐245(72).

Pedestrian's negligence in crossing street is ordinarily for jury, in absence of express statute regulating his conduct.

6. Automobiles ⇐217(1).

Contributory negligence of pedestrian, struck by truck while crossing street, must be determined from all facts and circumstances in evidence.

7. Automobiles ⇐245(72).

Pedestrian's duty to look to left when in middle of street *held* for jury in action for injuries sustained when struck by truck.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by D. W. Strange against the Los Angeles Examiner, a corporation, and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Bertrand J. Wellman, of Los Angeles, for appellant.

Joe Crider, Jr., Clarence B. Runkle, and Elber H. Tilson, all of Los Angeles, for respondents.

GRAY, Justice pro tem.

[1] Appellant, while walking from the southeast to the northeast corner of Sixth street and Towne avenue, in the city of Los Angeles, was struck by an autotruck owned by the corporate respondent, and operated by the other respondents as its employees. For the resultant injuries, due to respondents' alleged negligence, he seeks in this action to recover damages. The court, at the close of appellant's case, sustained respondents' motion for a nonsuit, and appellant appeals from the judgment thereafter entered. In their briefs both parties agree that the judgment can be sustained only if appellant's own testimony establishes, as a matter of law, his contributory negligence in failing to use ordinary care for his own protection and safety. As aptly suggested by respondents, appellant's own testimony contains the sole description of his acts and conduct immediately before and at the time of the accident. But such acts and conduct must be measured in the light of the attendant circumstances described in the other testimony.

[2] Appellant testified that he was on his way to church when struck; that the accident happened on March 6th at 7:15 in the evening; that his eyesight was good; that he knew that the intersection was a dangerous crossing; that, when a few steps from the curb, he looked to the east, to the west, and in front, but did not see any approaching automobile, and so proceeded to cross; that, as he reached the middle of the street, he was struck by something he never saw, and became unconscious for forty-six hours; that he never heard any warning; that immediately before he was struck he was thinking of the church meeting he was about to attend, and he crossed his arms over his breast and gave utterance to some religious sentiment. He also testified both that, when in the middle of the street, he looked to the west, and that he did not remember so doing. A friend testified that appellant's hearing was bad. An eyewitness of the accident testified the lights on the truck were dim; that the truck was traveling at a rate of speed between thirty and thirty-five miles per hour when appellant was hit; that appellant came in contact with the left front fender; that his body was carried on the truck for a distance of between thirty and thirty-five feet, and then dropped off; and that the truck continued about ten to twelve feet further. Conceding that the distance which this last witness observed the truck travel limited his ability to estimate its speed, yet the trial court could not ignore his estimate, because such limited ability raised merely a question of his credibility, and left for the trier of fact the question as to the weight to be given such estimate. Furthermore, the distance

traveled by the truck after the impact might be considered as corroborative of such estimate.

[3-7] Respondents argue that appellant's testimony conclusively proves his negligence because, if he did look to his left when in the middle of the street, he must have seen the truck in time to have avoided the collision; or, if he did not so look, he failed to perform his absolute legal duty to do so. Evidence of the truck's speed, traveling between approximately forty to fifty feet per second, and of its visibility, confined solely to dim lights, inferences to be drawn from the time of the accident, and its observation, for a short distance before the impact, by the eyewitness at an unfixed distance from its path, paint too incomplete a picture of the situation to force the single conclusion that appellant must have seen the truck, if he looked as he testified. The legal premise, upon which this argument is based, is the erroneous assumption that the law placed upon appellant when in the middle of the street the absolute duty of looking to the west (that is, to his left), from which direction he should have reasonably anticipated an automobile might come. In support of this legal principle, respondents cite certain cases which are based upon Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 P. 185. As this court recently pointed out in Long v. Barbieri (Cal. App.) 7 P.(2d) 1082, the doctrine of that case was explained and limited in Burgesser v. Bullock's, 190 Cal. 673, 677, 214 P. 649, 651, where the true rule was enunciated as follows: "The question of whether or not the pedestrian is negligent in crossing a street is one which, in the absence of express statutes regulating his conduct, must ordinarily be left to the jury; for the conduct of an ordinarily prudent person under such circumstances must be largely determined by the condition of the traffic at the particular time and place in question." See, also, Filson v. Balkins, 206 Cal. 209, 273 P. 578; Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41. As showing that there could be a difference of opinion as to whether appellant was negligent, it is interesting to note that a finding that a pedestrian was not negligent was held, in Ohlson v. Callender, 87 Cal. App. 382, 262 P. 357, to be sustained by evidence similar in all essential details to that in the instant case. An instruction, stating the law to be as respondents contend, was held erroneous in Nickell v. Rosenfield, 82 Cal. App. 369, 255 P. 760. Whether appellant was negligent is to be determined from all the facts and circumstances in evidence, and whether or not it was his duty to have looked to his left when in the middle of the street was a question of fact which the court was not authorized to decide as a matter of law. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125.

The judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 402

PEOPLE v. MORRIS.

Cr. 2203.

District Court of Appeal, Second District, Division 2, California.

June 21, 1932.

1. Burglary ⇐42(1).

Possession of stolen property shortly after theft, and failure of accused to account for such possession, are circumstances pointing toward guilt of burglary.

2. Burglary ⇐42(3).

When property stolen in perpetration of burglary is found in defendant's possession shortly after theft, corroborating evidence necessary to connect defendant with offense need be but slight.

3. Burglary ⇐42(3).

False statements by defendant, dealing with stolen property as his own under fictitious name, and giving of false testimony, are circumstances corroborating proof of defendant's recent possession of stolen property.

4. Burglary ⇐41(1).

Evidence *held* sufficient to sustain conviction for burglary.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Theodore Morris was convicted of second degree burglary, and he appeals.

Affirmed.

William G. Kenney and John E. Glover, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Dep. Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appellant and one Edmund Buisseret were found guilty of second degree burglary. The sole point on this appeal is that the evidence is insufficient in law to sustain the conviction of appellant.

It is conceded by appellant that on July 8, 1931, between 12:30 and 3:30 p. m., the residence of one Mrs. C. V. Holmburg was bur-

glariously entered, and that among other things an Illinois watch was stolen, being later, at about 4:30 p. m., pawned by a man who signed the pawnbroker's ticket with the name "Bob Morrow." Appellant was not identified by any witness as being at the scene of the burglary, though his codefendant was so identified. The contention of appellant is that there is not sufficient evidence to connect him with the crime.

The appellant testified to the effect that he did not pawn the watch and did not sign the name "Bob Morrow" to the pawn ticket; that he had an apartment with one Harold Hanson, who had since gone back to Ohio or Illinois, and who, before leaving, had told appellant that he had pawned a watch and where he had pawned it; that he, appellant, had described this watch in a conversation at which one Fred Brooker was present, and later went to the pawnshop with Mr. Brooker, who expressed a desire to see the pawned article; that they went to the pawnshop some time in August, and that this was the only time appellant had ever been in the pawnshop. On cross-examination appellant denied that he had ever told Mr. Brooker that he had pawned the watch or offered to trade it for a watch of Mr. Brooker, and further testified that he did not know that the watch was "hot," and had never told Mr. Brooker that it was "hot." Brooker testified that appellant told him that he had a watch in a pawnshop which he would trade for one of the witness's watches, and that appellant also told him that the pawned watch was "hot."

The pawn ticket and various exemplars conceded to be in appellant's handwriting were received in evidence. Two handwriting experts testified that in their opinion the name "Bob Morrow" on the pawn ticket was written by the same person who wrote the exemplars. The pawnbroker, called as a witness, testified that he could not positively identify appellant as the man who pawned the watch, but did testify that the man who pawned it "looks like" and "resembled" the appellant. While this identification was not positive, it was sufficient, if believed by the jury, to warrant their concluding that appellant was the person who disposed of the watch [see People v. Griggs, 114 Cal. App. 133, 299 P. 555; People v. Farrington (Cal. Sup.) 2 P.(2d) 814; People v. Radovich (Cal. App.) 9 P.(2d) 542, and cases cited], a conclusion strongly corroborated by the testimony of the handwriting experts. The jurors were the sole judges of the credibility of the witnesses, and, with the testimony of appellant impeached by proof of his having suffered two prior convictions of felony and contradicted by other witnesses on practically every point material to his defense, were not only justified in disbelieving the testimony of appellant, but also in believing that the testimony he gave was knowingly and willfully false.

[1-3] While the mere possession of stolen property shortly after it was stolen is not sufficient to connect a defendant with the perpetration of a burglary in which the property was stolen, it is a circumstance pointing toward guilt, as is also the failure of the accused to account for such possession upon a theory inconsistent with his guilt of the offense charged. People v. Russell (Cal. App.) 8 P.(2d) 209, and cases cited. It is well settled that when property stolen in the perpetration of the crime charged is found in the possession of a defendant shortly after it was stolen, the corroborating evidence necessary to connect the defendant need be but slight. People v. Russell, supra, and cases cited. Among the circumstances which, when coupled with such possession, are sufficient to connect the defendant with the commission of the crime charged and to sustain a conviction are false statements, selling or dealing with the stolen property as his own under a fictitious name, and the giving of false testimony. See cases cited in People v. Russell, supra.

[4] The evidence here shows that within two hours after the burglary the appellant pawned the watch, giving and signing a fictitious name, made negotiations to trade it, stating that he had pawned the watch and that it was "hot," a word we recognize as synonymous with "stolen," and then, in the face of his identification by the pawnbroker and most convincing proof by the handwriting experts that he was the person who signed the fictitious name on the pawn ticket, he took the witness stand and denied ever having seen the watch until after his arrest. The evidence was amply sufficient to sustain the conviction.

The order and judgment are affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

BOURNE v. ROOT et al.*

ROOT et al. v. BOURNE et al.

Civ. 729.

District Court of Appeal, Fourth District, California.

June 23, 1932.

Rehearing Granted July 23, 1932.

1. Principal and agent ⇐171(1).
Generally, principal accepting benefits of unauthorized contract by agent is bound by contract.

2. Corporations ⇐432(5).
Corporation, after evidence indicating ratification of contract of employment by agent, had burden of showing lack of knowledge of agreement.

3. Corporations ⇐432(11).
Testimony respecting corporation's ratification of employment contract by agent *held* improperly stricken.

4. Evidence ⇐222(2).
Evidence of conversation in nature of admissions in respect to employment contract was admissible against person making statement.

5. Appeal and error ⇐926(4).
Court cannot on appeal assume that trial court would have found in favor of prevailing party had contradictory evidence not been improperly stricken.

Appeal from Superior Court, Tulare County; J. S. Clack, Judge.

Action by Murray Bourne against Alfred C. Root and another, wherein defendants filed a cross-complaint against the plaintiff and another. From the judgment, defendants and cross-complainants appeal.

Affirmed in part, and in part reversed.

See also (Cal. App.) 4 P.(2d) 264.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 1066.

Bradley & Bradley, of Visalia, and Manley C. Davidson and Archie A. Smith, both of Los Angeles, for appellants.

F. H. Pearson, of Fresno, for respondents.

SCOVEL, Justice pro tem.

The complaint in this action sets up a promissory note executed by defendants to plaintiff alleging nonpayment of the same and praying for judgment thereon. Defendants' answer admitted liability on the note. Defendants filed a cross-complaint upon a quantum meruit for services rendered to the plaintiff and the Yosemite Portland Cement Company. The Yosemite Portland Cement Company was made a party to the action upon the filing of the cross-complaint, and both cross-defendants filed an answer thereto in the nature of a general denial. At the trial of the matter it was stipulated that judgment might be entered in favor of plaintiff in an agreed amount upon the complaint, the trial proceeding upon the cross-complaint.

It appears from the transcript that the plaintiff was a director and the treasurer of the Yosemite Portland Cement Company, a corporation. A conversation in regard to the sale of cement by the corporation was had between plaintiff and defendant Alfred C. Root. According to plaintiff the conversation merely related to business being done by the company and its prospects for future sales. He denied ever having made an agreement with defendant employing him to make sales of cement.

This defendant Alfred C. Root was called as a witness and testified that in the conversation plaintiff employed him for the purpose of selling cement to the Valley Paving Company and agreed the company would pay him 10 cents per sack for all sacks of cement he might sell. This testimony was objected to on the ground that no proper foundation had been laid, in that it had not been shown that plaintiff was authorized to make such an employment contract on behalf of the corporation. A ruling was reserved, but at the close of the trial, upon motion of plaintiff, the evidence was stricken from the record.

J. C. Caldwell, president of the Valley Paving Company, testified that his company purchased the sacks of cement after solicitation by defendant Alfred C. Root, and that in a conversation with plaintiff Bourne regarding a discount to be allowed, Bourne stated the discount would be paid through defendant Alfred C. Root. A similar objection and motion to strike was made to this testimony and at the close of the trial it also was stricken from the record. Judgment was entered in favor of plaintiff Bourne, on the complaint in accordance with the stipulation and in favor of both cross-defendants on the cross-complaint. From the whole of this judgment cross-complainants appeal. No contention is made that that portion of the judgment in favor of plaintiff on the complaint is erroneous, from which it follows that that portion of the judgment must be affirmed.

[1] Appellants' sole contention as to their appeal from that portion of the judgment in favor of cross-defendants on the cross-complaint is that the court erred in striking from the record the testimony above set forth. They concede that no direct testimony showing authority in respondent Bourne sufficient to authorize the making of the agreement for employment was introduced and that he had no such authority merely by reason of his position as director and treasurer of the company. See 6a Cal. Jur. 1164. Appellants contend that the corporation having accepted the fruits of the contract through the sale of the cement thereby ratified the action of its agent and is bound thereby. Respondents concede the general rule that where a principal accepts the benefits of an unauthorized contract made by its agent it is bound by the contract but contend the rule only applies where it is shown that the principal had full knowledge of the acts which it is claimed were ratified. That since it was not shown that the respondent corporation had any knowledge of the agreement to pay a commission, it cannot be held for such commission merely because it thereafter accepted the sales made thereunder and that the evidence as to the terms of the contract providing for a commission was therefore properly stricken from the record.

The proper rule to be applied is set forth in Blen v. Bear River, etc., Co., 20 Cal. 602, 81 Am. Dec. 132, wherein it is stated that "a ratification supposes a knowledge of the thing ratified, and in the case of a contract the inference from the ratification is that its provisions were known." The rule is again set forth in Laack v. Dimmick, 95 Cal. App. 456, 273 P. 50, 54, as follows: "When ratification is proved, the inference necessarily follows that it was with knowledge of the facts, and, if there was any mistake or misapprehension, that fact must be shown by the party who claims the mistake or misapprehension."

[2-5] Appellants having shown a ratification of the contract of employment on the part of the respondent corporation, the burden of going forward and showing a lack of knowledge thereupon shifted to the corporation. It follows, therefore, that the testimony was improperly stricken from the record. It is also elementary that in so far as the liability of respondent Bourne is concerned the evidence stricken was unquestionably admissible as against him, the conversation being in the nature of admissions on his part. He contends, however, that in any event the

judgment in his favor must stand, since in his testimony he denied having made any employment agreement with defendant Alfred C. Root, and that therefore the judgment was based on conflicting testimony and should not be disturbed on appeal. All of such conflicting testimony having been stricken from the record, there was at the time of judgment no conflict. We cannot on appeal assume that the court would have found in favor of plaintiff had the contradictory evidence not been stricken.

That portion of the judgment in favor of plaintiff upon the complaint is affirmed. That portion of the judgment in favor of the cross-defendants upon the cross-complaint is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

124 Cal.App. 454

LYNCH v. LYNCH.

Civ. 866, 867.

District Court of Appeal, Fourth District, California.

June 22, 1932.

1. Gifts ⇐4.

Essentials of gift are donor's competency, voluntary intent to make gift, delivery, acceptance, complete divestment of control by donor, and lack of consideration.

2. Gifts ⇐49(6).

Evidence showed intent by donor to make present gift of corporate stock, though donor reserved control as agent.

3. Gifts ⇐29.

Gift of corporate stock is not void because donor reserves to himself right to dividends declared during his lifetime.

4. Gifts ⇐18(2).

Where donor exercises custody and control over property as donee's agent, all other essentials of completed gift existing, gift is not thereby invalidated.

5. Gifts ⇐29.

Sufficient symbolical delivery of stock is made when transfer is noted on corporation's books and new certificate issued in donee's name (Civ. Code, § 324).

6. Gifts ⇐29.

Where donor had stock transferred on corporation's books and had certificate issued in donee's name which donee accepted and donee gave power of attorney to donor, present and completed gift was made (Civ. Code, § 324).

7. Judgment ⇐570(5).

Dismissal not made upon merits was not bar to consideration of complaints in intervention upon retrial of case.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Two actions by Lloyd Lynch against Frank Lynch. From judgment in each case in favor of defendant, plaintiff appeals.

Judgments reversed, and new trial ordered.

Curtis Hillyer and Irve C. Boldman, both of San Diego, for appellant.

Ray M. Harris, of San Diego, amicus curiæ for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent.

SCOVEL, Justice pro tem.

There are two actions involved in this litigation. Judgment was entered in each in favor of the defendant and appeals were perfected from both judgments. Upon stipulation of counsel and an order of this court the appeals have been consolidated for hearing and determination.

It appears that in the year 1918, defendant was the owner of three thousand shares of stock in the Benson Timber Company, an Oregon corporation, and three hundred shares in the Benson Lumber Company, later reorganized as a California corporation. These shares represented three-fifths of the total issued capital stock of the respective corporations. In 1918, the defendant, a man well along in years, decided to give stock in these two companies to certain of his heirs, including the plaintiff, in order that they might during his lifetime receive some benefit from the earnings of the companies and also avoid the payment of inheritance taxes and the expense of probate proceedings at his death. He did not want to lose control of the two companies nor be obligated to pay to the heirs all of the dividends that might thereafter be declared upon their respective shares of stock, as considerable sums of money were necessary for the running of the companies. In order to carry out his plan, therefore, he had certificates issued in the names of the various heirs for the amount of stock that he desired to give to them; the transfer of the stock from himself to the heirs being noted in the stock transfer books of the corporations. Accordingly one certificate for one hundred shares of stock in the Benson Timber Company, and a certificate for ten shares of stock in the Benson Lumber Company, were issued in the name of the plaintiff. During the month of March, 1919, in response to a letter received from defendant, plaintiff came to San Diego. The defendant

informed plaintiff that he was giving him the stock represented by the two certificates, but that he (the defendant) would collect all of the dividends on the stock and pay him interest thereon at the rate of 5 per cent. per annum; that upon his death the total amount of the dividends would be paid from his estate, but if it became necessary he would, if he were able, advance to plaintiff from time to time a portion of the dividends. He further explained to plaintiff that he desired to control the management of both corporations and that it would be necessary for plaintiff to execute a general power of attorney giving him the right to vote the stock. Plaintiff thereupon executed a general power of attorney wherein defendant was made his attorney in fact. Plaintiff was not shown the certificates of stock and at all times thereafter they were held in the possession of the defendant. For a period of some ten years dividends were regularly declared upon the stock, amounting to a total of some $68,000 at the time these actions were filed. During all of this time the dividends were collected by defendant, interest thereon at the rate of 5 per cent. was paid to plaintiff, and, in addition thereto, advancements on the dividends in the sum of approximately $9,000 were paid, defendant executing, but retaining in his possession, notes payable to plaintiff for the amount of the dividends.

Shortly before the institution of these actions plaintiff revoked the power of attorney and thereafter filed the actions seeking, in action Civil No. 866, to recover possession of the above-mentioned certificates of stock, and in action Civil No. 867, an accounting and judgment for the amount of dividends collected and unpaid by defendant.

In answer to the complaint in action Civil No. 866, defendant denied that plaintiff was the owner of the certificates of stock, and alleged that the gifts or attempted gifts thereof were made upon condition that plaintiff would give defendant a general power of attorney authorizing him to vote the shares of stock, that defendant would retain in his possession during his lifetime the stock certificates, that he should collect all dividends paid upon the stock, execute notes thereof payable to plaintiff paying interest thereon at 5 per cent. per annum. Defendant further alleged that plaintiff had broken the conditions and that he therefore elected to revoke the gifts. Defendant filed a cross-complaint in which he alleged practically the same facts set up in his answer, praying that the gifts be annulled and that the interest and dividends already paid be returned.

In answer to the complaint filed in action Civil No. 867, defendant alleged facts similar to those set forth in his answer in action Civil No. 866. He filed also a cross-complaint praying for a cancellation of the gift and return of the dividends and interest.

A complaint in intervention was filed in each action by Georgia A. Lynch, wife of defendant, alleging that the stock given to plaintiff was the community property of herself and the defendant, that she had never consented to the transfer, and that therefore it was void under section 172 of the Civil Code.

The court found the facts to be substantially as alleged by defendant in his answer and cross-complaint, and, as a conclusion of law therefrom, determined that there was no completed gift of the corporate stock from defendant to plaintiff, but that there was a completed gift as to the interest and dividends paid to plaintiff. Judgment was entered declaring defendant owner of the shares of stock and canceling the notes.

As to the complaints in intervention the court found that by reason of the fact that no title to the stock had passed it deemed it unnecessary to make findings with reference thereto and entered judgment dismissing the complaint. No appeal was taken from the judgment dismissing the complaints in intervention; these appeals are from the judgments entered in favor of defendant and cross-complainant on the complaints and his cross-complaints.

[1] Appellant maintains that the finding that the defendant is the owner of the stock, and the judgment based thereon, is not supported by the evidence, and contends that the evidence shows a completed gift. As set forth in 13 Cal. Jur. 32, the essentials of a completed gift are: (1) Competency of the donor to contract; (2) a voluntary intent on the part of the donor to make a gift; (3) delivery, either actual or symbolical, amounting to a transfer of title; (4) acceptance, actual or imputed; (5) a complete divestment of all control by donor; (6) a lack of consideration in return for the gift.

[2] It is conceded that the defendant was competent, that no consideration was given, and that plaintiff accepted the gift. We are of the opinion that the uncontradicted testimony also shows an intent on the part of the defendant to make a present gift. The testimony of defendant himself admits of no other construction. He testified regarding the matter as follows: "It was a question in my mind whether to will all these different relatives a certain amount of my property or whether to give them some stock instead. If I had willed them the property they wouldn't have gotten any benefit until my death, but if I gave them, each of them, stock, then if there were any dividends paid why they would derive some benefits from the dividends or the interest on the dividends. * * * I concluded to give him this stock conditionally, reserving the right to always vote the stock because I had a majority of the stock at that time, and if I gave too much of it

away I would be in the minority and that would put me in a bad position. So I wanted it fixed so I would always control the stock, and with that understanding and the agreement that Lloyd signed and all the rest of them, I transferred the stock and gave it to them conditionally on this agreement." (Referring to the power of attorney.) From this testimony it unmistakably appears that a present gift was intended, the defendant reserving only control over the stock as agent of plaintiff in order to continue the successful operation of the companies during his lifetime. Defendant does not seriously dispute this matter, but does vigorously contend that there was not a sufficient delivery or divestment of control to complete the gift.

[3-6] It will be recalled that a portion of the stock held by defendant was actually transferred on the books of the corporation and a certificate therefor issued in plaintiff's name, defendant merely retaining possession of the certificate. In Jean v. Jean, 207 Cal. 115, 277 P. 313, it was held that under section 324 of the Civil Code a transfer upon the corporation books of shares of stock, together with the issuance of a new certificate, constitutes a prima facie case of transfer sufficient to create a legal delivery of the shares and the fact that the donor may retain the certificate does not necessarily overcome this prima facie showing. The force of this decision is recognized by defendant, but he argues that the prima facie showing of delivery by transfer on the corporation books and the issuance of the certificates in the name of the plaintiff is overcome by the retention of control over the voting rights of the stock and the reservation of the right to collect all dividends declared thereon. It has been decided in Calkins v. Equitable Building & Loan Association, 126 Cal. 531, 59 P. 30, however, that a gift of corporate stock is not voided by the fact that the donor reserves to himself the right to the dividends declared upon the stock during his lifetime.

It will be recalled in the present case, also, that defendant did not reserve to himself the dividends but merely the use thereof during his lifetime, the total amount being payable to plaintiff after the death of defendant. Does the fact then that defendant demanded the right to control the voting power of the stock constitute such a reservation of control as will invalidate the gift? In considering this matter it must be remembered that the right to control the stock was vested in defendant solely by virtue of the power of attorney given to him by plaintiff. In dealing with the stock, either in exercising the voting power incident thereto or otherwise, defendant was acting pursuant to such power and therefore as agent of the plaintiff and not as the owner of the stock. "A reservation by the donor of certain proprietary rights in the subject of the gift, such as the use and enjoyment thereof, is not necessarily inconsistent with the absolute character of the gift, and gifts accompanied by such reservations have been repeatedly upheld." 28 Cor. Jur. 647.

Perhaps the example most illustrative of this rule would be the gift of a parcel of real property with a life estate therein reserved, the right to the use, possession, and enjoyment thereof being retained in the donor as an incident of the life estate reserved. This principle is also announced in 12 Ruling Case Law, 936, as follows: "Under some circumstances, when all of the other requisites of the gift are present the donor may by declarations or otherwise constitute himself trustee of the property for the benefit of the donee, or the retention of possession by a donor may be accounted for by proof of an agreement to pay hire for the property given."

Unquestionably in the present case the defendant intended to control the stock merely as the agent of the plaintiff, otherwise, why was the power of attorney demanded by him? If he were the owner of the property, no power of attorney from plaintiff would have been necessary in order that he might exercise absolute control over the stock. The giving and taking of the power of attorney are wholly inconsistent with any reservation of title or ownership in defendant. So far as we have been able to find, the effect upon a gift of retention of control by the donor as agent for the donee has never been determined in California.

The principle involved, however, has been considered in Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, 950. It there appeared that in the year 1916 the defendant desired to give certain bonds to his minor children. Accordingly the bonds were put in his safety deposit box in a trust company with instructions to the company to collect the coupons and credit the interest to the accounts of the children; each child having a separate account with the defendant as trustee. Upon the wrapper containing the securities for each child there was a memorandum, similar in each instance except as to the name of the child, reading as follows: "Memorandum: Deposited to Hillyer Prentice in the Union & New Haven Trust Company, New Haven, December 25, 1912, held in trust the following: 10 Seattle Electric bonds," etc. For a considerable period of time the money was collected by the trust company and deposited in the respective accounts. The money in these accounts was used to pay for the schooling and current expenses of the children. The defendant later disposed of the bonds and used the proceeds for his own purposes. He afterwards came to San Diego and purchased a parcel of real property, and, becoming finan-

cially involved, he conveyed the real property to the children. The action was filed by his creditors to set aside the conveyance on the ground that it was without consideration and in fraud of creditors. The defendant contended that the conveyance was made to repay the children for the securities which he had disposed of as above set forth. The question as to whether an actual and completed gift of the securities had been made was therefore involved. The court held that no delivery of the bonds was shown since the defendant retained possession thereof, and that the memorandum, being unsigned and containing no words of grant, was insufficient as an assignment. It was further contended that the defendant, by depositing the bonds in the safety deposit box with the memorandum set forth, thereby became a trustee for the children, but the court held that the memorandum was not sufficient to constitute a valid trust in the securities but did recognize that under certain circumstances a donor may make a gift and retain custody and control of the subject of the gift as a trustee.

If a donor may retain custody and control of the subject of the gift as trustee, we can see no reason why such custody and control might not be retained as agent of the donee. We are of the opinion that a donor may retain custody and control over the subject of the gift where such possession and control relates only to the use and enjoyment thereof and does not vest in the donor any interest or title in the property itself, and that where such custody and control is to be exercised by the donor as agent of the donee, all other essentials of a completed gift existing, the gift is not thereby affected or invalidated.

Defendant cites Lefrooth v. Prentice, supra, as contrary to our holding as above set forth. The court there held that the mere deposit of the bonds in the donor's safety deposit box with an unsigned memorandum that they were held in trust for certain donees did not constitute sufficient delivery to vest title thereto in the donees. The subject of the attempted gift was bonds, negotiable by written assignment or by manual transfer without assignment. By retaining custody and control, and without a written assignment, it quite clearly appears that no delivery, either actual or symbolical, was ever made. As set forth in Jean v. Jean, supra, the rule in regard to stocks is that a sufficient symbolical delivery is made when the transfer is noted on the corporation books and a new certificate issued in the name of the donee. The distinction between Lefrooth v. Prentice, supra, and the case at bar is apparent.

We are of the opinion that, when the stock was transferred on the books of the corporation in 1918 and a certificate issued in the name of the plaintiff and accepted by him, and a power of attorney in turn given by him to defendant, a present and completed gift of the stock was made. It therefore follows that the judgment must be reversed.

[7] In remanding the case for retrial certain matters should, however, be mentioned. The court found that at the time the gift was made certain conditions were attached thereto. Since no conclusion of law was made therefrom, the effect upon the gift of such conditions is not involved in this appeal and we do not decide the effect thereof. It will be recalled that the complaints in intervention were dismissed by the trial court without any findings upon the issues of fact raised therein. The dismissal not having been made upon the merits is not a bar to the consideration thereof upon the retrial of the case. Slaker v. McCormick-Saeltzer Co., 179 Cal. 387, 177 P. 155; Hogeberg v. Industrial Acc. Com., 201 Cal. 169, 256 P. 413.

The judgments appealed from are reversed, and a new trial ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

124 Cal.App. 462

INDERBITZEN et al. v. LANE HOSPITAL et al.

Civ. 8018.

District Court of Appeal, First District, Division 1, California.

June 23, 1932.

Rehearing Denied July 23, 1932. Hearing Denied by Supreme Court Aug. 22, 1932.

1. Trial ⇐163.

Motion for nonsuit must state grounds with sufficient particularity to direct attention of court and plaintiff's counsel to particulars in which evidence is insufficient.

2. Appeal and error ⇐241.

Order granting nonsuit will be reversed where none of grounds stated in motion are tenable, though other defects in proof would have justified order.

3. Trial ⇐163.

Specification in motion for nonsuit that allegations of complaint were not sustained *held* too general to support order granting nonsuit.

4. Appeal and error ⇐241.

On appeal from order granting nonsuit on motion specifying generally that allegations of complaint were not sustained and

that charges of negligence were not proved, court is limited to consideration of latter ground, with any incurable defects inherent in action.

5. Appeal and error ⇐241.

Contention, not made ground of motion for nonsuit, that there was no proof of defendants' corporate entities, cannot avail them on appeal.

6. Evidence ⇐31.

Court may take judicial notice of incorporation of Leland Stanford Junior University by special statute (Code Civ. Proc. § 1875).

7. Charities ⇐45(2).

That hospital, sued for tortious treatment of patient, was charitable one, not operated for profit, was affirmative defense, which it had burden of proving.

8. Hospitals ⇐7.

Hospitals are liable for tortious conduct of physicians employed by them to treat inmates.

9. Hospitals ⇐7.

Hospital permitting unlicensed medical students to experiment on and treat patient, paying for medical attention, without her consent, is liable for resulting damages.

10. Appeal and error ⇐241.

Inadequacy of proof that men examining patient in hospital were medical students cannot be considered on appeal from order granting nonsuit in action against hospital for damages, where not made ground of motion for nonsuit.

11. Evidence ⇐52.

While impropriety of particular medical treatment can generally be established only by expert medical testimony, such evidence is unnecessary where matter is one of general knowledge.

12. Evidence ⇐14.

Court will take judicial knowledge of danger of infection from vaginal examination of woman, before childbirth, with unsterilized hands.

13. Appeal and error 241.

Absence of evidence in action against hospital that infection of plaintiff's uterus was proximately caused by unlicensed medical students' examination with unsterilized hands *held* not available to defendant on appeal from order granting nonsuit, where not made ground of motion therefor.

14. Appeal and error ⇐927(2).

Court cannot presume on appeal from order granting nonsuit in action against hospital that repeated examinations of woman before childbirth by ten or twelve men was necessary and proper.

15. Hospitals ⇐8.

Medical testimony as to impropriety of repeated examinations of female patient in hospital by ten or twelve men without her consent *held* unnecessary to establish such fact.

16. Hospitals ⇐7.

Repeated examinations of female patient in hospital by ten or twelve men against her objections constituted assault or trespass to her person, entitling her to substantial damages.

17. Assault and battery ⇐10.

Physician or medical student has no more right than layman needlessly and rudely to lay hands on patient against her will.

18. Hospitals ⇐8.

Woman repeatedly examined at hospital by ten or twelve men against her objections before childbirth *held* entitled to recover damages from hospital for assault as against contention that case was not tried on such theory, where complaint alleged and evidence was offered to prove such fact.

19. Appeal and error ⇐927(3).

On appeal from order granting nonsuit, court must take evidence most strongly in plaintiff's favor.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Julia Inderbitzen and husband against the Lane Hospital and others. From an order granting a nonsuit, plaintiffs appeal.

Reversed.

Superseding opinion in 7 P.(2d) 1049.

Keyes & Erskine, of San Francisco (Lionel Browne, of San Francisco, of counsel), for appellants.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal by plaintiffs, husband and wife, from an order of the trial court granting a nonsuit at the close of plaintiffs' evidence. The action was one for damages for alleged tortious treatment of the appellant wife in connection with her delivery of a child in a hospital alleged to have been operated by respondents. The evidence shows that Mrs. Inderbitzen was received into the hospital for the purpose of receiving the hospital and medical attention necessary in the delivery of a child; that she was shown into a room where she was undressed and examined by a young man whom she took to be a medical student, and, upon her demanding

a doctor, the young man left the room and returned with an older man, who subjected her to a rectal and vaginal examination after taking his hands from his pockets and without washing or sterilizing them; that she was then subjected to a similar examination by the younger man, also without sterilizing his hands; that she was taken to the delivery room where she was examined intimately two or three times each by at least ten or twelve young men whom she took to be students; that several of these persons rolled her over and poked and prodded about her body several times; that she screamed and protested repeatedly at this treatment and "whenever I screamed and protested they just laughed, told me to shut up." There was evidence by a physician who examined Mrs. Inderbitzen two months later that there was then a tear in her uterus which was infected and discharging profusely.

The motion for nonsuit was in the following language: "I move for nonsuit on the grounds that the allegations of the second amended complaint have not been sustained, and upon the further ground that the charges of negligence and carelessness have not been proved."

[1-4] A motion for nonsuit must state the grounds with sufficient particularity to direct the attention of court and counsel for the plaintiff to the particulars in which the evidence is insufficient so as to enable counsel to supply the omitted evidence, if that can be done (Moore v. Steen, 102 Cal. App. 723, 725, 283 P. 833; Moore v. Moffatt, 188 Cal. 1, 5, 204 P. 220; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322; Palmer & Rey v. Publishing Co., 90 Cal. 168, 27 P. 21), and, where a nonsuit has been granted, the court on appeal will reverse the order if none of the grounds stated in the motion are tenable, even though there may be other defects in the proof which would have justified the granting of the nonsuit if they had been specified in the motion. Raimond v. Eldridge, 43 Cal. 506; Moore v. Moffatt, supra. This is for the sufficient reason that if the defect had been clearly pointed out plaintiff might then have cured it by the introduction of additional evidence. It is clear that the specification, "that the allegations of the second amended complaint have not been sustained," was altogether too general to support the order granting the nonsuit. Dawson v. Tulare Union High School, 98 Cal. App. 138, 140, 276 P. 424; Henley v. Bursell, 61 Cal. App. 511, 215 P. 114; Brown v. Sterling Furniture Co., supra. It follows that we are limited on this appeal to the consideration of the ground that "the charges of negligence and carelessness have not been proved," together with any defect which may be inherent in the action, and cannot be cured (Warner v. Warner, 144 Cal. 615, 78 P. 24) if any such exists. With these rules in mind, we shall proceed to a consideration of the particular reasons advanced against, and in support of, the order appealed from.

[5-10] Respondents contend that there was no proof of the corporate entity of Lane Hospital and Stanford Hospital. This was not made a ground of motion for nonsuit, and cannot now avail them. Besides an answer was filed on behalf of the trustees of Leland Stanford Junior University, operating such hospital. We may take judicial notice of its incorporation by special statute. Code Civ. Proc. § 1875.

It is further urged that the hospital is a charitable one and not operated for profit, but this is an affirmative defense, the burden to prove which rests with the defendant. Lewis v. Young Men's Christian Ass'n, 206 Cal. 115, 273 P. 580. Respondents cite Pilger v. City of Paris Dry Goods Co., 86 Cal. App. 277, 261 P. 328, as establishing that a hospital corporation cannot be liable for the malpractice or other tortious conduct of a physician. The case was one against a department store which had rented space to a chiropodist who injured the plaintiff's foot in treating her. There is language in the case which would support counsel's contention, although the case might well have been decided on the ground that the chiropodist was a tenant and not an agent or employee. However, both before and since the decision of the Pilger Case, hospitals have been held liable in this state for the tortious conduct of physicians employed by them to furnish treatment to their inmates [Brown v. La Societe Francaise, 138 Cal. 475, 71 P. 516; Bowman v. Southern Pac. Co., 55 Cal. App. 734, 204 P. 403; Bellandi v. Park Sanitarium Ass'n (Cal. Sup.) 6 P.(2d) 508] and there is substantial authority from other jurisdictions to the same effect. Jenkins v. Charleston Gen. Hospital & Training School, 90 W. Va. 230, 110 S. E. 560, 22 A. L. R. 323; Gilstrap v. Osteopathic Sanatorium Co., 224 Mo. App. 798, 24 S.W. (2d) 249; Sawdey v. Spokane Falls & N. R. Co., 30 Wash. 349, 70 P. 972, 94 Am. St. Rep. 880; Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 S. E. 481; Texas & Pacific Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173; Arkansas Midland R. Co. v. Pearson, 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 317; Carver Chiropractic College v. Armstrong, 103 Okl. 123, 229 P. 641; Harber v. Gledhill, 60 Utah, 391, 208 P. 1111. This court in deciding the Pilger Case did not cite or discuss the earlier cases in this state cited above, nor in the Bellandi Case did the Supreme Court cite or refer to the Pilger Case. Under the circumstances, we feel bound to follow the rule announced by the Supreme

Court in Brown v. La Societe Francaise, supra, and Bellandi v. Park Sanitarium, supra. There is a further reason why this point cannot be urged by respondents. It was plaintiffs' contention that most of the men who examined and treated Mrs. Inderbitzen were students and not licensed physicians. Whether a hospital could be held liable for the tortious conduct of physicians or not, it certainly would render itself liable to a patient who had paid it for medical attention if it permitted unlicensed students to experiment upon her and treat her without her consent. While the proof that these men were students may not have been adequate, this was not made a ground of the motion for nonsuit, and so cannot be considered on this appeal.

[11-13] Coming to the one ground which respondents did specify, i. e., that there was no proof of carelessness or negligence, we are satisfied that it was not well taken. Mrs. Inderbitzen testified that she was examined through the rectum and vagina by two men with unsterilized hands. While it is the general rule that the propriety or impropriety of particular medical treatment can only be established by expert medical testimony, this rule is subject to the exception that, if the particular matter is one of general knowledge, expert evidence is not necessary. In Barham v. Widing, 210 Cal. 206, page 216, 291 P. 173, 177, the Supreme Court held that expert testimony was not necessary to establish that it constituted negligence for a dentist to administer a local anæsthetic for the purpose of extracting a tooth without sterilizing the needle or the flesh into which it was inserted, the court saying: "The court will take judicial knowledge of the necessity to use ordinary care to procure sterilization under such circumstances." We will likewise take judicial knowledge of the danger of infection to a woman about to give birth to a child from a vaginal examination performed with unsterilized hands. Two months afterwards Dr. Hughes found Mrs. Inderbitzen with an infected uterus discharging profusely. There was no evidence that this was proximately caused by these examinations, but that was not made a ground of motion for nonsuit, and, if it had been, the proof might have been supplied.

[14, 15] The repeated examinations of Mrs. Inderbitzen while she was in labor by ten or twelve different men which caused her to scream and protest, and the levity and rudeness displayed in laughing at her and telling her to shut up, present anything but a pretty picture. In Stone v. William M. Eisen Co., 219 N. Y. 205, 114 N. E. 44, 45, L. R. A. 1918B, 291, the New York Court of Appeals said of a contract for treatment of a woman patient: "Decent and respectful treatment is implied in the contract from the confidential relation of the parties, and especially because of the necessary exposure of the person required of the patient in connection with the services to be performed pursuant to the contract." It is revolting to the sense of decency to think of a woman in confinement, necessarily disrobed, being subjected to what must have been at least thirty or forty most intimate physical examinations at the hands of ten or twelve different men, and being treated with disrespect when she protested at such treatment. Counsel for respondents ask us to presume that this treatment was necessary and proper, or at least say that we cannot hold that it was improper, in the absence of medical testimony to that effect. We think that common sense will tell any reasonable person that such treatment at the hands of so many is unnecessary and improper, and "that scientific knowledge is not essential for the determination of an obvious fact." Bellandi v. Park Sanitarium Ass'n, supra, page 512 of 6 P.(2d)

[16, 17] This treatment, at least after Mrs. Inderbitzen had objected to it, constituted an assault upon her or trespass to her person. A physician or a medical student has no more right to needlessly and rudely lay hands upon a patient against her will than has a layman. That the jury might have awarded substantial damages for these assaults seems clear from the distress of mind indicated by Mrs. Inderbitzen repeatedly screaming and protesting.

[18] Counsel for respondents argue, however, that the case was not tried on the theory of assault. The complaint alleged these facts, the evidence was offered to prove them, and nothing appears in the transcript to lead us to believe that plaintiffs did not rely upon them to establish a cause of action.

[19] It should be understood that throughout this opinion we have taken the evidence most strongly in plaintiffs' favor as we must where an appeal is taken from a nonsuit. We wish it understood that we are expressing no opinion as to the weight of the evidence, or its truth or falsity.

The order appealed from is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

SMITH v. O'DONNELL.

L. A. 11817.

Supreme Court of California.

June 30, 1932.

Rehearing Denied July 29, 1932.

1. Carriers ⇐235, 280(1).

Person operating airplane for purpose of carrying for hire passengers applying for ride *held* "common carrier," with duty of exercising highest degree of care (Civ. Code, § 2168).

[Ed. Note.—For other definitions of "Common Carrier," see Words and Phrases.]

2. Carriers ⇐244.

Prospective customer invited to take ride on airplane *held* "passenger," and as such entitled to highest degree of care.

Passenger had been solicited for business for machine shop by employee of owner and operator of airplane, and in developing good will for purpose of securing business, he was invited to take a ride in the airplane, which he accepted, with resulting injury in collision.

[Ed. Note.—For other definitions of "Passenger," see Words and Phrases.]

3. Carriers ⇐316(1).

Presumption of negligence on part of carrier arises when occurrence is such as does not ordinarily happen without negligence.

4. Carriers ⇐321(21).

Instruction authorizing application of doctrine of res ipsa loquitur in respect to injury to passenger in airplane collision *held* proper.

5. Carriers ⇐284(4).

Operator of airplane is not liable for injury to passenger in collision with another plane in case accident occurred solely by reason of other's negligence.

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by James W. Smith against Lloyd O'Donnell, also known as J. L. O'Donnell. Judgment for plaintiff, and defendant appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 5 P.(2d) 690.

Kelby & Lawson, of Los Angeles, for appellant.

Todd, Pawson & Watkins and L. D. Uhlman, all of Long Beach, for respondent.

Newlin & Ashburn, W. Jefferson Davis, O'Melveny, Tuller & Myers, and Walter K. Tuller, all of Los Angeles, Frank A. Flynn, of San Francisco, and Haight & Trippet, Oscar A. Trippet, and Walter L. Bruington, all of Los Angeles (James, Brann & Rowe and Harmon D. Skillin, all of San Francisco, of counsel), amici curiæ.

PER CURIAM.

The judgment in this action in favor of the plaintiff was reversed by the District Court of Appeal of the Second Appellate District, Division 2; the opinion having been written by Mr. Justice Thompson and concurred in by his associates. Notwithstanding the reversal of the judgment, the appellant petitioned to have the action transferred to this court for a hearing herein. Due to the novelty of the questions involved, the controversy having arisen out of a collision between two airplanes, we granted appellant's petition in order that these questions might be given further study and consideration. Since the granting of said order, the cause has been orally argued by counsel for the respective parties and additional briefs have been filed by them, as well as by certain amici curiæ appearing herein. The argument, both oral and printed, has been given our most careful attention. Our study and examination of the case thus presented lead us to the same conclusion which was reached by the District Court of Appeal. The reasons given by that court in reaching its conclusion appear to us to be logical and reasonable and the opinion based upon sound legal principle. We therefore adopt the opinion of the District Court of Appeal in this case as the opinion of this court upon the matters therein discussed and decided. Said opinion is as follows:

This is the companion case to that of Ebrite v. Crawford, 5 P.(2d) 686, this day determined and is an appeal by the defendant from a judgment against him and in favor of the plaintiff in the sum of $2,000 and costs. In addition to the facts set forth in the Ebrite Case, it is necessary to note the following: O'Donnell was not engaged in carrying passengers from one terminal, i. e., from the Long Beach Municipal Airport to another fixed landing field, but rather of carrying "Two passengers for five dollars. * * * Up and down the road toward the ocean." In other words, he was engaged "in the aviation business" for the purpose of taking those who might apply on a flight from the municipal field toward the ocean and back again, landing on the field whence he started. He also maintained and operated a machine shop. On the day in question a Mr. Bradford, working for the appellant, called on respondent for the purpose of getting respondent, and through him respondent's brother, to give them some work for the machine shop. At the sugges-

tion of Bradford they journeyed to O'Donnell's place of business for the purpose of making respondent acquainted with O'Donnell. While there Bradford and appellant asked respondent to go for a ride. He accepted and was injured in the collision which followed.

The trial judge gave four instructions, all based upon the propositions that the appellant was a common carrier and that the doctrine of res ipsa loquitur was applicable to the situation. The appellant asserts, not only that he was not a common carrier and that the doctrine should not have been applied, but also that the facts do not justify the conclusion that respondent was a passenger.

[1] We therefore turn our attention to the question whether the appellant was a common carrier, and liable as such. Counsel for appellant apparently grounds his argument in two thoughts: First, that there must be "the carriage of the thing or person from one place to another on terra firma" in order to constitute a common carrier; and, second, that "so new a craft, so new an industry," ought not to "be so classified and charged with such a liability." His first assertion assumes as a premise and as a reason for the conclusion, the conclusion itself, and the second furnishes no legal basis for the desired result. If the craft be employed as a common carrier vehicle, it is not a reason for applying different rules of liability to say that it and the industry are new. If too new, a conclusion we think unfounded, should not its owner either decline to use it for the purpose, or assume the liability incident to the use to which he puts it? Our attention has not been directed to any case wherein this question was involved, nor do we know of any in this jurisdiction. However, we have found two authorities from other forums. The first is that of North American Acc. Ins. Co. v. Pitts, 213 Ala. 102, 104 So. 21, 23, 40 A. L. R. 1171. In that case a pilot named Lieutenant Albert Whitted visited at Camp Walton, a summer resort in Florida, over the week-ends. And while so visiting he took passengers up for short flights over and around the bay, for hire, and by special contract would carry others from the resort to Pensacola and other points. To quote the opinion in part, it is said: "He had the right to take only such persons as he saw fit; he took only white people, would not take negroes, or intoxicated persons; and it was generally understood that he was under no duty to take up passengers or make any trips unless it pleased him, or he saw fit to do so." The Supreme Court of that state determined that Whitted was not operating his craft as a common carrier, but as a private carrier of passengers, basing its decision largely upon the grounds that the trips in the air were made by special arrangement, and that he did not and would not take all who applied. It is to be noted further that he had no established business, but operated at his own convenience during the week-end visits. The same collision was under the consideration of the United States Circuit Court of Appeals in the second case, that of Brown v. Pacific Mutual Life Ins. Co., 8 F.(2d) 996, 997, where the same result was reached by similar reasoning; the court saying: "He operated on such days, at such hours, and under such conditions as pleased him, and did not pretend to maintain regular schedules." The essential difference between the instant case and the operations of Lieutenant Whitted is that here the appellant maintained a regular place of business for the express purpose of carrying those who applied. Section 2168 of our Civil Code defines a "common carrier" as follows: "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." Under the wording of this definition it is plain that Lieutenant Whitted was not a common carrier, and it is also almost equally certain that the appellant was, the difference being found in the language, "Everyone who offers to the public to carry, etc." In Forsyth v. San Joaquin Light, etc., Corp., 208 Cal. 397, 281 P. 620, 623, the court, after quoting the Code section, employed the words found in 4 California Jurisprudence at page 815, as follows: "'Private carriers are such as carry for hire and do not come within the definition of common carrier. Certain prominent characteristics mark the difference between these two classes. To impress upon one the character of common carrier it must be shown that he "undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action."'" It will thus be seen, as is said in Nugent v. Smith, L. R. 1, Common Pleas Div. 19 and 423, and quoted with approval in Georgia Life Ins. Co. v. Easter, 189 Ala. 478, 66 So. 514, 516, L. R. A. 1915C, 456, that: "The real test whether a man is a common carrier, whether by land or water" (and we might now add "or air"), "therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he had room, the goods of all persons indifferently who send him goods to be carried." Under this rule the books contain decisions to

the effect that any of the following may be common carriers, viz., stagecoaches, busses, automobiles, hackney coaches, cabs, drays, carts, wagons, sleds, elevators, and in fact almost every vehicle which can be employed for the purpose. There is an interesting and instructive case, that of O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 1007, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407, in which the question was as to whether a scenic railway was a common carrier. The court said: "Why is not this rule [the rule of liability applying to common carriers] applicable to those operating cars upon a scenic railway, such as the one here in question? The passengers carried therein are subject to great risk of life and limb. The steep inclines, sharp curves, and great speed necessarily are sources of peril. The argument of appellant that the character of this scenic railway was of itself notice of the danger to its passengers; that its presence and operation involved no danger to those who kept away from it; that in this regard it differed from steam or electric railways or passenger elevators in buildings; and that therefore such a railway should not be held a common carrier—does not appeal to us. Should the motive which causes a person to take passage make any difference as to the degree of responsibility with which the carrier is charged? Passenger elevators are frequently operated in buildings in order to convey persons to some vantage point where they can overlook a great city or some other object of interest, and trips on electric cars are often made solely for pleasure. * * * We think, not only by fair analogy, but on reason and sound public policy, appellant should be held to the same degree of responsibility in the management of the railway in question as a common carrier." To the same effect, see Sand Springs Park v. Schrader, 82 Okl. 244, 198 P. 983, 22 A. L. R. 593, and Best Park & Amusement Co. v. Rollins, 192 Ala. 534, 68 So. 417, Ann. Cas. 1917D, 929. We are conscious of the fact that there are some authorities contra, but we think the better reason supports the quotation, and that every consideration of public policy requires it. There can be no doubt, under the general law of common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. The industry itself should be desirous of assuring the public that those who accept their invitation to travel by air will be accorded that protection which may be afforded by the exercise of "the utmost care and diligence for their safe carriage." See section 2100, Civ. Code. It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier. To indulge for a moment in the speculation which follows in the wake of the statement just made, if there are those in the business of carrying passengers in the air to-day (and we do not say there are) who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service. The appellant's testimony is that he was in the aviation business principally for the "passenger flying," and it is also established that he maintained a definite place of business to that end; and that he had a fixed charge for the trip "up and down the road toward the ocean." We have no doubt that the trial judge adopted the correct yardstick of care when he instructed the jury that it was the duty of appellant to "exercise the highest degree of care for the safety of his passengers," provided of course that the respondent was a passenger.

[2] And to that question we now direct our attention. We are largely guided in our solution of this problem by the case of Walther v. Southern Pacific Co., 159 Cal. 769, 116 P. 51, 53, 37 L. R. A. (N. S.) 235. In that case Walther, an employee of the defendant, and absent on leave, was traveling on a pass issued to him as an employee and containing a provision purporting to relieve the company of liability for negligence, even though gross. The court held the releasing clause to be void under section 2175 of the Civil Code, and although the plaintiff was carried without money consideration, applied the rule of care required of common carriers. It is there said: "As such [a common carrier], under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but at the time of this accident at least it could legally waive any of these requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration. But, on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously, See Rogers v. Kennebec Steamboat Co., supra [86 Me. 261, 29 A. 1069, 25 L. R. A. 491]. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see Ohio & Miss. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in Sessions v. Southern Pacific

Co. [159 Cal. p. 599], 114 P. 982, a mere trespasser on the vehicle. The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law." This case is in line with Champagne v. A. Hamburger & Sons, 169 Cal. 693, 147 P. 954, and in view of the fact that appellant here was interested in developing the good will of the respondent for the purpose of securing business, the latter case is also very much in point. Taken together, they bring us to the conclusion that respondent was a passenger at the time of the collision.

As already indicated, the court in effect instructed the jury that if by a preponderance of the evidence the plaintiff established that he was a passenger and that a collision occurred between the plane in which he was riding and another as the result of which he was injured, it was then incumbent on the defendant to prove, either that he was free from negligence, or that plaintiff could have avoided the injury by the exercise of ordinary care. In other words, the court instructed the jury to apply the doctrine of res ipsa loquitur to the accident for the purpose of assisting it in determining liability. Appellant's objection to this instruction is approximately the same as it is to those already discussed. He has some other objections, as, for instance, he says that the court assumed in one of the two instructions upon the question that plaintiff was a passenger. This assertion, however, is untenable because the court specifically said that the burden was upon the plaintiff "throughout the whole case" to establish that he was a passenger. He also says that the defense of contributory negligence is not open to the carrier if plaintiff was in fact a passenger and therefore the court might as well have instructed the jury to return a verdict for plaintiff. This position cannot be maintained. In the absence of the slightest suggestion of negligence on the part of the respondent, the instruction is the same as though it ended with the statement that it was incumbent on appellant to show that he was free from negligence. Furthermore, the contention in this particular is concluded by such authorities as Bonneau v. North Shore R. Co., 152 Cal. 408, 93 P. 106, 125 Am. St. Rep. 68, and Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243.

[3, 4] The question really is whether the doctrine was applicable under the facts proved. It should be remembered that the injury was occasioned by a collision in the air with the plane of Ebrite. The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can the most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence. O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, 676; Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 341, 73 P. 164. In other words, as is said in the first-cited case: "* * * To justify its application in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. For this reason the rule that the accident speaks for itself and prima facie shows negligence has been held inapplicable in many actions by an employee against his employer to recover damages for injuries sustained by the employee in the course of his employment." The rule has been most frequently applied in common carrier cases where injury has occurred to a passenger. (See Bush v. Barnett, 96 Cal. 202 [31 P. 2]; and 19 Cal. Jur. p. 714), because as is said in Housel v. Pacific Electric Ry Co., 167 Cal. 245, 139 P. 73, 75, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665: "The reason for the application of the doctrine in such cases appears to be practically as stated in this quotation, viz., that, in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercised such care, and that ordinarily when such an accident occurs it is due to failure on the part of the person operating the car to use the proper degree of care in so operating it, or, in other words, to 'the manner in which defendant used or directed the instrumentality under its control.'" The language is peculiarly apt in the instant cause. If the proper degree of care is used, a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury.

[5] For reasons now to be stated, the case, however, must be reversed. If the defendants successfully established under proper instructions that they were not guilty of any negligence, and that the accident occurred solely by reason of the negligence of Ebrite,

then the defendants were not answerable in damages. We have determined in the Ebrite Case that the instructions given were improper and therefore there was no proper guide by which the jury could determine whether the collision was caused solely by the negligence of Ebrite.

The judgment is reversed.

215 Cal. 724

EBRITE v. CRAWFORD et al.

L. A. 11818.

Supreme Court of California.

June 30, 1932.

Rehearing Denied July 29, 1932.

1. Municipal corporations ⇐721(1).

City had extraterritorial power necessary to regulate and lay down rules governing use of municipally owned airport lying partly without city (St. 1927, p. 485, § 1 et seq.).

2. Trial ⇐253(4).

Instruction respecting liability for injuries in collision between airplanes *held* erroneous as ignoring possibility of negligence on part of one pilot.

Instruction was that, if jury believed from evidence that immediately before collision defendant was at a greater height than plaintiff and that he was behind plaintiff's plane and that plaintiff was not taking off, but was preparing to land, they should return a verdict for plaintiff without mention of any acts of negligence on part of plaintiff which might relieve defendant from liability.

3. Trial ⇐253(7).

Formula instruction must contain all elements essential to recovery.

4. Trial ⇐253(4).

Instruction, in action to recover for injuries in airplane collision, respecting contributory negligence that would prevent recovery, *held* properly refused as too narrow.

Instruction was to effect that, if jury found that plaintiff had touched ground with landing gear of plane for purpose of making student landing, or was piloting plane in such manner that his conduct in that respect would lead defendant to believe he was making or attempting to make a student landing, in either of those events they would find for defendant.

5. Trial ⇐252(8).

Instruction, in action to recover for injuries in airplane collision respecting doctrine of last clear chance, *held* erroneous as without support in evidence.

6. Negligence ⇐139(1).

Instruction, in action to recover for injuries in airplane collision, setting out ordinance, *held* properly refused as confusing.

Instruction set out provision of ordinance respecting duty of plane at higher level to avoid collision with aircraft at lower level, including definition of overtaking aircraft as every aircraft coming up with another aircraft from any direction more than 110 degrees from ahead of the latter or in such position with reference to the aircraft that it was overtaking that at night it would be unable to see either of aircraft's side lights, which was hardly understandable by ordinarily intelligent persons not versed in science of engineering.

7. Trial ⇐252(8).

Instruction, in action to recover for injuries in airplane collision, respecting ordinance provision requiring due caution in operation, *held* erroneous as inapplicable.

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Alva E. Ebrite against Ray Crawford and another. Judgment for plaintiff, and defendants appeal.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 5 P.(2d) 686.

Kelby & Lawson, of Los Angeles, for appellants.

Todd, Pawson & Watkins, of Long Beach, for respondent.

Haight & Trippet, Oscar A. Trippet, and Walter L. Bruington, all of Los Angeles, amici curiæ.

PER CURIAM.

This is a companion case to the case of Smith v. O'Donnell, 12 P.(2d) 933, this day decided. While the same questions are not involved here as arose in the Smith Case, the two actions grew out of the same collision of two airplanes and are predicated upon the same state of facts. They were tried together, and were decided at the same time by the District Court of Appeal. Due to the fact that the two actions were so closely related, we ordered, upon the petition of the appellants, a transfer of the present action at the same time we granted a hearing herein of the Smith Case. The principal argument, since these two actions have been before this court, has been directed to the Smith Case.

In our opinion nothing particularly new has been presented to this court by counsel respecting any question involved in the instant action that was not before the District Court of Appeal. We are satisfied with the opinion and decision of that court in this case, and we approve and adopt the same as the opinion of this court. As in the Smith Case, the opinion in this case was written by Mr. Justice Thompson and concurred in by his associates. It is as follows:

The defendant Lloyd O'Donnell during February, 1928, and for some time prior thereto, was engaged in the business of carrying passengers for hire in aeroplanes and of giving flying lessons to students, and to that end maintained his place of business at the Long Beach Municipal Airport. Ray Crawford was an employee of O'Donnell's and at the time of the collision which gave rise to this litigation was acting within the scope of his employment. The respondent Ebrite was engaged in a like enterprise. The Long Beach Municipal Airport is approximately 2,900 feet wide from north to south, and for a distance of about 2,200 feet from the west to east, and at this point narrows to about 200 feet and continues on easterly 4,500 feet or thereabouts. Intersecting the narrow portion of the field at a point about 2,700 feet easterly of the wide part is a ditch or drainage canal. This stretch of the field, i. e., the plot 2,700 by 200 and lying easterly of what we may call the main airport and westerly of the ditch was used by pilots for the purpose of giving landing lessons to students. Just previous to the collision Ebrite and a student had taken off from the main field, risen to an altitude of about 900 feet, and after turning had descended to that portion of the field already indicated until the landing wheels touched the ground, whereupon the motor had been opened up and they had risen to repeat the operation. Thrice they had landed. On the fourth occasion, according to the testimony of Ebrite he came down to an altitude of about 50 feet, where he leveled off and flew directly westward for the purpose of making his final landing on the main field, and while so flying the airplane driven by Crawford descended upon and collided with his plane. Crawford testified that he was coming onto the field and that at an elevation of about 1,500 feet he saw Ebrite on the ground just westerly of the ditch; that at 900 feet he made observations to see if any planes were in his way; that the next he saw was Ebrite's ship crashing through his own right wing in an upward direction. Both planes fell on the narrow runway at a distance of from 700 to 800 feet easterly of the main field. The jury returned a verdict in favor of the plaintiff to compensate him for the damage to his airplane and the injuries sustained personally. This is an appeal by the defendant O'Donnell from the judgment entered on the verdict.

The first reason assigned for a reversal of the judgment is that the court misinstructed the jury as follows: "The court instructs you that if you believe from the evidence that immediately before the collision, the defendant Ray Crawford was at a greater height than the plaintiff Ebrite and that he was behind the Ebrite plane and that the plaintiff Ebrite was not taking off but was preparing to land, then you shall return a verdict for the plaintiff Ebrite and against the defendants Crawford and O'Donnell."

Appellant attacks this instruction in two particulars. He says that the conditions mentioned therein constitute no "evidence of negligence," and also that it omits facts in controversy material to the defense and entirely ignores the question of contributory negligence, which defense was pleaded. The respondent, however, justifies the instruction as being the substance of sections 10i and 10m of an ordinance of the city of Long Beach, which was introduced in evidence. Those sections of the ordinance read as follows: Section 10i. "Anything in this ordinance to the contrary notwithstanding, an aircraft in the act of landing shall always have the right of way." Section 10m. "In the case of aircraft approaching aerodromes or sea harbors for the purpose of landing, the aircraft flying at the greater height shall be responsible for avoiding the aircraft at a lower level and as regards landing shall observe the rules for an overtaking aircraft for passing." The section which gives the rules for overtaking craft is involved in another of the instructions, but we give it here to fully explain the one now under consideration. It reads: "Any motor driven aircraft overtaking any other aircraft shall so alter its course as to pass to the right of such overtaken aircraft and must not pass by diving. Every aircraft coming up with another aircraft from any direction more than one hundred ten (110) degrees from ahead of the latter or in such a position with reference to the aircraft which it is overtaking that at night it would be unable to see either of that aircraft's side lights, shall be deemed to be an overtaking aircraft and no subsequent alteration of the bearing between the two aircraft shall make the overtaking aircraft a crossing aircraft within the meaning of these rules, or relieve it of the duty of keeping clear of the overtaken aircraft until it is finally passed and clear."

[1] The appellant replies to this contention that the accident occurred outside the city limits of Long Beach, the easterly city limits being westerly of the point on the narrow portion of the field above which the machines

collided. This argument of appellant cannot be sustained for the reason that the city of Long Beach had extraterritorial power necessary to regulate and lay down rules governing the use of the municipally-owned airport, lying partly within and partly without the city. By act of the Legislature approved April 28, 1927 (Stats. 1927, p. 485), California municipalities were authorized and empowered to purchase, lease, or otherwise acquire land for and to operate airports or flying fields and in connection therewith "to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport." Section 4. In addition to the implication which necessarily flows from the quoted language of the statute, it should be observed as is said by the Supreme Court in Re Blois, 179 Cal. 294, 176 P. 449, 451: "* * * Municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality." And it requires no great meditation to realize how strange an anomaly it would be to say that the city might own an airport adjoining its boundaries, and yet be without the power to regulate the manner of its use. For other statements of the right of the city to exercise extraterritorial jurisdiction when necessary to the proper conduct of its affairs, see Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702; 18 Cal. Jur. 803; and case note to Brown v. Cle Elum, 55 A. L. R. p. 1175–1186.

[2, 3] However, the instruction was erroneous. It ignores the possibility of negligence on the part of Ebrite, and in effect says that proof that Crawford was above and behind the plane of Ebrite at a time when the latter was preparing to land, coupled with proof of the collision, is conclusive upon the question of negligence. The respondent in effect recognizes the error when he says: "It is a well known principle in the law of negligence that infraction of a penal law or ordinance is prima facie evidence of negligence." We may assume in accordance with the intent of the ordinance that the lower landing plane had the right of way and that it was the duty of the higher rear plane to pass to the right of and avoid the lower ship, and yet we can conceive the happening of many things not mentioned in the instruction which might as matters of fact relieve the latter of liability, as, for example, the very thing which the defendant claimed herein, to wit: That plaintiff was apparently preparing to land, suddenly changed his mind, and "zoomed" into the air and into the defendant's ship, without possibility of avoidance on the part of the defendant's plane. It is a well-known rule of law that a "'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law." Douglas v. So. Pac. Co., 203 Cal. 390, 264 P. 237, 238, and a long list of authorities there cited. We cannot agree with respondent that the words "preparing to land" saves the instruction. It would be more debatable had the phrase read, "was in the act of landing," which is the language of the ordinance, but "preparing to land" leaves too broad a field wherein to wander. It might easily be reasoned that he was preparing to land from the time he started his descent even though he changed his course and attempted temporarily to take to higher levels. It is a well-known fact that airplanes do not always land on the first attempt; that the pilot may judge the conditions therefor, when near the earth, to be unfavorable, in which event he immediately increases the speed of his propeller and ascends for the purpose of again making an attempt to land safely. Whether he should be deemed negligent in such maneuvers would depend largely upon the surrounding conditions. That he could give every appearance of landing, lull the pilot of a higher plane into a false sense of security, and then without warning project himself into the exact line of flight of the other plane, and his act, in so doing, not be called into question is a conclusion we very much doubt. Whether there was negligence in this particular, or whether the defendants were guilty of negligence in relying upon appearances, bearing in mind the duty of the overtaking plane to avoid a collision, and also remembering that, unlike other vehicles of transportation, airplanes, so long as they are in midair, must keep traveling, are questions which should have been left to the jury under appropriate instructions.

[4] The appellant next complains because the court refused to give an instruction requested by him as follows: "If you find from the evidence that at the time of the last circle of the field by the plaintiff, Ebrite, that he touched the ground with the landing gear of his plane for the purpose of making a student landing, or if you further find that he was piloting his plane in such a manner and under such circumstances that his conduct in that respect would lead the defendant, Crawford, to believe that he was making, or attempting to make, a student landing, then, in either of those events, if you find that either of them did so, of course your verdict will be for both of the defendants."

For similar reasons the court very properly rejected the proffered instruction. It seems obvious from what we have already said that had the instruction been given it would have restricted the jury to an altogether too narrow field of deliberation. In addition, "con-

tributory negligence" was defined to the jury and the jury properly instructed with respect thereto.

[5] The court instructed the jury upon the doctrine of the last clear chance, and the appellant says that in so doing it committed error because the evidence failed to furnish a basis for its application. There is testimony which is sufficient to have warranted a finding by the jury that prior to the collision the plaintiff was guilty of negligence and by reason thereof had placed himself in a position of great danger from which, the jury was justified in believing, he could not extricate himself by the use of ordinary care, because he was oblivious thereto; but we have failed to find any evidence that the appellant knew of this perilous situation. There is evidence which, if believed, would justify the conclusion that by the exercise of ordinary care the appellant should have known of the situation and been able to avoid the collision by the use of ordinary care. The question then is this: Can negligence in failing to discover the dangerous situation of the plaintiff be substituted for actual knowledge as one of the prerequisites for the application of the doctrine of the last clear chance? We think this would be extending the doctrine beyond the proper orbit. Such is the effect of the discussion and decision of our Supreme Court in the case of Starck v. Pac. Electric Ry. Co., 172 Cal. 277, 156 P. 51, L. R. A. 1916E, 58. Reference may also be had to the long list of authorities cited therein.

[6] The court also instructed the jury in the words of section 10m of the ordinance which we have already quoted. As we read the first part of the instruction, it means that it is the duty of a plane on a higher level to avoid a collision with an aircraft at a lower level. This becomes increasingly manifest when read in connection with the other instructions. We cannot believe that the jury when considering other rules for measuring the liability of the appellant could have understood that the higher plane undertook to guarantee against all contingencies that a collision would not take place. Probably it would have been better had the court actually defined the duty of the plane at the higher level, but no damage was actually done. However, the last part of the instruction, to wit, "and as regards landing shall observe the rules for an overtaking aircraft for passing," is so inextricably interwoven with the next instruction of which complaint is made that it must rest or fall therewith. We have also quoted it above. The first sentence, i. e., "any motor driven aircraft overtaking any other aircraft shall so alter its course as to pass to the right of such overtaken aircraft and must not pass by diving," is readily understood, except that we have no definitive statement of what constitutes an overtaking craft. We venture the assertion, however, that 99 out of 100 ordinarily intelligent persons, not versed in the science of engineering, would not be able to understand without assistance the next sentence—the definition. It reads: "Every aircraft coming up with another aircraft from any direction more than one hundred ten (110) degrees from ahead of the latter or in such a position with reference to the aircraft which it is overtaking that at night it would be unable to see either of that aircraft's side lights, shall be deemed an overtaking plane. * * *" The confusion first arises from the words "coming up with another." Does it mean arising with another, or does it mean overtaking another? From the sole fact that the section of the ordinance is discussing overtaking planes we determine that it means the latter, but the loose construction of the definition is at once apparent. But worse still is, "one hundred ten (110) degrees from ahead of the latter." Had the ordinance or the instruction made use of the language employed in subsection F of section 74 of the air traffic rules (Hotchkiss, Aviation Law, p. 251), it would have been understood. That section reads: "An overtaking aircraft is one approaching another directly from behind or within 70° of that position. * * *" But in the section of the ordinance made use of in the instruction, to employ a homely but apt expression, the fathers of the language literally "put the cart before the horse" or they went around in front to get behind. And in so doing the section of the ordinance was rendered unintelligible to the ordinary man. In fact, the writer of this opinion in order to comprehend its meaning submitted the language to his associates, who were as much confused as he, and it was finally necessary to seek the services of an engineer before he clearly understood the language. Enough has been said to demonstrate that the judge of the trial court should not have submitted the section to the jury as constituting an explanation of a rule of law. In 24 California Jurisprudence, p. 817, we read: "Instructions should be clear and concise, complete, intelligible, unambiguous and certain; and this ordinarily requires that they be couched in plain and simple language which is readily comprehended by the jury." We are not, however, attempting to pass upon its validity as an ordinance, but we do most positively assert that as an instruction it failed to comply with the quoted requirements for an instruction.

[7] Complaint is also made of an instruction which is another portion of the ordinance reading as follows: "The court instructs you that it is unlawful for any person, firm or corporation, whether as principal, agent, servant, employee or otherwise, to knowingly and willfully operate any aircraft within the city of Long Beach without due caution and cir-

cumspection or in such manner as to endanger the life, limb or property of any person." We are at a loss to understand what purpose the instruction was intended to serve. The respondent attempts to justify it upon the theory that the violation of a penal ordinance "is prima facie evidence of negligence." But the negligent operation of the aircraft is made the unlawful act by the section given as an instruction. We fear that respondent, like the industrious squirrel, is merely lost in the revolutions of his cage. Not being in response to any issue before the jury, the instruction should not have been given. Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953. However, we doubt, if that were the only error, it would be sufficient to warrant a reversal of the judgment.

The other instructions complained of apply especially to the case of Smith v. O'Donnell (Cal. App.) 12 P.(2d) 933, a companion action which was tried with the present case and the appeal in which is this day determined. No other points require discussion.

The judgment is reversed.

216 Cal. 1

PEOPLE v. BROAD (GENERAL MOTORS ACCEPTANCE CORPORATION, Intervener).

S. F. 14513.

Supreme Court of California.

July 1, 1932.

Rehearing Denied July 29, 1932.

1. Forfeitures ⇐5.

Notice to owner of property and judicial hearing are necessary to constitute valid statutory forfeiture, as well as common-law or judicial forfeiture.

2. Forfeitures ⇐5.

Property cannot be forfeited without notice to owner and hearing at which he can be heard, except in few cases of necessity.

3. Forfeitures ⇐5.

Forfeiture, which statute declares shall take place when offense is committed, is not fully effective, nor state's title perfected, until judicial determination of forfeiture.

4. Forfeitures ⇐5.

Forfeiture of property cannot be judicially determined in action wherein owner is not party.

5. Forfeitures ⇐5.

"Common-law or judicial forfeiture" does not take effect until state's or government's rights are established by judgment in suit instituted for such purpose, but "statutory or legislative forfeiture" takes place on commission of offense.

6. Constitutional law ⇐309(1).

Neither Legislature nor court can dispense with constitutional requirement of notice to owner and hearing before forfeiture of property.

7. Forfeitures ⇐2.

State Narcotic Act does not merely determine who shall be in possession of vehicles forfeited for use in transporting prohibited drugs until title is determined in some form of action (St. 1929, p. 388, § 15).

8. Forfeitures ⇐2.

To sustain statute forfeiting property used in violating law, statute itself must contain provision for hearing to owner.

9. Constitutional law ⇐309(1).
Forfeitures ⇐2.

Statute forfeiting vehicles transporting certain narcotic drugs, without providing for hearing to owner, *held* unconstitutional (St. 1929, p. 388, § 15).

10. Constitutional law ⇐305.

To constitute "due process of law" respecting taking of property, statute should give interested parties some adequate remedy to vindicate their rights.

[Ed. Note.—For other definitions of "Due Process of Law," see Words and Phrases.]

11. Constitutional law ⇐309(1).

For due process respecting taking of property, statute itself must provide for notice of time and place to hear orderly presentment of issues.

12. Constitutional law ⇐309(1).

Regarding due process, defect for not requiring hearing or notice, actual or constructive, in statute authorizing taking of property is not supplied by public officers' rules thereon.

13. Constitutional law ⇐305.

Respecting statute authorizing taking of property, extra-official, casual, or discretionary hearing is not substantial substitute for due process constitutionally required.

14. Constitutional law ⇐309(1).

That owner had no defense is immaterial where property was taken under statute defective in not requiring notice and hearing to him.

15. Constitutional law ⇐309(1).

Portion of Narcotic Act purporting to authorize forfeitures of vehicles used to transport drugs without notice to owner *held* invalid (St. 1929, p. 388, § 15).

The state Narcotic Act (St. 1929, p. 388, § 15), declares that vehicles used in transporting unlawfully drugs mentioned

in section 1 may be seized, considered as evidence, and, upon conviction of the party charged with violating act, be delivered to Department of Finance. The car seized had been sold conditionally. The person operating it appeared as registered owner, and seller's assignee as legal owner. The person operating the car was arrested and pleaded guilty to violating the statute, and the car was forfeited without notice to legal owner, which was unaware that car was being used for an illegal purpose.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by the People against Philip Broad to forfeit an automobile used to transport narcotics, in which General Motors Acceptance Corporation sought to intervene. From an order denying intervention, the intervener appeals.

Reversed.

Adopting opinion of District Court of Appeal, 5 P.(2d) 55.

William S. Downing and Philander B. Beadle, both of San Francisco, for appellant.

John H. Corning and John R. Flor, both of San Francisco, amici curiæ for appellant.

U. S. Webb, Atty. Gen., Ralph O. Marron, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Peter J. Mullins, Asst. Dist. Atty., both of San Francisco, for the People.

PER CURIAM.

[1-4] A petition for hearing after a per curiam opinion by the District Court of Appeal, First Appellate District, Division 1, was granted in this case in order to give further consideration to the contention of respondent that notice to the owner and a judicial hearing are not necessary to constitute a valid forfeiture where the forfeiture is decreed by statute, as distinguished from a common-law or judicial forfeiture. After a further consideration of this point, we are of the opinion that the distinction claimed does not exist. As set forth in the opinion of the District Court of Appeal, hereinafter incorporated into this opinion and made a part hereof, there can be no forfeiture of property without notice to the owner and a hearing at which he can be heard, except in the few cases of necessity hereafter mentioned. Even where, as here, the statute declares that a forfeiture takes place at the time of the commission of the offense, such forfeiture is not fully and completely operative and effective, and the title of the state is not perfected until there has been a judicial determination. That judicial determination cannot be in an action in which the owner is not a party. In the instant case, the only judicial determination provided is a hearing as to the guilt or innocence of the accused. No provision is made for notice to the owner, and no provision is made for a hearing at which it can be heard. It is obvious that many situations could arise where the owner would have a defense to the forfeiture which the accused has not or may not desire to raise.

[5, 6] The distinction that exists between a common-law or judicial forfeiture and a legislative or statutory forfeiture is simply this: A common-law or judicial forfeiture does not operate or take effect until by a proper judgment in a suit instituted for that purpose the rights of the state or government have been established. But in the case of a statutory or legislative forfeiture the forfeiture takes place on the commission of the offense. But, after the commission of the offense resulting in the forfeiture, the title of the state is inchoate or incomplete until such time as there is a judicial determination of the forfeiture. Neither the Legislature nor the courts can dispense with the constitutional requirement of a notice and hearing. 25 Cor. Jur. 1175, § 65 et seq. The only important difference between the two types of forfeiture is that in the case of the common-law or judicial forfeiture the rights of the state date from the judicial determination; while in the case of a legislative or statutory forfeiture the rights of the state, after such judicial determination, date back to the time of the offense, and cuts off even the rights of a bona fide purchaser.

The point that a judicial determination is necessary in the case of a statutory or legislative forfeiture is well settled, both by the decisions of this court and by the decisions of the United States Supreme Court. In United States v. Stowell, 133 U. S. 1, at page 17, 10 S. Ct. 244, 33 L. Ed. 555, it is stated: "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." In Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, at page 383, 220 P. 306, it is stated: "When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed. (Gelston v. Hoyt, 16 U. S. [3 Wheat.] 311 [4 L. Ed. 381, see also Rose's U. S. Notes]; United States v. Bags of Coffee, 12 U. S. [8 Cranch] 398, 405 [3 L. Ed. 602]; Kriess v. Faron, 118 Cal. 142, 146 [50 P. 388]; Upham v. Hosking, 62 Cal.

250, 257.) The adjudicated cases establish the rule beyond all doubt that the forfeiture becomes absolute on the commission of the prohibited acts, and that the title from that moment vests in the state. (Henderson's Distilled Spirits, 81 U. S. [14 Wall.] 44, 57 [20 L. Ed. 815].) In case a prosecution of the offender ensues, and a decree of condemnation follows in a court of competent jurisdiction the decree relates back to the date of the wrongful acts alleged and proved at the trial or in the hearing of the cause. (Henderson's Distilled Spirits, supra.) But the law requires proceedings to be instituted for the purpose of ascertaining the facts of the forfeiture (Wessels v. Beeman, 87 Mich. 481, 490 [49 N. W. 483]), and the inchoate title of the state to the goods forfeited is not fully consummated until after judicial condemnation has been had. (Caldwell v. United States, 49 U. S. [8 How.] 366, 381 [12 L. Ed. 1115]; Tracey v. Corse, 58 N. Y. 143, 149.)"

[7-9] The contention that the statute simply determines who shall be in possession of the property until title is determined in some form of action not provided for is without merit. The very terms of the statute refute that contention. In order to sustain such a statute, the statute itself must contain provision for a hearing to the owner. No such provision is here contained, and, for that reason, in our opinion, the statute is unconstitutional.

On the other points involved, we are of the opinion that they were properly disposed of by the decision of the District Court of Appeal, which we adopt as part of this opinion, to wit:

An appeal by General Motors Acceptance Corporation from an order of the superior court of the city and county of San Francisco, denying the prayer of its complaint in intervention and ordering a certain automobile to be delivered to the department of finance of the state of California.

On November 15, 1930, defendant Broad was apprehended and subsequently charged in the above court with a violation of the state narcotic law (Stats. 1929, p. 380). He entered a plea of guilty to the charge.

On October 17, 1930, Broad entered into a contract with Don Lee, Inc., for the purchase of the automobile for $2,435, upon which has been paid the sum of $750. Title was retained by the seller. The contract provided that the purchaser should not use the car illegally, and that, if the same became in danger of confiscation, the seller or its assignee might terminate the purchaser's interest and repossess the car. On the date of the execution of the contract, the interest of the seller therein with title to the automobile was transferred to General Motors Acceptance Corporation. Registration of the car was effected with the division of motor vehicles, defendant Broad appearing as the registered owner, and the corporation last named as the legal owner.

It was testified that at the time of Broad's arrest the officer also took possession of the automobile; that the same had been used by Broad to transport narcotics; and that a quantity of morphine was found in the car. It is conceded that the corporation was unaware of the unlawful use of the car.

The latter in its complaint set forth the facts constituting its ownership of the car, which is not denied, and alleged that the portion of the act under which forfeiture was sought contravened the due process clause both of the state and Federal Constitutions. After a hearing, the order appealed from was entered.

Section 15 of the state narcotic act (page 388) provides:

"Seizure and forfeiture of vehicles used to transport drugs.

"Any automobile or other vehicle used to convey, carry or transport any of the drugs mentioned in section 1 of this act, which are not lawfully possessed or transported, is hereby declared to be forfeited to the state, and may be seized by any duly authorized peace officer and when such seizure is made shall be considered as part of the evidence under this act and the magistrate shall upon conviction of the party charged with the violation of said act, turn the automobile or other vehicle over to the department of finance of the State of California and said department of finance shall deliver to the division of narcotic enforcement of the State of California such number of said automobiles or other vehicles as may be needed by the said narcotic division in enforcing the provisions of this act; provided, that nothing contained herein shall apply to common carriers, or to an employee acting within the scope of his employment under this act."

The corporation admits that regardless of his guilt or innocence an owner's interest in an automobile used in the violation of the laws prohibiting traffic in narcotics may be forfeited; but it contends that, since no provision is made in the act for notice of the intended forfeiture or a hearing, the above section of the act is void.

[10-13] The rule is well settled that to constitute due process of law in regard to the taking of property the statute should give the parties interested some adequate remedy for the vindication of their rights (12 Cor. Jur., Constitutional Law, § 997, p. 1220); and while it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action—instances of this kind being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to

destroy property kept in violation of law which is incapable of lawful use (12 Cor. Jur., Constitutional Law, § 999, p. 1224)—nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard (Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 P. 59); and it has accordingly been held that to constitute due process the statute itself must provide for notice of the time and place of hearing where the parties may present in a regular and orderly manner issues of law and fact (Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115). The same rule was declared in Moffat v. Hecke, etc., 68 Cal. App. 35, 228 P. 546, where it was held that the essential validity of the law was to be tested not by what has been done under it, but by what may by its authority be done; and where a statute authorizes the taking of private property, but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules covering the situation. So in Security Trust Co. v. Lexington, 203 U. S. 323, 27 S. Ct. 87, 89, 51 L. Ed. 204, a case involving the validity of an assessment, it was held that, if a statute makes no provision for notice in any form, it is not material that as a matter of grace or favor notice may be given. As the court stated, "it is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case, that is material, but the question is whether any notice is provided for by the statute." Nor can extra-official or casual notice, or a hearing granted as a matter of discretion, be deemed a substantial substitute for the due process that the Constitution requires. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027; Louisville & Nashville R. R. v. Central Stockyards Co., 212 U. S. 132, 29 S. Ct. 246, 53 L. Ed. 441.

To the same effect are the following cases: State v. Rose, 3 W. W. Harr. (Del.) 168, 132 A. 864, 45 A. L. R. 85; Savannah, etc., R. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847; Beebe v. Magoun, 122 Iowa, 94, 97 N. W. 986, 101 Am. St. Rep. 259; People v. Marquis, 291 Ill. 121, 125 N. E. 757, 8 A. L. R. 874; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A. L. R. 65; Chicago, M. & St. Paul R. R. Co. v. Commissioners, 76 Mont. 305, 247 P. 162; In re Rutherford, 72 Pa. 82, 13 Am. Rep. 655; National Auto Corp. v. Barfod, 289 Pa. 307, 137 A. 601; Matter of Grout, 105 App. Div. 98, 93 N. Y. S. 711; People ex rel. Robert Simpson Co. v. Kempner, 154 App. Div. 674, 139 N. Y. S. 440, affirmed 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914D, 169; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L. R. A. 1917A, 1185; Stillwater Bd. of Education v. Aldredge, 13 Okl. 205, 73 P. 1104; Boggs v. Commonwealth, 76 Va. 989.

[14] It is admitted by plaintiff that notice and an opportunity to be heard are necessary to constitute due process; but it is urged that, where the owner cannot possibly show facts that would relieve him from forfeiture, notice to him would be an idle act; that the person using the automobile is the only one in a position to make a defense, and, consequently, notice to him with an opportunity to be heard was sufficient to meet the constitutional requirements.

Whatever the effect of the criminal proceedings upon Broad's interest in the automobile (and this we do not decide), he was not appellant's agent for any purpose; and the sole question here is the sufficiency of the statute as against the latter. As held in the cases above cited, the question of the sufficiency of the statute does not depend upon the notice or hearing actually afforded by the court (Stuart v. Palmer, supra), and it is no answer to one who protests against the taking of his property that in his particular case due process would have led to the same result because he had no adequate defense on the merits (Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72; Coe v. Armour Fertilizer Co., supra, page 424 of 237 U. S., 35 S. Ct. 625.

The cases of Van Oster v. Kansas, 272 U. S. 465, 47 S. Ct. 133, 71 L. Ed. 354, 47 A. L. R. 1044, and Goldsmith Jr.-Grant Co. v. United States, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376, cited by plaintiff, are authorities for the rule that the fact that the owner's interest in an automobile is subject to forfeiture regardless of his guilt or innocence does not render a statute unconstitutional, but not for plaintiff's contention that there need be no provision by statute for notice to the owner. In the case first cited, the statute declared an automobile or other vehicle used for the transportation of intoxicating liquor to be a common nuisance, and established a procedure to be followed in case of forfeiture, including notice to all claiming an interest therein. In the second case, the statute under consideration, namely, section 3459, Revised Statutes, provided for the forfeiture of property used to evade the revenue acts, but made no provision for notice to the owner. No objection to the sufficiency of the statute on this ground was raised, however, and it was decided, this being the only question involved, that the property of an innocent owner might be declared forfeited without depriving him of property in violation of the fifth Amendment.

[15] According to some authorities, a requirement of notice is to be implied from the fact that it is a constitutional requirement, irrespective of the particular provisions of the statute under which the proceeding is

had; and, according to this view, a statute is not unconstitutional unless it undertakes to dispense with notice. 12 Cor. Jur., Constitutional Law, § 1006, p. 1229, and cases cited. But in this jurisdiction the cases have established the rule that to constitute due process the statute must itself provide for notice; and, consequently, we must hold the portion of the act which purports to authorize forfeitures without notice to the owner to be invalid.

The order appealed from is reversed.

215 Cal. 749

PEOPLE v. SMITH et al.

Cr. 3457.

Supreme Court of California.

June 30, 1932.

1. Indictment and information ⇐110(17).

Indictment charging murder in form and language of statute *held* sufficient, notwithstanding failure to allege malice aforethought or that victim was human being (Pen. Code, § 951).

2. Indictment and information ⇐137(2).

That only 28 veniremen were served out of designated number consisting of 30 did not render grand jury illegal body so as to require setting aside indictment.

3. Homicide ⇐229, 236(1).

Evidence in murder prosecution *held* sufficient to identify victim as person named in indictment and to show bullet wound caused death.

4. Witnesses ⇐252.

Presentation of photographs to witnesses from which witnesses made certain identifications, *held* not error.

5. Criminal law ⇐850.

Placing jury in hands of sheriff during trial *held* not improper, where done to relieve jurors from annoyances to which certain witnesses were subjected.

6. Criminal law ⇐713, 870.

Right to return special verdict is within power of jury, and district attorney's opposing submission of special form of verdict was not misconduct.

In Bank.

Appeals from Superior Court, Alameda County; Fred V. Wood, Judge.

George Smith and another were convicted of first degree murder, and they separately appeal. Defendant Rossi's appeal was dismissed on said defendant's death.

Affirmed as to defendant Smith.

Ernest Spagnoli, of San Francisco, for appellants.

Charles J. Janigian and Vincent Surr, both of San Francisco, for appellant John Kazarin.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Earl Warren, Dist. Atty., of Oakland, for the People.

SEAWELL, J.

[1] The defendants, George Smith and John Kazarin, were jointly accused by the grand jury of the county of Alameda of having murdered Reinhold A. Frey on or about December 20, 1930, in said county. They were tried together and convicted of murder of the first degree without a recommendation by the jury that a lesser punishment than the extreme penalty, which is death, be imposed. Judgments imposing the death penalty upon each were accordingly pronounced by the court. Separate appeals were taken from the judgments of conviction and from the orders denying motions for new trials. Objection is made to the sufficiency of the indictment because of the failure to allege that the crime was committed with malice aforethought or that Reinhold A. Frey was a human being. It does not describe the crime as a felony. The crime is pleaded in the form and language of the statute, and therefore is sufficient. Pen. Code, § 951. That the deceased was a human being was amply shown by the evidence. So also was the homicide shown to have been committed wickedly and with malice aforethought. The use of the word "murdered," which appears in the indictment, is an additional answer to both objections.

Defendant Kazarin, after conviction and while confined in the state prison at San Quentin, pending his appeal, took his own life. The appeal as to him has been dismissed.

The defendants were both residents of the city and county of San Francisco. The deceased was a man of small stature, being five feet and four or five inches in height, and weighed 140 or 145 pounds, and he was past fifty years of age. He was a member of the copartnership of Dempsey & Frey, engaged in conducting a cigar and soft drink business on the north side of Twelfth street, between Franklin and Webster streets, several doors east of the St. Mark's Hotel in the city of Oakland. Dempsey & Frey were also engaged in cashing pay checks for the employees of several factories and plants in said city of Oakland. It was the custom of the deceased to go to the Bank of America, situate at the northeast corner of Twelfth and Broadway streets, at about the hour of 9 o'clock a. m. on certain days and draw from said bank several thousand dollars, using a small satchel or bag in which he carried the silver coins from the bank to his place of business. On the morning of December 20, 1930, he went to said bank,

as was his custom, and drew $2,500, $500 of which was in silver and $2,000 in currency. He placed the silver in the small satchel and put the currency in his pocket. The traffic at this hour was beginning to assume the normal proportions for the day. The Oakland Rubber Company, of which Francis W. Harley is an employee, is located on the north side of Twelfth street adjacent easterly to the St. Mark's hotel, and two or three doors westward of Dempsey & Frey's place of business. Automobiles were parked singly the full length of the curb line. While standing in front of the place where he was employed, from approximately 9 to 9:15 a. m., he had noticed a maroon colored Chevrolet coupé in the double parking lane opposite to where he stood, moving backwards and forwards in such a manner as to prevent other machines from obstructing its clear exit. At this time the driver's person was not visible to Mr. Harley. He had also noticed for some fifteen or twenty minutes a man wearing a gray cap, gray overcoat buttoned, and amber glasses and smoking a cigar, walk several times up Twelfth street from the direction of the Bank of America, which was westerly, as far as the window of the store in which he was employed. His conduct was that of a person watchful of pedestrians, and was such as to arouse Harley's suspicions. He also saw the man whom he afterwards identified as defendant Smith finally walk over to the maroon colored Chevrolet, which was then double parked, and which had been maneuvered by the driver in such fashion as to keep its way open for an unobstructed exit, and hold a conversation with its driver, a very dark-skinned and black-haired man, whose hair, somewhat disordered, stood up rather straight. He also noticed a large and distinct wound or scar on his forehead over his left eye. He identified this man as defendant Kazarin. The description which he gave in considerable detail fitted Kazarin. Defendant Kazarin admitted from the witness stand that he had received a wide cut upon the forehead a few days before December 20th from broken glass, and the scar was still visible at the time of trial. Shortly after Harley went inside the store to wait upon Broadus, the driver of a Shell Oil Company truck which had double parked immediately behind the maroon Chevrolet coupé, and about two minutes after Smith had talked with the man in the coupé, identified as Kazarin, he heard Frey, who had come from the bank, make an outcry. The witness next saw Smith, who was facing the witness, pull from his pocket, upon a second attempt, a dark-colored revolver, shoot, and then run to the maroon colored Chevrolet car, transferring the revolver to his other hand, enter the car, and close the door after him. The other man, who was at the wheel, drove westerly toward Franklin, a cross street, which was approximately 125 feet distant from the place where Smith entered the car. It then turned south down Franklin to Eleventh street and was lost to view. The witness went out and found Frey lying close to the building line. He was holding the satchel or grip, and he said, "Take the grip; don't let them get the grip." The police found in Kazarin's possession when he was arrested in Los Angeles, approximately seven weeks after the commission of the crime, a revolver generally resembling the one the witness saw in the hands of Smith. Defendant Smith was arrested in San Francisco on December 22nd, two days after the crime was committed.

Wilfred Broadus, employed as a truck driver by the Shell Oil Company, to whom reference was above made, was another eyewitness to the shooting. He arrived at the scene of the shooting at approximately 9 o'clock, a. m. and double parked behind a maroon colored Chevrolet coupé, 1930, with wire wheels. The car was somewhat dirty, and had some mud spots upon it. It carried no spare wheel or tire. As he left his truck to enter the store in which Harley was employed, the man whom he identified as defendant Smith, and who had been standing at the door of the Chevrolet car as above described, walked in front of him to the sidewalk and thence to the window of said Oakland Rubber Company, and pulled his cap down close to his eyes and straightened his overcoat collar. Broadus walked into the office of the Oakland Rubber Company and stood at a counter which was placed in such manner as to permit one standing at the counter to see through the window. He engaged in conversation with Harley. As he looked through the window, he saw defendant Smith back toward the curb, pull a revolver from his pocket, shoot, and immediately run to said waiting Chevrolet coupé and enter it. The coupé was driven hurriedly to Franklin street, where it turned southerly out of the witness' view. He hurried to the sidewalk, and saw Mr. Frey, apparently wounded, lying near the wall of a building. Neither Harley nor Broadus from their position was able to see Frey. Broadus identified a Chevrolet coupé found two days after the shooting at the rear of and near the premises of Smith's grandfather as corresponding exactly in all respects with the coupé which he saw defendant enter as it was driven from the scene of the shooting. A few days afterwards the witness was taken to the city prison for the purpose of testing his ability to identify the defendant Smith who was in a line with several other persons. Smith addressed this remark to him: "There is no use in looking any further; I am the fellow they are trying to hang it on."

Leslie Todd, a machinist by trade, but who had for some time past made the cigar store on the southwesterly corner of Twelfth and Franklin streets his headquarters, and in which he occasionally worked, testified that

he recognized Smith as a person he had occasionally seen in the locality of the cigar store for approximately a year. He was not so certain as to Kazarin, but he believed that he had also seen him in the locality within a month prior to the day of the shooting. He recalled seeing Smith in the locality within a week prior to the day on which the crime was committed. Smith in his testimony first denied that he had been in the vicinity, but afterwards admitted that he had occasionally visited said locality. Witness Todd was attracted to the defendants at some time between 9 and 9:20 o'clock on the morning of December 20, 1930, by an outcry or scream immediately followed by a shot. He saw Smith get into the maroon colored Chevrolet coupé which was double parked, and Kazarin, who was at the wheel, started west on Twelfth street. In turning into Franklin street, Smith took hold of the wheel, as Kazarin apparently was having trouble in making the turn. They barely missed hitting another car as they made the turn. In so doing, it brought the coupé within 8 or 10 feet of the witness. He recognized the defendants as the persons whom he saw fleeing in the coupé and whom he had formerly seen in the vicinity of Twelfth and Franklin streets.

Minot Williams, an ironmoulder by trade, while standing on the curb at the southwest corner of Twelfth and Franklin streets at about 9 o'clock in the morning of December 20, 1930, heard a man, who stood with his back to the wall, hollering. It appeared to him that he was fighting off two men. He had a bag which he was swinging in front to protect himself from the attacking men. One of said men was tall and the other shorter. (Smith is a rather tall, spare man, while Kazarin is much shorter.) It appeared to the witness that the shorter man "slugged" the man with the bag, and as he buckled up the taller man stepped back and shot him. As the taller man shot, the shorter man ran and entered the coupé, which was double parked, and the taller man followed him. They fled in the car down Twelfth street to Franklin, barely missing a collision with another car in their effort to make the Franklin street turn. The coupé passed very close to the witness, who stood on the street corner, and he was positive as to his identification of the occupants of said coupé, whom he pronounced to be Smith and Kazarin. He took the rear license number of the coupé, which was 7H 44–09. When he went to the city prison for purposes of identification, Smith covered his face with a handkerchief. After the witness succeeded in seeing him and identified him with the crime, he said, "God damn it."

Rudy Hilgedick, a salesman for an electrical supply house, upon leaving the lobby of the St. Mark's hotel heard, as he stepped upon the sidewalk, a man scream, and saw Smith standing not more than 50 feet from him with a pistol in his hand. Frey was not more than 30 feet from the witness. The witness stepped back into the doorway, and heard a shot ring out. He then stepped out on the sidewalk and saw Smith leave the sidewalk between two parked cars. The maroon colored Chevrolet coupé then came past the witness and turned southerly on Franklin street. Kazarin was leaning over the wheel, and he noticed the scar on his forehead. The wheels were painted black and the coupé carried no spare or rack to support one. He made a note of the rear license number, which was 7H 44–09. Four days thereafter he saw the coupé, which had been recovered in San Francisco. There is absolutely no doubt but that the coupé first came into the possession of Kazarin on a sales contract dated August 27, 1930, and subsequently into the possession of Smith on a transfer by Kazarin of his equity to Smith by a contract dated October 28, 1930. Both Smith and Kazarin denied their signatures which appeared several times on the conditional sales contract and also on the transfer of equity, but the proof is conclusive against their denials. The witness said the coupé in which he saw defendants on December 20th corresponded in every way with the car which was exhibited to him in Oakland on December 24th, with the exception that the license numbers did not agree. The coupé, which had been recovered in San Francisco on December 24th, and which was undoubtedly the coupé which had been in the joint possession of Smith and Kazarin under their contracts, bore a different rear license number than it bore on December 20, 1930. Several persons took the rear license number on December 20th and all tallied as to 7H 44–09. No one attempted to take the forward license number. The license numbers on the coupé shortly after the assault of December 20th were 7K 45–64. This was the legal number. This attempt to confuse identification will presently appear. The witness stated that the license plate holder bore fresh marks and other evidence which indicated that it had recently been tampered with. William McMahon, police inspector in the San Francisco department, was assigned to the duty of locating the missing coupé, and did so on December 22d at the rear of the home of Smith's grandfather. He also testified to fresh marks upon the rear metal license plate holder which were probably made by the slipping of a screwdriver in removing the license number plate. The threads of screws which held it in place showed bright and were rust free. A few screws were missing. Herman Steiger, a switchboard installer of the Western Electric Company, was the owner of a Pontiac car which he kept at the garage of the Olympic hotel located at the corner of East Twelfth street and Second avenue in Oakland. One of the police inspectors investigating the case called upon him, inasmuch as the license num-

ber issued by the state to him was the same number as the license number which the defendants' coupé bore at the time of the shooting and attempted robbery. He had not used his car for two days before December 20th, and upon inspecting his car found that the rear license number plate was missing.

Mr. Hilgedick said he was about 30 feet from Smith as he fired at Mr. Frey. The coupé, which was about one hundred twenty-five feet from the Franklin intersection, was started slowly and rapidly picked up speed until it reached the corner. At one time the coupé was headed directly at him. Smith wore eyeglasses when on the sidewalk and had none on after he entered the coupé.

Walter Miller, employed by the Industrial Steel Company, was standing on the south side of Twelfth street opposite the scene of the shooting. He heard Mr. Frey scream, and ran across the street and saw Smith shoot Frey and jump into the coupé. Miller was about 8 feet from Smith as he shot. Kazarin was driving the coupé and looked back a number of times. He had on tortoise rimmed glasses. Smith had no eyeglasses on after he entered the coupe. Miller followed the maroon Chevrolet from Twelfth to Eleventh street, and took the rear license plate number, which was 7H 44-09. He identified both defendants as the men who committed the crime charged against them.

John W. Dalley, a construction worker, was standing across the street from where the shooting occurred talking to Ralph Young. The first thing that drew his attention was a man striking another over the head with what appeared to him to be a black-jack or piece of pipe. Frey was attempting to ward off the attack. The motions were fast, and he could not distinguish the instrument being used. Frey and the two other man were struggling together. Frey hollered for help, and as he did so Kazarin ran to the coupé and the taller man, Smith, stepped back and shot Frey, who fell to the sidewalk. Smith then joined the other man in the coupé. The witness ran to the scene and was near the coupé as it started. He followed it to the street corner. His description of the coupé agreed in all particulars, even to the missing spare tire, with the car used by the defendants. He also took the license number. He identified both defendants as the men who took part in the crime.

Ralph Young, a show card printer, who stood on Twelfth street opposite to the assault, heard Frey cry out for help and ran across the street. Frey had his back to the wall, and Smith was striking him upon the head. Frey was trying to ward off the blows. As Frey cried out, Smith stepped back two or three steps and shot him. Kazarin ran to the coupé, and Smith followed him. Smith wore a cap. He described the coupe, not omitting the radiator cap.

The crime was committed not later than 9:15 o'clock on the forenoon of December 20, 1930, and at approximately 11:30 a. m. of that day Police Officer P. H. Kemeany of the San Francisco police department, who was driving east on Folsom street near Third street, in the city of San Francisco, passed Smith and Kazarin driving westerly from the direction of the Ferry landing. He had no knowledge at that hour of the commission of the crime, but he, nevertheless, made a note of the license number of the defendants' coupé at the time, which was its proper number, 7K 45-64. The coupé was the same coupé heretofore described. Both Smith and Kazarin had police court records, and each had been suspected of the commission of other crimes. The police were in the habit of checking any car they saw them using. Kazarin had served a term in the Preston School of Industry, and had been released from the county jail but a short time before he committed the crime of which the defendants stand convicted. This testimony was brought out by the examination conducted by the defense. Both defendants took the witness stand in their own behalf, but neither of them nor any witness produced in their behalf gave any testimony or produced any evidence which tended in any substantial manner to disprove or refute the identification of the defendants with the commission of the crime charged against them, or which tended to seriously impeach or shake the evidence as detailed by the eight eyewitnesses as to the participation of the defendants in the commission of said crime. In addition to the testimony of said witnesses, there are a number of incriminatory circumstances which we will not point out, but which may be said to be cumulative in the conclusiveness of the defendants' guilt. The model, body, color of wheels, color of body and top of said car, as well as its condition and equipage, were absolutely described by one or more eyewitnesses, who had ample opportunity to observe the car as well as its occupants.

Neither of the defendants made a serious effort to account for their presence on the forenoon of December 20, 1930. Smith, when arrested on December 22d, said that he was in bed at 416 Bryant street until 9:30 o'clock a. m. of that day, but further than this isolated statement he produced no witness or evidence as to where he was on that day. The arresting officer was unable to get any information from him as to where the maroon Chevrolet coupé was garaged or parked. He vaguely intimated that it would be produced in due time, and refused to discuss the matter of the assault upon Frey, and said that his "mouth piece" would do the talking. What he said to the arresting officer and upon the stand was of no assistance in accounting for his presence at the scene of the murderous assault, where he was placed by at least eight eyewitnesses. Kazarin, his companion

for a number of years, also made a weak attempt to establish an alibi. One of the circumstances relied upon by each of the defendants to show the improbability of their fraternizing together on December 20th was that on or about December 15th they engaged in a fist fight back of Smith's grandfather's residence, 416 Bryant street, upon the conclusion of which the victor was to be declared the owner of the car. Smith, according to the testimony of the defendants, opened up afresh, with a heavy blow, the wound made upon Kazarin's forehead a few days prior thereto by his contact with glass, and he therefore withdrew his claim of ownership in the car and retired from the premises, and he was never thereafter friendly with Smith. This evidence was badly shaken by the further examination of the defendants given later in the trial, and, besides, it is highly improbable. Kazarin claims that he left for Los Angeles immediately after the fight with Smith. He offered nothing but his own uncorroborated statement that he left San Francisco prior to the shooting of Frey, and, aside from the testimony of the identifying witnesses, his claim, in the face of convincing circumstances, is not at all impressive.

There is no room for the existence of a reasonable doubt in the case as to the guilt of the defendants of the crime.

Both defendants were represented in the trial court by the same attorney. Upon the appeal they severed. Smith continued with the attorney who defended both defendants in the trial court, and Kazarin engaged the attorney who represented him upon appeal to the day of Kazarin's suicide, as above related. After his death and the dismissal of his appeal, the attorney for Smith obtained leave of this court to incorporate by way of reference certain portions of the brief filed in behalf of Kazarin, to wit: Alleged errors in the court's instructions; the discussion that the doctrine of "imputed further intent" no longer obtains in California; and alleged misconduct of the district attorney. The dismissal of Kazarin's appeal, which was largely given to a discussion of the doctrine of "imputed further intent," which doctrine it is claimed (against the consistent holding of this court by a long line of decisions since its organization) was abrogated by the Legislature of 1856 when it struck from the laws of this state the word "killing" and inserted in its stead the word "murder," renders it unnecessary to discuss said doctrine, inasmuch as it can have no applicability to Smith. The discussion is founded solely upon the fact that Kazarin did not actually fire the shot that killed the deceased, and, by his construction of section 189 of the Penal Code, Kazarin's attorney reasons that Kazarin was not guilty of murder by reason of his participation in the crime to commit robbery, and therefore the first degree murder penalty should not be imposed upon him. This is not an open question in this state. The authorities holding to the contrary are so familiar to the profession that it would be an unnecessarily irksome task to again cite them.

But as to Smith there is no doubt that he is responsible for the death of a human being in an attempt to commit robbery as provided by section 189, Penal Code, but, independent of said section, he is guilty of deliberately and wickedly killing a human being in a manner which showed him to have been acting under the impulse of an abandoned and malignant heart. The brief of the attorney for Kazarin in his attempt to save him from his share of responsibility in the killing correctly states the law as applicable to Smith and condemns him as guilty of deliberate murder independent of the purpose to commit robbery. Every instruction defining deliberate, premeditated, and willful murder would have appropriate bearing upon Smith, as appropriate as does section 189, Penal Code.

[2-4] We will now turn briefly to alleged errors of law occurring prior to, and at the time of, trial. We have not been cited to any authority which holds that a grand jury is an illegal body in case only twenty-eight veniremen were served out of a designated number consisting of thirty. We are not informed as to whether the two whose names were drawn, but who were not served, were dead or had left the county. The motion to set aside the indictment on such a ground was properly denied. There is no merit in the claim that the person murdered was not proved to be Reinhold A. Frey, the person named in the indictment. Nor is there any question as to the direct cause of his death. Three physicians attended the autopsy and described the course that the bullet took upon entering the shoulder, passing through one lung and finally cutting the spinal cord. They testified that said bullet wound was the direct cause of death. Several photographs were shown witnesses, from which they made certain identifications of persons. That the photographs resembled the persons whom they purported to represent was but another way of describing the persons whose appearances were sought to be established. It did not constitute error. One or two other assignments are made, but they are too trifling and infinitesimal in substance to merit repetition.

[5] Upon full deliberation, we feel that we cannot pass by without rebuke the unwarranted accusations of unfairness made by Kazarin's attorney on appeal against the trial judge. We have read the entire record of the evidence, consisting of 647 typewritten pages, and can find not the slightest justification for the serious charges made by a coun-

sel who was not present and did not participate at the trial. The attorney who actually participated in the trial does not join in the charges written into Kazarin's brief. The trial court was exceptionally lenient. There seemed to be scarcely any limit to the bounds which the attorney for defendants was permitted to go. Three days were given to impaneling the jury; six days were given to the taking of testimony in a matter relating to identification. The cross-examinations of witnesses were unnecessarily protracted through hundreds of pages; no objections to questions of doubtful relevancy were sustained against the defense. Objections made by the prosecution and which should have been sustained were frequently overruled by the trial court out of an abundance of caution. The trial judge is severely criticized, in fact, his motives are challenged, because he placed the jury in the hands of the sheriff during the trial of the case. In the light of the experiences of some of the witnesses which developed during the trial it was a wise foresight on the court's part to have relieved the members of the jury from the annoyances to which certain witnesses were subjected.

[6] We find no merit in the charge that the district attorney was guilty of misconduct in opposing the submission of a special form of verdict to the jury on the theory that it would simply confuse it and probably result in a mistrial. The right to return a special verdict was in the power of the jury, and the court so informed the jury in its instructions.

The instructions were full, fair, and complete. No other point requires discussion.

The judgment and orders appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; TYLER, Justice pro tem.; PRESTON, J.; LANGDON, J.

216 Cal. 10

NELSON v. NELSON.

Sac. 4542.

Supreme Court of California.

July 5, 1932.

1. Appeal and error ⇐994(3), 1011(1).

Responsibility of weighing conflicting evidence and determining witnesses' credibility is with trial court sitting without jury.

2. Appeal and error ⇐1010(1).

Supreme Court cannot set aside trial court's conclusion of fact supported by substantial evidence.

3. Quieting title ⇐44(4).

Evidence in suit to quiet title *held* sufficient to support finding that plaintiff made absolute conveyance of land to defendant, with intent to divest himself of all title thereto.

4. Quieting title ⇐44(4).

Evidence in suit to quiet title *held* sufficient to show that plaintiff knew contents of instrument, in which he disclaimed any interest in property, before signing it.

5. Contracts ⇐93(2).

Grantor having every opportunity to inform himself of nature and purpose of instrument, disclaiming interest in property conveyed by him, before signing it, cannot complain that he did not know its contents, but is bound by terms thereof.

In Bank.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action by Frank B. Nelson against Elizabeth Nelson. Judgment for defendant, and plaintiff appeals.

Affirmed.

James F. Gaffney and H. W. Zagoren, both of Sacramento, for appellant.

Huston, Huston & Huston, of Woodland, for respondent.

CURTIS, J.

This action is between a brother and sister. The suit involves the ownership of two tracts of land situated in the county of Yolo. The land formerly belonged to the brother. While such owner, and on or about December 11, 1926, the brother executed two deeds of the said land in favor of his sister. It is contended by the plaintiff that these two deeds, with a power of attorney executed by him to his sister at or about the same time the deeds were executed, were executed and delivered by him to his sister for the purpose of enabling her to secure a loan upon said real property with the proceeds of which she was to discharge the indebtedness of the plaintiff to various persons, included in which was a judgment against said plaintiff which was then a lien against said two parcels of land. After securing said loan, and the discharge of plaintiff's said indebtedness, so the plaintiff claims, the defendant was to reconvey said land to the plaintiff. The plaintiff further contends that his sister, after acquiring title to said lands by means of said deeds, did obtain loans, which were secured by liens upon said land, and from the proceeds of said loans, and from the rents, issues, and profits derived from said real property since she acquired title thereto, has paid off the indebtedness, including said judgment lien for which the plaintiff was

liable at the time he conveyed said real property to the defendant, and has collected further rents, issues, and profits from said lands in the amount of $60,000, which sum defendant has appropriated to her own use, and, furthermore, that she has repudiated her agreement to reconvey said lands to the plaintiff, and claims the same as her own property.

On the other hand, the defendant contends that due to the fact that plaintiff was deeply in debt and was about to lose said real property by reason of his indebtedness, including the judgment which was a lien upon said real property at the time the plaintiff conveyed the same to her, plaintiff solicited and importuned the defendant to accept said deeds to said real property as conveyances of the absolute title thereto to the defendant and as her sole and individual property free from any claim or right of plaintiff thereto; that in response to this request of the plaintiff, defendant agreed to and did thereafter accept conveyances to said real property, which were absolute in form, and which were intended to and which did transfer the legal title to said real property to the defendant as her sole and individual property, free from any right therein of the plaintiff, and that on acquiring title to said real property defendant paid and satisfied the indebtedness of the plaintiff, and as the said real property had been sold under execution issued upon said judgment and a sheriff's deed had been issued to the purchaser, defendant acquired by a valid deed of conveyance said real property from the purchaser at the execution sale. The case went to trial upon these issues as made by the pleadings. The trial court upon the issues thus presented found in favor of the defendant, and rendered judgment accordingly against the plaintiff, from which judgment the plaintiff has appealed.

[1-3] As we view the record, the only question presented on this appeal is one of fact. It is true that the evidence of the plaintiff, corroborated in some respect by the attorney who drew the two deeds from plaintiff to defendant by which he conveyed said real property to defendant, would support the contentions of the plaintiff. Yet this testimony is flatly contradicted by the evidence of the defendant, who testified that the deeds were executed as absolute conveyances of said real property, and without any agreement, express or implied, on her part to reconvey the same to the plaintiff. The evidence further shows that just prior to the execution of said deeds to defendant the plaintiff requested his mother to accept said property upon the same terms plaintiff later deeded the lands to defendant, but that his mother refused to accept his offer, giving as a reason that she had once held property belonging to the plaintiff in her own name at the request of the plaintiff and that the plaintiff, without any demand or request for a reconveyance of said property to him, had brought suit for the recovery thereof, and that she (the mother) would have nothing further to do with plaintiff's affairs. The responsibility of weighing this evidence and determining the credibility of the witnesses testifying before it was with the trial court. It is not within the province of this court to set aside the conclusions of the trial court where there is substantial evidence to support it. There can be no question but that the record in this case contains sufficient and satisfactory evidence to support the claim of the defendant that the plaintiff made an absolute conveyance of said lands to her, and intended thereby to divest himself of all title thereto.

[4, 5] A further important fact shown by the evidence in this case is that the plaintiff on March 4, 1927, nearly three months after the execution of said two deeds, executed and delivered to the defendant a written instrument in which he expressly disclaimed any "claim of any kind or character to said property, or any part thereof." The property thus referred to was in the prior portions of said written instrument conclusively identified as the real property described in said two deeds from plaintiff to defendant. Plaintiff admits the identity of the property mentioned in said written instrument, and also admits the execution and delivery of said written instrument. He claimed, however, and so testified, that he did not know the contents of said written instrument, and that he had not read the same prior to signing it. Upon this point the defendant testified that she gave the written instrument to the plaintiff in his hotel room at Lovelock, Nev., that they there discussed the nature of the instrument, that he took it and left for his attorney's office, and that later he came back with the instrument signed. This evidence was sufficient to refute the testimony of the plaintiff that he did not know the contents of the instrument before signing it. He surely had every opportunity to inform himself of the nature and purpose of the instrument before affixing his signature thereto. If he neglected to do so, it is now too late for him to complain. He is bound by its terms.

We have reviewed the proceeding upon the motion for a new trial, and find nothing therein which would justify us in holding that the trial court abused its discretion in denying said motion.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; TYLER, Justice pro tem.

215 Cal. 742

WALKER v. HOUSTON et al.

L. A. 11024.

Supreme Court of California.

June 30, 1932.

Rehearing Denied July 29, 1932.

1. Tender ⇐19(1).

"Tender" is offer of performance, not performance itself, and, when unjustifiably refused, places other party in default and permits party making tender to exercise remedies for breach of contract.

[Ed. Note.—For other definitions of "Tender," see Words and Phrases.]

2. Tender ⇐19(1).

Tender of payment terminates all incidents of obligation, such as interest, sureties' liability, and liens, but not obligation itself (Civ. Code, § 1504).

3. Tender ⇐19(1).

Debt is not discharged by tender of payment, but only by actual payment to creditor or deposit of sum due in bank in his name (Civ. Code, §§ 1500, 1504).

4. Sales ⇐476.

Conditional seller's title is incident of obligation to pay balance of purchase price, which is discharged on tender thereof (Civ. Code § 1504).

5. Sales ⇐467.

Buyer under conditional sale contract has full right of possession and use of property, unless he defaults, and may secure title by performing his obligation without further assent by seller.

6. Sales ⇐476.

Mortgagee or purchaser from conditional buyer may tender balance of price with same effect as tender by buyer, though contract contains express restrictions against sale, assignment, or mortgage.

7. Chattel mortgages ⇐170(1).
Sales ⇐476.

Title to property, sold under conditional sale contracts, vested in buyers on tender of balance of price to seller by subsequent mortgagee, and seller's subsequent resale thereof was conversion.

8. Chattel mortgages ⇐177(4).

Seller's liability to mortgagee of personalty, sold to mortgagor under conditional sale contract, for conversion thereof by resale after mortgagee tendered balance due, *held* not limited to difference between proceeds of resale and balance due; measure of damages being value of property (Civ. Code §§ 3308, 3336).

9. Sales ⇐476.

Conditional seller lost superior right in goods on subsequent mortgagee's tender of balance due, hence could not claim priority over mortgagee in fund resulting from seller's subsequent unlawful resale of goods.

10. Chattel mortgages ⇐177(1).

Lessors, to whom lessees executed second mortgage on furniture purchased by mortgagors under conditional sale contract, *held* entitled to surplus proceeds of seller's unlawful resale thereof after satisfaction of first mortgage.

11. Chattel mortgages ⇐177(1).

Judgment for second mortgagees against conditional seller of mortgaged furniture for surplus proceeds of latter's unlawful resale thereof after satisfaction of first mortgage *held* proper, though second mortgagees' cross-complaint was against mortgagors only, where all parties were before court and all facts entitling second mortgagee to relief granted were fully pleaded (Const. art. 6, § 4½; Code Civ. Proc. §§ 475, 578).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Bertha M. Walker against A. Houston, Mary A. Houston, the Eastern Outfitting Company, a corporation, Ellis C. Howe, and Ferne E. Howe, in which defendants Howe filed a cross-complaint against defendants Houston. From a judgment for plaintiff and defendants and cross-complainants Howe against defendants corporation and Houston, defendant corporation appeals.

Affirmed.

Rehearing denied; CURTIS, J., dissenting.

Superseding opinion of District Court of Appeals in 5 P.(2d) 953.

Benjamin & Benjamin, I. B. Benjamin, and Clore Warne, all of Los Angeles (Aaron Elmore, of Los Angeles, of counsel), for appellant.

R. R. Sleeper and E. A. Lane, both of Los Angeles, for respondent.

William Ellis Lady, of Los Angeles, for defendants Howe.

Murphy & Cohen, of Los Angeles, for defendants Houston.

LANGDON, J.

This action was brought to foreclose a chattel mortgage. Between January 2, 1924, and March 8, 1924, defendants Houston, lessees of an apartment house, purchased certain furniture from defendant Eastern Outfitting Company on condition sale, for a total price of $9,150, payable in installments. On May 31, 1924, defendants Houston executed a promissory note for $2,500 to plaintiff, secured by a chattel mortgage on all of the furniture in the apartment house, the bulk of which was still being paid for under the conditional sales contracts. The mortgage was

properly executed and recorded. It referred to the conditional sales, and provided that it was a mortgage only of the "equitable interest" of the mortgagors. It further provided that in the event that the mortgagors failed to make their payments to the seller, "the mortgagee shall have the right to pay the same when due and shall be entitled to repayment from the mortgagors forthwith, with interest thereon at the rate of 7 per cent per annum from the date of payment until paid." On July 17, 1924, defendants Houston gave a second mortgage on all of said furniture to defendants Howe, lessors of the apartment house, to secure rent to become due under the lease. This mortgage was also duly recorded, the mortgagees having knowledge of the prior mortgage.

Defendants Houston failed to meet their rental payments, and on September 23, 1925, defendants Howe secured judgment against them in an unlawful detainer proceeding in the sum of $1,206.75, no part of which has been paid.

On September 30, 1925, defendants Houston delivered all of the mortgaged furniture to the warehouse of defendant Eastern Outfitting Company (the conditional seller), although they were, at said time, not in default in their payments. On October 2, 1925, there was a balance due the seller of $3,166.89. On October 8, 1925, plaintiff made a valid tender of $3,300 in United States gold coin to the seller, and demanded possession of the property, which was refused. Thereafter, on October 19, 1925, plaintiff commenced this action to foreclose her mortgage, joining as defendants the Houstons as mortgagors, the Howes as second mortgagees, and Eastern Outfitting Company as possessors of the property. Defendants Howe, in addition to their answer, filed a cross-complaint against defendants Houston, to foreclose their mortgage and to recover any sums remaining from the sale of the property after satisfaction of the claim of plaintiff.

Some months later, and during the pendency of the action, defendant Eastern Outfitting Company sold the furniture and retained the proceeds.

The trial court made findings and conclusions of law to the effect that upon the tender to the seller of the balance due under the contracts, title to the property vested in the buyer, subject to the liens of the first and second mortgages; that the defendant seller had converted the property, and was liable in damages for its value, which was found to be $3,945.25; that the balance due and owing from defendants Houston to Eastern Outfitting Company was $3,166.89. Judgment was rendered in favor of plaintiff and defendants and cross-complainants Howe against defendants Eastern Outfitting Company and Houston; and in favor of defendant Eastern Outfitting Company against defendants Houston. Eastern Outfitting Company appealed.

[1-3] The first contention made is that the tender by plaintiff was ineffective to discharge the title of the seller because it was not "kept good" by deposit of the money in a bank in the name of the creditor, under section 1500 of the Civil Code. This contention rests upon a misconception of the nature and purposes of tender. "Tender" is an *offer* of performance, not performance itself. When unjustifiably refused, one of its effects is to place the other party in default, and permit the party making the tender to exercise his remedies for breach of contract. See Marshall v. Hilton, 209 Cal. 531, 289 P. 165. Another effect is specified in section 1504 of the Civil Code: "An offer of *payment or other performance*, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and *has the same effect upon all its incidents* as a performance thereof." In such a case, the *obligation* still remains, but all of its *incidents* are gone. Interest is stopped, sureties are released, and liens are discharged. Leet v. Armbruster, 143 Cal. 663, 77 P. 653; Loughborough v. McNevin, 74 Cal. 250, 14 P. 369, 15 P. 773, 5 Am. St. Rep. 435; Wiemeyer v. Southern T. & C. Bank, 107 Cal. App. 165, 290 P. 70. Some uncertainty exists as to whether tender discharges a mortgage, but logically it should, for the mortgage is only a lien. See Cal. Civ. Code, § 2888; Wiemeyer v. Southern T. & C. Bank, supra; Himmelmann v. Fitzpatrick, 50 Cal. 650; 5 Cal. L. Rev. 78; 3 Cal. L. Rev. 336. The discharge of the incidents, however, does not affect the ultimate obligation, which, in the case of a debt, can only be discharged by either an actual payment to the creditor, or a deposit of the sum due in a bank in his name. Section 1500 of the Civil Code provides: "An obligation for the payment of money is *extinguished* by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor." This is not tender, but actual performance. It discharges the obligation and not merely its incidents. This distinction between sections 1500 and 1504 of the Civil Code has been heretofore made, and no difficulty should arise in their application. See Marshall v. Hilton, 209 Cal. 531, 289 P. 165; Sheller v. Livingston, 25 Cal. App. 572, 144 P. 547. Sayward v. Houghton, 119 Cal. 545, 51 P. 853, 52 P. 44.

[4-7] In our opinion, there is no doubt but that the title of the conditional seller is an "incident" of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. It is true that the cases previously cited deal with

liens. Nevertheless, the title reserved by a conditional seller for the purpose of securing payment of the purchase price is no less an incident of an obligation to pay money than a mortgage or pledge. The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose. Hence it follows that tender of the balance of the price should have the effect of discharging the title of the seller and vesting such title in the buyer, and it has been so held. Davies-Overland Co. v. Blenkiron, 71 Cal. App. 690, 236 P. 179; Dame v. C. H. Hanson & Co., 212 Mass. 124, 98 N. E. 589, 40 L. R. A. (N. S.) 873, Ann. Cas. 1913C, 329; National Cash Register Co. v. Wapples, 52 Wash. 657, 101 P. 227. The right of a mortgagee or purchaser from the conditional buyer to make such tender with the same effect as if made by the buyer himself is also recognized, even where the conditional sales contract contains express restrictions against sale, assignment or mortgage. Thus in Davies-Overland Co. v. Blenkiron, 71 Cal. App. 690, 694, 236 P. 179, 180, supra, the court said: "The purpose of the stipulation in the contract against assignment thereof, without the written consent of the vendor, was solely for his financial protection. His only interest in the contract was to receive the total amount of money for which he sold the property. Whether the money was to be paid in one lump sum by the vendee or by the assignee of the vendee was of no concern to the vendor. 'One man's money is just as good as another's.' By such payment the vendor's rights in the premises would be fully protected, and he would have no cause for complaint." See, also, Dame v. C. H. Hanson & Co., supra; 1 Williston on Sales, § 331, p. 773; Vold on Sales, § 95, pp. 277, 278.

It follows that upon the tender made by plaintiff, title to the property vested in defendants Houston, buyers under the conditional sales, and that the subsequent resale by the seller was a conversion.

[8, 9] The second point raised by defendant Eastern Outfitting Company is that assuming the sale to be a conversion, the court erred in the measure of damages applied. The judgment was for plaintiff against this defendant for the amount due under the mortgage, including interest, costs, and attorneys' fees, in the sum of $2,987.83. It is contended that under section 3308 of the Civil Code the court should have limited the liability of the seller to the difference between $3,945.25, the amount received from the resale, and $3,166.69, the balance due on the price. The section relied upon deals with mere breach of a seller's agreement to deliver personal property, whereas, in this case, there is a conversion after tender of the price and passage of title, the measure of damages being the value of the property under section 3336 of the Civil Code. On principle, the claim of the defendant is unsound, for it amounts to the proposition that the seller, having unjustifiably refused to accept the amount due, and having converted the goods and forced plaintiff to sue to protect her claim, is entitled to the same rights as if it had fully performed. The conclusion compelled by the foregoing authorities is that all rights of the seller against the goods were divested by the tender and refusal. The obligation to pay the balance of the price remained, but it was an obligation of the buyers—defendants Houston, and not the mortgagee. The seller had a valid claim against the Houstons for the balance of the price, and the lower court gave judgment in its favor against the Houstons in that sum. But the seller had lost its superior right in the goods, and is not entitled to claim priority over the plaintiff mortgagee, in the fund resulting from the unlawful sale of the goods.

[10, 11] The final contention is that the judgment in favor of defendants Howe, the second mortgagees, is void in that their pleadings were against defendants Houston and sought no relief against defendant Eastern Outfitting Company. We see no reason for reversal of the judgment on this ground. Apart from the question of pleading, it is clear that defendants Howe, as second mortgagees, are in the same position as plaintiff, the first mortgagee, except that their rights are subordinate to hers. The surplus of the fund remaining from the sale of the furniture, after satisfaction of the claim of the first mortgagee, should obviously go to them. Their failure to seek relief against the seller is perhaps due to the fact that they sought recovery against the mortgagors and against the goods by foreclosure; and at the time of the filing of the cross-complaint, title to said goods was in the buyers, the mortgagors. The conversion by the seller took place after the action was commenced. However, if there was a defect in the form of relief demanded, it was immaterial. All of the parties were before the court, and all of the facts entitling defendants Howe to the relief granted were fully pleaded. Section 578 of the Code of Civil Procedure provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." The authority conferred upon the court by this section is broad, and its purpose is to avoid a multiplicity of actions. Considered in the light of the constitutional and statutory ad-

monitions to disregard immaterial errors in pleading (see Cal. Const. art. 6, § 4½; Cal. Code Civ. Proc. § 475), the action of the trial court was proper. See Wiseman v. Sklar, 104 Cal. App. 369, 285 P. 1081; Martin v. Howe, 190 Cal. 187, 211 P. 453.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

215 Cal. 709

MISSOURI STATE LIFE INS. CO. v. GILLETTE, County Sheriff, et al.

L. A. No. 13383.

Supreme Court of California.

June 28, 1932.

1. Sheriffs and constables ⇐169.

In mortgagee's action against sheriff and surety for conversion of personalty sold under execution, evidence sustained findings as to value and that property was turned over to mortgagee for money due mortgagee.

2. Chattel mortgages ⇐136.

Crop mortgagee entitled to possession did not lose its lien by taking possession.

3. Chattel mortgages ⇐170(2).

Sale by sheriff under execution of wheat rightfully in possession of mortgagee, without tender of mortgage debt, *held* wrongful, constituting conversion (Civ. Code, § 2969).

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by the Missouri State Life Insurance Company against C. L. Gillette, sheriff, and others. From a judgment in favor of plaintiff as against defendant sheriff and defendant the Maryland Casualty Company, but against plaintiff as to defendants Watson and Brackenbury, both the sheriff and the Maryland Casualty Company appeal.

Judgments against sheriff and the Maryland Casualty Company affirmed.

Superseding former opinion, 4 P.(2d) 587.

Harry W. Horton, of El Centro, for appellant Gillett.

M. C. Atchison, of Calexico, for appellant Maryland Casualty Co.

Hickcox & Trude, of El Centro, and Chapman & Chapman, of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District, in order to give further consideration to the question of the liability of defendant Maryland Casualty Company. We are satisfied that the opinion of Mr. Presiding Justice Barnard properly disposes of the other issues of this case, and we adopt the following portions of said opinion as part of the opinion of this court:

The facts of this case are as follows: The plaintiff owned land in Imperial county, and on October 8, 1927, leased the same to one Jack Kennedy for a term of three years, the lessor to receive as rental one-fourth of all the grain grown on the premises. On October 28, 1927, the plaintiff loaned to Kennedy the sum of $680 for the purpose of enabling him to farm the land, and on that day Kennedy executed and delivered to the plaintiff his promissory note for that amount, with interest, secured by a crop mortgage covering all grain grown on the land, which mortgage was in all respects properly executed and recorded. During the crop season of 1928 a crop of barley matured first, and the plaintiff permitted Kennedy to sell the same in his own name and to retain all of the proceeds thereof except the sum of $157, which was paid to the plaintiff. When the wheat matured, it was harvested and delivered to the plaintiff at Seeley, Cal., on May 12, 1928. On May 14, 1928, the defendant Gillette, as sheriff of the county of Imperial, levied an execution upon this wheat, the execution being issued in another action wherein another party had recovered a judgment against the said Jack Kennedy. The plaintiff filed with the sheriff a duly verified third party claim; setting forth its claim to the ownership and right of possession of the said wheat. An undertaking was then filed with the sheriff in accordance with section 689 of the Code of Civil Procedure. Following that, and on May 23, 1928, the sheriff sold the wheat at public auction. This action was brought by the third party claimant against the sheriff, the Maryland Casualty Company, the surety on the sheriff's official bond, and also against R. Y. Watson and Richard Brackenbury as sureties upon the undertaking filed in accordance with section 689 of the Code of Civil Procedure. After a trial, judgment was entered in favor of the plaintiff for $1,358.70 as against the defendant sheriff and the defendant Maryland Casualty Company, and it was further ordered that the plaintiff take nothing against the defendants Watson and Brackenbury. From this judgment both the sheriff and the surety on his official bond have appealed; both appeals being, by stipulation, submitted upon one transcript and one set of briefs.

[1] So far as the appellant sheriff is concerned, the only grounds for reversal urged are that the amount of the judgment is excessive in any event, and that, under the evidence, the respondent had no right to the grain, since its claim was fully paid. In reference to the first contention, it is argued that the evidence shows that the grain weighed 61,620 pounds, that its greatest value according to the testimony was $1.40½ per hundred, and therefore that the judgment should not have been for more than $865.76. It is apparent that counsel has made a miscalculation, as the evidence of value referred to was $2.40½ per hundred instead of $1.40½. Appellants' contention that the respondent's claim was fully paid rests partly upon a similar miscalculation and partly upon a reliance upon only a portion of the evidence, together with a mistaken claim of law. In arriving at their conclusion they not only figure the wheat at $1.40½ per hundred instead of $2.40½, but they claim the crop of barley sold for around $1,500 and that the respondent received at least $1,214 of that amount, while they figure the total amount coming to the respondent was $1,340.50. The court found upon sufficient evidence that the barley in question sold for $800, and that the said Kennedy, with the consent of respondent, retained all of the proceeds of said barley except the sum of $157, which was paid to the respondent on account of the rent. While the appellants argue from a portion of the evidence that the respondent received all of the proceeds of the barley, and thereupon reloaned most of the same to Kennedy, the findings above referred to are fully supported by the evidence. The court was justified in finding that the respondent merely permitted said Jack Kennedy to retain most of the proceeds of the barley, that it merely waived its crop mortgage on that portion of the crop, and that the note and obligation of Kennedy was by no means extinguished. Grangers' Business Association v. Clark, 84 Cal. 201, 23 P. 1081. It fully appears from the evidence that upon the items of rent and the crop mortgage the respondent had coming from Jack Kennedy on the day the sheriff took possession of the wheat at least $1,316. In addition to those items, it appears that the respondent had guaranteed the expense of harvesting the crop of wheat, amounting to several hundred dollars. It further appears that the wheat had been completely and entirely turned over to the respondent by Jack Kennedy two days before it was levied upon by the sheriff. The amount due to the respondent was unquestionably ample consideration for the delivery of the wheat, and, in any view of the case, the respondent was damaged in the full amount of the value of the property. * * *

The court found that the defendants R. Y. Watson and Richard Brackenbury did not file a "bond of indemnification" with the said sheriff. This finding is not sustained by the evidence. It was both stipulated at the trial and testified to by a deputy sheriff that such a bond was furnished. The respondent has not appealed from that portion of the judgment which relieved Watson and Brackenbury from responsibility, and, therefore the question whether they could be joined with the sheriff as defendants in this action is not before us. Furthermore, the indemnity bond which they signed does not appear in the record, and its provisions are unknown to us. In anything said in this opinion we are not in any manner attempting to pass upon whether these bondsmen are liable to the appellant sheriff.

[2, 3] Defendant Maryland Casualty Company, surety on the sheriff's official bond, contends on appeal that it is not liable for the acts of the sheriff in that he merely performed the duties required of him by law. It is said that, under section 689 of the Code of Civil Procedure, as it read at the time of the levy of execution, the sheriff was bound to keep property upon the filing of a third party claim until the filing of an undertaking of indemnity by the creditor, but that thereafter he was compelled to execute on the property. Hence it is concluded that he merely performed the acts required by law, and, even if he is himself liable, such liability is not within the terms of his bond. We need not discuss the effect of section 689 since it clearly appears that the sheriff violated another statute, section 2969 of the Civil Code. This section provides, in substance, that, where there is a chattel mortgage on personal property, no levy of execution may be made upon such property unless the officer first tenders to the mortgagee the amount of the mortgage debt and interest, or deposits the same with the county clerk or treasurer, payable to the order of the mortgagee. In the instant case, the wheat was turned over to the plaintiff. When execution was levied, it filed a third party claim. By the terms of its mortgage it was entitled to possession of the wheat, and the taking of possession under the mortgage did not extinguish its lien. See Summerville v. Kelliher, 144 Cal. 155, 77 P. 889; Wixom v. Davis, 57 Cal. App. 620, 207 P. 694; McDevitt v. Jones, 60 Cal. App. 773, 214 P. 661. The sale by the sheriff without tender of the mortgage debt was therefore wrongful, amounting to a conversion. Sousa v. Lucas, 156 Cal. 460, 105 P. 413; Passow & Sons v. United States F. & G. Co., 56 Cal. App. 72, 204 P. 545. His act was squarely within the terms of the bond.

The judgments against defendants Gillette and Maryland Casualty Company are affirmed.

SHAFER v. STATE BAR OF CALIFORNIA.

L. A. 13395.

Supreme Court of California.

June 27, 1932.

As Modified on Denial of Rehearing, July 25, 1932.

Attorney and client ⇐56.

Although attorney convicted of felony involving moral turpitude had been suspended from practicing law pending final action on conviction, disciplinary proceedings based on facts giving rise to criminal action could be brought against him and further order of suspension rendered (Code Civ. Proc. §§ 287–289, 299).

In Bank.

Proceedings instituted by Jesse R. Shafer to review a recommendation of the Board of Governors of the State Bar of California that petitioner be suspended from practicing as an attorney.

Respondent suspended.

Ben C. Cohen and Sam Wolf, both of Los Angeles, for petitioner.

Guy Richards Crump and Philbrick McCoy, both of Los Angeles, for respondent the State Bar of California.

PRESTON, J.

This petitioner, by formal complaint filed October 20, 1930, with the State Bar, was charged with the commission of acts involving moral turpitude growing out of his misuse of the funds of a certain estate, of which he was executor, in an effort to redeem the property of another client. Unfortunate and unforeseen developments prevented petitioner from returning the money to the estate when distribution was due. Payment was later made to the respective distributees under the executor's bond, and petitioner gave his note to the bonding company to cover the payments so made by it. Petitioner was then about fifty-five years of age. He had practiced in Los Angeles since 1910, and had always borne a good reputation for truth, honesty, and integrity. On August 19, 1930, at the inception of this investigation, he voluntarily closed his law office, and has not practiced since that date.

The hearing in this proceeding was originally set for November 12, 1930, but was continued to avoid possible prejudice to the rights of petitioner upon the trial of a criminal action charging him with felony based upon his failure to account for the proceeds of said estate. Said criminal action resulted in petitioner's conviction, but he was granted probation for three years from February 27, 1931. Upon that day a copy of the judgment of conviction was certified to this court, which thereupon filed its order (section 299, Code Civ. Proc.) suspending petitioner until said judgment "shall have become final"; further ordering that, should said judgment be affirmed on appeal, petitioner should thereupon be deemed removed from office, but, in case such conviction be set aside, he should be deemed fully restored to his office as an attorney at law, and that, until so restored, he be precluded from practicing as an attorney.

During petitioner's period of probation and temporary suspension, to wit, on March 4, 1931, the local administrative committee of the State Bar proceeded with the hearing in this matter. Petitioner, pleading said order of suspension, filed a special appearance challenging its jurisdiction, and testified only over objection. The committee, however, reviewed the case at length, and, after considering said wrongful acts and unfortunate circumstances as well as the evidence of petitioner's good character, it found him guilty of conduct involving moral turpitude, and recommended a three-year period of suspension to run from February 27, 1931, or concurrently with said period of probation. These findings and recommendation were adopted by the board of governors of the State Bar, and the matter is now before us for review. Petitioner contends that this court is powerless to make a second and different order of suspension for the same wrongful act. Respondent argues that the order of February 27th was merely made as required by statute, and was not a determination of the fitness of petitioner to continue in the practice of the law; hence that issue may be properly adjudicated in this proceeding. It should also be noted that, if the court below, under the power conferred upon it by section 1203 of the Penal Code, should set aside the verdict of guilty and dismiss the accusation against petitioner, he would be thereby released from all penalties for his offense, and would probably be restored to his right to practice law, the result being to place in the Superior Court and not in this court the power to determine the period of petitioner's suspension.

This brings us to a consideration of the sole question presented by this review. Where an attorney has been convicted of a felony involving moral turpitude, and, pending final action upon the judgment of conviction, has been suspended from the practice of law by this court pursuant to the provisions of sections 287, 288, 289, and 299 of the Code of Civil Procedure, may disciplinary proceedings, based upon the very facts giving rise to the criminal action, be brought against him and terminate in a further order of suspension or disbarment?

This question must be answered in the affirmative. The first order of suspension is provisional and temporary, awaiting the affirmance or reversal of the judgment of conviction. In re Jacobsen, 202 Cal. 289, 260 P.

294. It does not purport to satisfy the charge against a petitioner or to settle his fitness to remain a member of the bar. Its purpose is to preserve the respect and dignity of the court until the facts authorizing summary disbarment mature into a final judgment. Section 299, Code Civ. Proc. Subdivision 5 of section 287 of said Code provides that an attorney may be removed or suspended for the commission of any act involving moral turpitude, etc., and that, "in the event that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension. * * *" This provision offers ample authority to proceed by proper complaint to a redetermination of the issues involved in the criminal prosecution and to do so either before the judgment becomes final or after it is reversed or set aside. There is no merit in the claim that the order of suspension heretofore made is exclusive or in the nature of res adjudicata.

The punishment recommended by the State Bar in this case seems just and fair. The period begins on the same date as that of petitioner's probationary term, and it has the same duration. It is ordered that the petitioner, Jesse R. Shafer, be, and he is hereby, suspended from the practice of the law in this state for a period beginning February 27, 1931, and ending December 31, 1932; provided that immediately prior to said last date petitioner file with this court a certificate from the State Bar of California certifying that petitioner has, in all ways and in good faith, complied with this order of suspension.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.; SEAWELL, J.

215 Cal. 763

PEOPLE v. GOOLD et al.

Cr. 3504.

Supreme Court of California.

June 30, 1932.

1. Criminal law ⇐680(1).

Permitting introduction of defendant's confession before permitting defendant to introduce evidence that he was so mentally deficient as to be unable to understand meaning of confession *held* not error; question being simply one of order of proof.

2. Criminal law ⇐517(4).

Evidence of corpus delicti in murder prosecution warranted introduction of confession.

3. Criminal law ⇐622(1).

In murder prosecution, granting or refusing permission for separate trials *held* within court's discretion.

4. Criminal law ⇐624.

Whether trial of issue of defendant's sanity in murder prosecution should be by different jury *held* within court's discretion.

5. Criminal law ⇐645.

Permitting or refusing to permit counsel for defendant pleading not guilty by reason of insanity to open and close argument on such issue *held* within court's discretion.

6. Criminal law ⇐570(1).

In murder prosecution, verdict of jury finding defendant, pleading not guilty by reason of insanity, sane *held* supported.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Harry Fuller Goold and Frank J. Paciga were convicted of murder in first degree, and they appeal.

Affirmed.

G. A. Benedict and R. F. Bird, Deputy Public Defenders, both of Los Angeles, for appellant Paciga.

William C. Schaper, of Los Angeles, for appellant Goold.

U. S. Webb, Atty. Gen., John D. Richer, Dep. Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Dep. Dist. Atty., both of Los Angeles, for the People.

LANGDON, J.

This is an appeal from a judgment of conviction of defendants, after a verdict of a jury, of the crime of murder in the first degree. Defendants were sentenced to death. This appeal also seeks to review orders of the court denying the motion of each defendant for a new trial.

Defendants were charged with having, on April 30, 1931, murdered William Fuller. Defendant Paciga pleaded not guilty. Defendant Goold pleaded not guilty, and not guilty by reason of insanity.

From the evidence it appears that the victim, Fuller, lived in an apartment in the city of Los Angeles. On May 1, 1931, he was found lying in his bed, bound and gagged. Death had been caused by strangulation by the gag, with contributory concussion of the brain resulting from blows received. Several witnesses, including the manager and other occupants of the apartment house, testified that defendant Goold had entered Fuller's apartment on several occasions prior to April 30. Goold was arrested in San Diego on May 2, and made a complete confession of the crime to the police officers. He said that he had been living with Fuller about three weeks.

having met him at the Midnight Mission. On the afternoon of April 30, Goold met Paciga and they decided to put into execution a previously discussed plan of robbing Fuller on his pay day. Fuller came in about 6 o'clock in the evening. Goold held him while Paciga struck him until he was almost unconscious. They then bound and gagged him, and took his pocketbook, containing about $50. Paciga gave Goold $20 and left. Shortly thereafter Goold left. The next day he was in Santa Ana, and from there wrote a letter to his parents telling them that he had robbed a man named Fuller with whom he was staying, and that if caught he would get one to ten years for it. Then he left for San Diego, where he was apprehended, and, upon questioning, gave a detailed recital of the facts surrounding the crime, of which the above is a summary.

Defendant Paciga was discovered in Mobile, Ala., and there arrested. He also made a complete confession of the crime. At the trial, Paciga testified as a witness on his own behalf, repeating substantially the matters stated in his confession. The only points in which the stories of Goold and Paciga differ relate to their relative participation in the enterprise. Paciga testified that they intended to rob and did rob Fuller, but that he never intended to kill him. This is borne out by the record. The tragedy which occurred was not within the original plans of the parties. It also appears clearly from the evidence that Goold was the instigator of the crime, took the lead, and directed all of the acts.

[1] The major point of appellants concerns the rulings of the court in receiving in evidence the confessions of defendants. Counsel for defendant Goold offered testimony to prove that he was, at the time of making the confession, so mentally deficient as to be unable to understand its meaning. This offer was made at the time the confession was about to be read in evidence, with the object of excluding it altogether. The court ruled that such testimony could be introduced later as part of the defendant's case. This was done, and the court fully instructed the jury as to their power to disregard the confession if they found it to be made by a person mentally incompetent. Hence, the question is simply one of the order of proof, and we see no prejudicial error in the ruling. The proper foundation was laid as to the free and voluntary making of the confession, and the attack upon it, on the ground of insanity, need not necessarily have preceded the reading of it. The case of People v. Dias, 210 Cal. 495, 292 P. 459, does not require a different order of proof from that followed here, and the only essential fact is that ultimately the jury were permitted to consider the evidence of such incompetency under proper instructions. See People v. Lehew, 209 Cal. 336, 287 P. 337.

[2] It is further contended on behalf of both defendants that neither confession was admissible because of lack of proof of the corpus delicti. In this connection it is said that although the homicide was clearly proved by other evidence, the facts showing it to be first degree murder were not, because the robbery was established solely by the extrajudicial confessions and admissions of the defendants. This is not the case. Paciga was found with the billfold of the deceased in his possession; and this, coupled with the evidence of the struggle and the immediate flight of both parties, was sufficient as a preliminary showing of the homicide while engaged in the commission of a felony, namely robbery. The preliminary showing was later substantiated by Paciga's testimony on the stand. We are satisfied that the confessions were properly admitted.

[3-5] The other allegations of error hardly require mention. Criticism is made of the refusal of the court to permit separate trials for each defendant, to permit trial by a different jury of the issue of sanity in the case of defendant Goold, and to permit counsel for said defendant to open and close the argument on this issue. These matters were, of course, discretionary with the court, and no abuse of discretion is shown. The specifications of improper instructions and refusal to give instructions are without merit; and the two instances of alleged misconduct on the part of the district attorney were immediately followed by proper admonitions by the court, which cured any prejudicial effect they might otherwise have had. We have mentioned these alleged errors very briefly, for the reason that the record is so clear on the facts respecting the commission of the crime, that even serious errors might not warrant a reversal, under the constitutional rule. Cal. Const., art. 6, § 4½.

[6] A final contention made on behalf of defendant Goold is that the verdict of the jury finding him sane is not supported by the evidence. In this connection the record discloses that he had from early childhood been considered mentally defective, and had been addicted to various forms of sexual perversion, which also appear in his relationship with Fuller. He had previously been twice confined in the state insane asylum at Norwalk, as a victim of dementia præcox. Doctors Steele, Carter, and Bowers, of the county lunacy commission, testified that he was insane during the times of the commission of the crime, the making of the confession, and the trial. Relatives, friends, and acquaintances gave testimony to the same effect. Nevertheless, on March 14, 1931, less than two months before the murder, he had been discharged from the asylum as cured, and two of the alienists appointed by the court, Doc-

tors Keyes and Blank, were of the opinion that he was sane. From the entire record, we are unable to say that the evidence established the legal defense of insanity, i. e., the inability to distinguish right and wrong. In the popular meaning of the term, Goold may perhaps be insane; certainly his mental and moral defectiveness stands out in the record. But, as this court has many times pointed out, it is not every such deficiency which comes within the legal meaning of insanity, and the matters urged by counsel on his behalf are really pleas for clemency, which should properly be directed to the chief executive.

The judgments and orders appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J; SHENK, J.; SEAWELL, J.; PRESTON, J.

124 Cal.App. 221

PEOPLE v. FERGUSON.

Cr. 64.

Supreme Court of California.

July 8, 1932.

In Bank.

Appeal from Superior Court, San Bernardino County; G. K. Scovel, Judge.

On application for hearing in Supreme Court.

Denied.

For opinion in District Court of Appeal, see 12 P.(2d) 158.

Joseph Seymour, of Riverside, and R. E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Dep. Atty. Gen., for the People.

PER CURIAM.

The petition is denied. However, we withhold our approval of that portion of the opinion which appears to hold that it is within the discretion of the trial judge to permit a juror to impeach his verdict, either by affidavit or oral testimony, in a case other than where a juror has been induced to consent to a verdict by a resort to chance. Section 657, subdivision 2 of the Code of Civil Procedure prescribes the only instance in which such a procedure is permissible.

BENNETT et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 8350.

District Court of Appeal, Second District, Division 2, California.

July 2, 1932.

Rehearing Denied July 30, 1932. Hearing Granted by Supreme Court Aug. 29, 1932.

Attachment ⊂⊃12.

Complaint, in purchaser's action arising out of contract for sale of land, *held* one in equity, precluding attachment against property of defendants.

Complaint, in action in which attachment was levied upon defendants' property, pleaded agreement for sale of land, that plaintiffs fully complied with agreement, that defendants failed and refused to perform acts required of them, that plaintiffs had served a notice of rescission, and that plaintiffs had demanded repayment of all moneys expended. Complaint concluded with prayer that agreement be canceled, terminated, and rescinded, and be decreed to be void, that plaintiffs have judgment for moneys expended by them with interest, and for such other and further relief as might seem just.

Original application by Logan H. Bennett and another, for a writ of prohibition prayed to be directed to the Superior Court in and for the County of Los Angeles, and Hon. Lewis Howell Smith, as Judge thereof.

Demurrer to the petition sustained, and the application denied.

De Forrest Home and Eugene Kelly, both of Los Angeles, for petitioners.

Everett W. Mattoon, S. V. O. Prichard, and McAdoo, Neblett & Clagett, all of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Petitioners commenced an action in the superior court and, based upon an affidavit declaring that the action was one upon an implied contract, secured a writ of attachment and levied upon the property of one of the defendants. This proceeding is to restrain the court from discharging the attachment. The complaint pleads an agreement for the sale of land providing for certain payments by the plaintiffs and the delivery of a deed and the performance of other conditions by the vendor, that the plaintiffs fully complied with their part of the agreement, but that the defendants failed and refused to perform any of the acts required of them by the terms of the contract, and that plaintiffs had prior to the commencement of the action served on

⊂⊃For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 21 P.2d 946.

defendants a notice of rescission of the purchase agreement, demanding repayment of all moneys expended and offering to deliver back everything of value received by them.

The complaint concludes with the prayer: (1) That the agreement be canceled, terminated, and rescinded, and decreed to be null and void; (2) that the plaintiffs have judgment for the moneys expended by them, with interest; and (3) for such other and further relief as might seem just.

Respondents have demurred to the petition, and, as one of the points, contend that the complaint shows on its face that the action is one in equity in which no attachment will lie, and that therefore a discharge of the attachment is proper.

In Stone v. Superior Court (Cal. Sup.) 4 P.(2d) 777, the court held that where a plaintiff sets forth an action for fraud and deceit and the serving of a notice of rescission and adds another count for money had and received, both counts being based upon the same transaction, such a complaint sets forth a cause of action for equitable relief and the addition of the common count does not change the situation, and that such a complaint cannot be used as a basis upon which to secure a writ of attachment, since the cause of action is the same in both counts and is founded upon the facts set forth in detail in the first. This decision is followed in Ingalls v. Superior Court (Cal. App.) 9 P.(2d) 266, a rehearing being denied by the Supreme Court.

Nearest in point upon the facts is the case of Fair View Farms Co. v. Superior Court (Cal. App.) 10 P.(2d) 1011, 1012, in which case the Supreme Court also denied a rehearing. The complaint there involved alleged that the parties entered into an agreement whereby defendants agreed to sell certain real property and to plant and care for grapevines thereon; that plaintiffs paid to defendants various sums of money; that defendants failed to comply with the terms of agreement; that there had been a total failure of consideration; and that plaintiffs had served defendants with a notice of rescission. The prayer of the complaint was for a sum equal to the amounts of money paid and for the rescission and cancellation of the contract. The court said: "That the complaint in the action here involved states a cause of action for rescission and seeks equitable relief there can be no question. The granting of a money judgment alone, without the cancellation of the outstanding contract, would have afforded plaintiff but an incomplete and inadequate remedy, under the circumstances."

The superior court may, therefore, properly discharge the attachment, because that remedy is not available in an action for equitable relief.

The demurrer to the petition is sustained, and the prayer of petitioners for a writ of prohibition is denied.

We concur: WORKS, P. J.; CRAIG, J.

124 Cal.App. 564

BAYSIDE FISH FLOUR CO. v. ZELLERBACH et al.

Civ. 8096.

District Court of Appeal, First District, Division 1, California.

June 29, 1932.

1. Fish ⇐3.

Property in fish within its waters is vested in state.

2. Fish ⇐1.

Property in fish can only become subject to private ownership in qualified way, and can never be subject of commerce, except with state's consent, subject to conditions imposed.

3. Evidence ⇐83(1).

Presumption is that fish commission will formulate reasonable rules and exercise powers in conformity with statute (St. 1919, p. 1204, § 5, as amended).

4. Fish ⇐10(1).

Permit to take, subject to conditions, certain amount of fish for manufacture of fish flour, subject to termination or modification by commission, *held* revocable under statutes at option of commission (St. 1919, p. 1204, § 5, as amended).

5. Fish ⇐10(1).

Fish commission's rule that permission to take fish for use in reduction process be restricted to seasonal run of fish *held* valid under statutes (St. 1919, p. 1204, § 5, as amended).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Petition by the Bayside Fish Flour Company for a writ of mandate directed to I. Zellerbach and others, members of the Fish and Game Commission, to compel the issuance of a permit to manufacture fish products. From a judgment denying the petition, petitioner appeals.

Affirmed.

See, also, 109 Cal. App. 707, 293 P. 834.

Roy L. Daily, of San Francisco, for appellant.

Eugene D. Bennett and Ralph W. Scott, both of San Francisco, for respondents.

PER CURIAM.

An appeal by petitioner from a judgment denying its petition for a writ of mandate to compel respondents, as members of the fish and game commission, to issue in the form demanded by petitioner a permit to manufacture fish products.

Since the year 1924 petitioner has been manufacturing an edible fish flour from sardines. In 1921, by an amendment to an act to conserve the fish supply in California (Stats. 1919, p. 1204), the Legislature declared it unlawful to use any kind or species of fish fit for human consumption for reduction purposes except fish offal, but provided that any person engaged in taking or dealing in fresh fish or fish products for human consumption, or canning, packing, or preserving such fish, desiring to use in a reduction plant any fish fit for human consumption, might make application to the commission for permission to do so. The act provided for a hearing and for an order permitting the use of a certain amount of fish each month for reduction purposes, and that "said order shall not be granted for a period longer than a seasonal run of said kind or species of fish mentioned in said order." Stats. 1921, p. 459. In 1925 the act was amended (Stats. 1925, p. 595) to regulate plants other than packing or reduction plants, where, by reduction or extraction process, fish or the oil therefrom is manufactured into products fit for human consumption. The amendment made it unlawful for such plants by reduction or extraction process to use sardines without obtaining a permit from the commission, and provided for the issuance under certain conditions of such a permit. The amendment did not limit the duration of a permit so issued, but provided that it might be revoked after a hearing if certain facts were shown.

On August 22, 1925, a permit was issued to petitioner under this act, and it operated thereunder until the act was amended in 1929 (Stats. 1929, p. 901, § 5) to provide "that the fish and game commission may grant a revocable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and game commission may adopt or prescribe, to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption, providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish. * * *" In 1930 petitioner applied to the commission for permission to use at its plant 15,000 tons of sardines "during each open season from August 1st of each year to February 15th of the following year." On October 22, 1930, after a hearing, petitioner was granted permission to take and use 10,000 tons of sardines for the manufacture of fish flour by reduction or extraction process, subject to certain conditions, among which were that the sardines were authorized to be taken and received only during the current sardine season, namely, between August 1, 1930, and February 15, 1931, and providing that the permit should not be valid after the date last mentioned; also that the permit might be "terminated, revoked or modified" by the commission without notice.

Petitioner contends that the commission was without power to limit the duration of its permit, and that the one issued was not a revocable permit within the meaning of the statute.

[1-5] Property in fish within its waters is vested in the state, and its policy has been to conserve the same for the benefit of all. Such can only become subject to private ownership in a qualified way, and can never be the subject of commerce except with the consent of the state and subject to conditions which it may deem best to impose for the public good (In re Phoedovius, 177 Cal. 238, 170 P. 412; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186); and it is presumed that the commission will formulate reasonable rules and exercise its powers in conformity with the statute (People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3). Before the act of 1929, such permits could be revoked after a hearing and for causes specified in the statute (Stats. 1925, pp. 595, 597, 598, § 5); but under the last amendment the permits are revocable, and are granted under such restrictions, rules, and regulations as the commission may prescribe. Here the permit issued was expressly made revocable; and, in view of the fact that the act provides for the taking of sardines during a certain season in each fish and game district, and, if for use in the reduction or extraction process, only if it shall appear that the species will not be depleted or the fish wasted or deteriorated, a rule of the commission that permission be restricted to the seasonal run of fish is not unreasonable or contrary to the spirit of the act. We are satisfied that this was a valid regulation, and the judgment is accordingly affirmed.

124 Cal.App. 488

QUINLAN v. OSBORNE-FITZ-PATRICK FINANCE CO.

Civ. 7178.

District Court of Appeal, Second District, Division 2, California.

June 24, 1932.

Rehearing Denied July 22, 1932.

Master and servant ⇐80(10).

In action to recover unpaid balance for services, evidence warranted finding that finance company had compensated sales manager as stipulated in settlement.

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by J. W. Quinlan against the Osborne-Fitz-Patrick Finance Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Henry G. Bodkin, of Los Angeles, for appellant.

Rush & Beirne, of Los Angeles, for respondent.

CRAIG, Acting P. J.

In an action for an alleged unpaid balance of compensation for services rendered by the plaintiff to the defendant, judgment was rendered in favor of the latter. The only question presented by the appellant is as to whether or not the findings and judgment are supported by the evidence.

It appeared that the parties had a verbal understanding that the appellant should act as sales manager for the respondent, and that he should receive an "over-writing commission" of 10 per cent. upon all sales effected by salesmen of lots in a certain tract. Thereafter a statement in the form of a letter was signed by both parties, that the respondent would pay 5 per cent. of the gross sale price of all lots sold by the appellant or by salesmen working under his direction or supervision. Subsequently to employment for the sale of lots as at first contemplated, the appellant entered upon the disposition of lots in a second tract. A contract was later executed formally, wherein it was recited that the plaintiff having acted as manager and being entitled to an overwriting commission of 10 per cent. on all sales, a controversy having arisen concerning his right to receive commissions on sales made and later canceled, it was desired by the parties that such controversy be amicably adjusted and terminated; that in consideration of the premises, and as a compromise, in full settlement, the defendant agreed to pay in cash, and the plaintiff agreed to accept, a specified amount, upon the signing of the instrument in controversy. Said contract further provided that the second party, appellant herein, "does hereby acknowledge full and complete satisfaction of every claim of every nature whatsoever which has been or otherwise might be asserted by said second party against said first party, as commissions upon any sales of sections in either of said tracts, or otherwise, except that said first party does hereby acknowledge its obligation to hereafter pay to said second party that portion of his overwriting commission of ten per cent upon sales made in the office of said second party and which sales are evidenced by contracts now in good standing * * * as and when the payments are received by said first party under said contracts. It is further agreed that the total commission to be paid * * * on re-sales is and shall be five per cent instead of ten per cent."

The trial court found, in effect, that the last-mentioned contract superseded and merged other agreements of the parties, and that further payments had not been received by the respondent upon contracts in good standing under which the appellant was entitled to compensation in addition to that already paid. While the evidence was conflicting, a careful review of the record discloses documentary evidence which there was testimony tending to corroborate from all of which the trial court must be held warranted in finding that the respondent had compensated appellant for his commission on all contracts as stipulated in the last writing.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

124 Cal.App. 485

HANLON et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8563.

District Court of Appeal, First District, Division 2, California.

June 24, 1932.

Rehearing Denied Sept. 17, 1932.

1. Appeal and error ⇐101(2).

On termination of unlawful detainer, order refusing motion to direct receiver to turn over money *held* appealable.

2. Mandamus ⇐4(1).

Ordinarily, existence of remedy by appeal precludes issuance of writ of mandate.

3. Mandamus ⇐7.

Granting or refusing of writ of mandate is within sound judicial discretion of court to which application is made.

4. Mandamus ⇐3(11).

Where pending litigation in trial court would determine rights of parties in funds in receiver's possession, writ of mandate would not issue to compel receiver, after dismissal of unlawful detainer action, to turn over funds held by him.

Application for writ of mandate by R. Y. Hanlon and others against the Superior Court of the City and County of San Francisco and others.

Writ denied.

Aitken & Aitken, of San Francisco, for petitioners.

Tobin & Tobin, of San Francisco, for respondents.

SPENCE, J.

Petitioners seek a peremptory writ of mandate to compel the respondent court and the respondent receiver appointed by said court to forthwith pay over to petitioners the balance of the sums collected by said receiver as rents from certain real property.

The controversy arises out of the conflicting claims of the parties to the real property involved. Respondent Western Loan & Building Company was the purchaser of said property upon a foreclosure sale under a deed of trust. Said petitioner thereafter commenced an unlawful detainer action to obtain possession, and the receiver was appointed in that action. Shortly prior to the commencement of the unlawful detainer action, and without the knowledge of the plaintiff therein, the petitioners R. Y. Hanlon and Martha Hanlon, his wife, had filed an action seeking to quiet title to the property and to enjoin the purchaser from asserting any claim thereto. Petitioners thereafter made a motion in the unlawful detainer action for the discharge of the receiver appointed therein, and before the hearing of said motion the purchaser filed a cross-complaint in the quiet title action seeking to quiet title against petitioners, and applied for the appointment of a receiver in said quiet title action. Upon the hearing of the motion to discharge the receiver in the unlawful detainer action, the purchaser advised the court that in the event that a receiver was appointed in the quiet title action it would voluntarily dismiss the unlawful detainer action, thereby disposing of the motion pending before the court. The court appointed a receiver in the quiet title action, the unlawful detainer action was voluntarily dismissed by the purchaser, and the court granted the motion to discharge the receiver in the unlawful detainer action "subject to settlement of accounts," stating in its order, "said motion being granted not on the merits but predicated upon the dismissal of this action by plaintiff." Thereafter the court made its order settling the accounts of the receiver in the unlawful detainer action; said order reciting that the balance of funds in the hands of the receiver was $530.20. The order further recited the pendency of the quiet title action and the existence of a controversy over the ownership of the funds in the hands of said receiver, and provided that said funds should be held by the receiver pending further order of the court. At the time of the hearing of the settlement of said accounts, the court also had before it a motion by petitioners for an order directing the receiver to pay over to them the balance of the fund in his hands. This latter motion was denied, and petitioners now seek by mandamus to compel the payment of said money to them.

[1-3] In our opinion the petitioners are not entitled to the relief asked. The order of the trial court denying petitioners' motion made after the dismissal of the unlawful detainer action is an appealable order (Coley v. Superior Court, 89 Cal. App. 330, 264 P. 1110), and ordinarily the existence of a remedy by appeal precludes the issuance of a writ of mandate. 16 Cal. Jur. 789. But in any event, "the issuance of the writ is not altogether a matter of right, but involves consideration of its effect in promoting justice. The granting or refusing of the writ lies, therefore, to a considerable extent, within the sound judicial discretion of the court where the application is made. Cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief." 16 Cal. Juris. 768.

[4] From the facts above stated, it appears that a controversy exists over the ownership of the property and the ultimate rights of the parties in the funds held by the receiver. The pending litigation in the trial court will determine these questions, and the issuance of a writ of mandate as prayed might serve to defeat justice rather than promote it. Even if it be assumed that mandamus is an appropriate remedy, we deem this to be a proper case in which to refuse the issuance of the writ in the exercise of a sound discretion.

The petition for a peremptory writ of mandate is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

124 Cal.App. 405

FRELIGH v. McGREW.

Civ. 4572.

District Court of Appeal, Third District, California.

June 21, 1932.

1. Courts ⇐188(8).

Action to rescind lease and recover amount paid by lessee was properly begun in superior court; municipal court having no jurisdiction (St. 1929, p. 838, § 2).

2. Limitation of actions ⇐180(1).

General demurrer, pleading only that facts stated in complaint were insufficient to constitute cause of action, did not raise question of limitations (Code Civ. Proc. § 338, subd. 4).

3. Limitation of actions ⇐182(3).

Statute of limitations is personal privilege, and must be specially pleaded.

4. Limitation of actions ⇐180(5).

Statement in demurrer on ground that statute of limitations has run that complaint does not state facts sufficient to constitute cause of action must be supplemented by direct reference to bar of statute.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Stella M. Freligh against Susan B. McGrew and others. From a judgment for named defendant, plaintiff appeals.

Reversed, with directions.

Y. B. Arsen, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondent.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to recover the sum of $1,000, and also to obtain a decree of the trial court rescinding and setting aside a certain indenture of lease entered into between the plaintiff and the defendant Susan B. McGrew. Other parties were named as defendants, but this appeal involves only the defendant Susan B. McGrew.

The complaint sets forth two causes of action. The first is a simple cause of action alleging the indebtedness of the defendant to the plaintiff in the sum of $1,000, and praying for a judgment for the recovery of that sum. The second cause of action is to obtain a decree rescinding, setting aside, and annulling a certain indenture of lease dated September 8, 1926. This cause of action sets forth that the defendant represented to the plaintiff that she was the owner of certain property described as the "McGrew Apartments," located in the city of Los Angeles. The complaint further sets forth that in the negotiations leading up to the execution of the lease, it was mutually understood and agreed that a former tenant of the premises was about to vacate the same, and that the defendant represented to the plaintiff that the former tenant was selling the furniture and furnishings in the apartment house, to the defendant for the sum of $1,400 in cash; that defendant represented to the plaintiff that the monthly rent of and for said property would be the sum of $500 per month, and that the sum of $500 per month must be paid in advance as security for the performance of the terms of the lease; that plaintiff thereupon informed the defendant that she did not have the sum of $2,400 in cash or credit wherewith she could pay $1,000 on the lease and $1,400 as the price of the furniture and furnishings, and that she had only the sum of $1,900, whereupon defendant then promised and agreed with plaintiff that she would loan the sum of $500 to plaintiff in order that plaintiff might have sufficient funds to purchase said furniture and enter into said lease; that thereafter, on or about the 14th of September, 1926, the defendant presented to plaintiff a written instrument purporting to be a lease for the premises mentioned herein; that plaintiff submitted said lease to her attorney for examination and approval, and her attorney, after due examination informed plaintiff that paragraph 15 of said lease provided that all the furniture in said apartment should be mortgaged as further security for said lease; that the plaintiff returned said lease to the defendant and her attorney, with the notations thereon, and advised said defendant that she would not accept said lease unless all matters objected to by her counsel were eliminated, especially paragraph 15; that defendant falsely and fraudulently represented to plaintiff that all objectionable matters in said lease would be eliminated, and especially paragraph 15; and, further, that defendant had purchased the furniture and furnishings from Mrs. Craig, and that said furniture would be free and clear of all incumbrances to plaintiff; that at all times during the negotiations of and with defendants, plaintiff informed them that the buying of the furniture of Mrs. Craig, at the price mentioned, was the prime and the sole consideration in entering into a lease with defendants, and that without said furniture plaintiff could not operate said apartments and could have no use or benefit therefrom; that the day following the return of said lease by plaintiff to defendants, with her demand that all objections of her attorney be met and corrected, defendants came to plaintiff and took her to the office of defendants' attorney, and then

and there assured plaintiff that all of the objections of plaintiff's attorney had been removed from said contract, and that paragraph 15 thereof had been completely eliminated; that what the defendant said to the plaintiff was false and untrue, and known to be untrue, and that said assurances, representations, and statements were made to the plaintiff for the purpose of deceiving her, and plaintiff was thereby deceived; that plaintiff, in good faith, believed that paragraph 15 in said lease had been eliminated, and that all of the objections made by her attorney to certain portions thereof had been eliminated; that plaintiff believed defendants' statements that they had already purchased the furniture and furnishings from Mrs. Craig, and, acting upon such belief, and in good faith, accepted said lease without taking the same to her counsel for further examination, and, acting upon the assurances and representations that she need not read said lease, she signed said lease without reading any part thereof, and that at the time she affixed her signature to said lease she had no knowledge as to what it contained, save and except that she believed what defendant had said to her that the lease contained, and plaintiff signed said lease solely and only on such belief; that plaintiff delivered the money herein referred to, represented by checks, to the defendant, $500 to be applied on the rent of the lease of said premises, and $500 to be applied toward the purchase of the furniture herein referred to, said application to be made by the defendant; that two days after the receipt of said lease the plaintiff read the same and discovered that it had not been corrected as promised, and that paragraph 15 thereof remained therein just as in the original draft, and plaintiff discovered that the defendants had not used the sum of $500 as a deposit on the furniture, and that they had not purchased the furniture from Mrs. Craig, and that Mrs. Craig had sold and disposed of the furniture to other parties; that immediately upon discovering defendants' fraud and deception plaintiff went to defendant and made a demand upon defendant for the rescission of said contract and repayment to her of the sum of $1,000 paid to her as aforesaid; that the defendant failed and refused, and still fails and refuses, to repay said plaintiff said sum of $1,000, or any part thereof, or to rescind said contract; that the plaintiff has never received anything of value from defendants; that she had not taken possession of the premises or any part thereof, and the defendant still has possession of the same; that the plaintiff discovered said fraud on or about the 18th day of September, 1926, and on the same day she made demand upon defendant for rescission and return of the money.

The complaint further sets forth the institution of an action by the plaintiff in the municipal court of the city of Los Angeles for the recovery of $1,000, in which action the facts herein referred to also appear. The prayer of the complaint is as follows: "That the plaintiff recover judgment against the defendant in the sum of $1,000.00 with interest thereon at the rate of 7 per cent. from September 14, 1926, and that by the decree of the court said contract or lease be annulled, canceled and declared void." To this complaint the defendant Susan B. McGrew appeared and filed a demurrer in the following language (omitting the title): "1. That said complaint does not, nor does any of the causes of action therein stated, state facts sufficient to constitute a cause of action against said defendant; II. That said action, and each of said causes of action, and the subject matter thereof, are without the jurisdiction of said Superior Court." The minutes of the court show that on the 25th day of February, 1930, an order was made sustaining the defendant's demurrer to the plaintiff's complaint, on the ground that the court had no jurisdiction.

All the facts presented in this cause appear to have been passed upon in an action begun by the plaintiff against the defendant in the municipal court of the city of Los Angeles, in which court the plaintiff had judgment, and upon appeal to the superior court the judgment was reversed on the ground that the municipal court had no jurisdiction. An appeal therefrom was taken to the District Court of Appeal, where the judgment of the superior court was affirmed. See Freligh v. McGrew, 95 Cal. App. 251, 272 P. 791. In the opinion there reported all the facts to which we have referred were set forth practically the same as appear here, save and except our statement may be slightly fuller, and, in the consideration of the facts and circumstances presented in this cause, the court, in its opinion affirming the judgment of the superior court, held that the action was essentially an action in equity for the rescission of the lease. The right to the return of the money is based upon a rescission of the lease. The right to the rescission of the lease is based upon the alleged fraudulent representations of the defendant.

In the opinion to which we have referred a slight error appears as to dates, which led the court to say that the plaintiff did not promptly attempt to rescind. The opinion erroneously states that the lease was signed in September, 1924, and the action was filed in the superior court in October, 1926, whereas, in truth and in fact, the lease was signed in September, 1926, and the action was begun in a little over a month thereafter, and not two years later, as erroneously stated in the opinion. Furthermore, it appears in the complaint in the action before us that the plaintiff had not taken possession of any of the property

referred to in the lease, and therefore there was nothing for her to return, save and except to return the lease and demand rescission, which appears to have been promptly tendered in this case, and within two days after the discovery of the alleged fraud.

[1] By the Act of the Legislature approved May 25, 1929 (Stats. 1929, p. 837, § 2), municipal courts are given jurisdiction as follows: "1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less"—and then, after specifying other cases in which municipal courts have jurisdiction, provides: "Each municipal court shall have jurisdiction in all cases in equity, when pleaded as defensive matter or by way of cross-complaint in any case at law commencing [commenced] in the municipal court of which it has exclusive jurisdiction," etc.

By a reference to the act from which we have quoted in part, it is apparent that the municipal court has no jurisdiction of the cause of action set forth in the complaint herein, and that the cause was properly begun in the superior court as the essential basis of the action; and the only theory upon which the plaintiff can prevail is that she is entitled to a rescission of the contract.

[2, 3] This brings us to a consideration of the defendant's demurrer to the plaintiff's complaint. As appears by reference thereto, the demurrer is general and pleads only that the facts stated are not sufficient to constitute a cause of action. Upon this appeal the respondent relies upon subdivision 4 of section 338 of the Code of Civil Procedure, in that this action was not begun within three years after the discovery of the fraud. However, the demurrer in this action does not raise the question of the statute of limitations. The decisions in this state uniformly hold that the statute of limitations is a personal privilege and must be specially pleaded.

[4] The respondent refers to the case of Young v. California State Board of Pharmacy (C. C. A.) 273 F. 30, 33, as supporting her contention. A reading of the language quoted from the opinion in that case shows that the respondent's contention is not supported. It is there said: "It is contended that the demurrer of the other defendants was insufficient, because it set up the bar of the statute as an insufficient statement of facts to constitute a cause of action." Why was the demurrer not sufficient? Insufficiency of the statement in the complaint clearly consisted of the failure of the plaintiff to allege facts showing that the cause of action arose within three years. This was a defect apparent on the face of the complaint. The court was unquestionably right in sustaining the demurrers. This statement of the law is in accordance with the holding of California courts that the demurrer for insufficiency of facts must state, among other things, that the cause of action is barred by the statute of limitations. The case referred to holds specifically that the bar of the statute was distinctly raised by the demurrer. In the instant case the demurrer does nothing of the kind.

In 16 California Jurisprudence, 608, § 204, we find the following text supported by abundant authorities: "The defense that a cause of action is barred by the statute of limitations cannot be raised by a general demurrer which merely states in general terms that the complaint does not state facts sufficient to constitute a cause of action. The ground that the cause of action is barred must be specifically pointed out, whether the demurrer is to the complaint or a counterclaim. This is the only exception to the rule that a general demurrer need not specify in what particulars it is claimed a complaint is insufficient. Since it is not the office of a demurrer to set out the facts, the demurrer need not, and should not, state facts showing the defense. While a demurrer may specify the particular code section by the provisions of which it is claimed that a cause of action is barred, it need not do so. If the particular code sections relied upon are specified, other sections will not be considered, and if the wrong section is pleaded, the demurrer must be overruled."

As shown by a reference to section 202 of the same volume, where the demurrer is on the ground that the statute has run, the statement in the demurrer to the effect that the complaint does not state facts sufficient to constitute a cause of action must be supplemented by a direct reference to the bar of the statute. This question has been passed upon a number of times by the Supreme Court, as appears by the citations contained in the case of Union Oil Co. of Cal. v. Purissima Hills Oil Co., 181 Cal. 479, 480, 185 P. 381, where it is said: "Undoubtedly the bar of the statute of limitations should have been set up by a demurrer calling attention to the proper section of the Code"—citing a number of cases.

In California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co., 158 Cal. 690, 112 P. 274, 278, Ann. Cas. 1912A, 729, the court had before it a similar question, and in the opinion we find the following: "While defendants have been permitted to demur on the ground that the action was barred, the only subdivision of section 430 [C. C. P.] under which this ground of demurrer could be brought was that 'the complaint does not state facts sufficient to constitute a cause of action.' But, inasmuch as the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, the party relying upon it must affirmatively set it up in his pleading. A demurrer merely stating that there is a want of facts will not suffice"—citing Brown

v. Martin, 25 Cal. 82; Bliss v. Sneath, 119 Cal. 526, 51 P. 848.

In line with what we have said is the text found in 37 C. J., page 1209 et seq. See, also, Bliss on Code Pleading (3d Ed.) p. 632.

The judgment is reversed, with directions to the trial court to permit the defendant to answer within such reasonable time as the trial court may specify, if the defendant is so advised.

We concur: PARKER, Justice pro tem.; R. L. THOMPSON, J.

124 Cal.App. 493

Ex parte GOUGH.

Cr. 1662.

District Court of Appeal, First District, Division 2, California.

June 25, 1932.

1. Habeas corpus ⇐113(6).

Where district attorney, representing only the people, announced after judgment that "appeal is taken at this time," appeal *held* taken by people (Code Civ. Proc. § 1963, subd. 15).

2. Habeas corpus ⇐113(6).

Expression at opening of specifications of grounds of appeal by the people, now comes the "warden of the California State Prison," *held* mere surplusage not vitiating appeal.

3. Habeas corpus ⇐3.

Even if trial court made erroneous order after final judgment, defendant could not raise objection for first time in habeas corpus proceedings.

4. Criminal law ⇐1216(6).

Time spent by prisoner in county jail after being sentenced to prison could not be applied on prison term (Pen. Code § 670).

Time spent in county jail could not be applied on prison term since, under Pen. Code § 670, the warden is bound to estimate the term of a prisoner from the date the prisoner is received in warden's custody.

5. Habeas corpus ⇐85(1).

Prisoner instituting habeas corpus proceeding had burden of establishing he was unlawfully restrained of his liberty.

6. Habeas corpus ⇐79.

Attack on manner in which prisoner's term was fixed could not be considered in habeas corpus proceeding where manner of fixing term was not shown by record.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Application by James W. Gough for a writ of habeas corpus against the People. From an order granting the writ and discharging the petitioner, the People appeal.

Order reversed.

See, also, 112 Cal. App. 218, 296 P. 658.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

Thomas T. Califro, of San Francisco, for petitioner.

STURTEVANT, J.

This is an appeal by the people of the state of California from an order granting a petition for a writ of habeas corpus and the discharge of the petitioner. The petitioner makes a preliminary objection in the form of a motion to dismiss the appeal.

[1] The application for a writ of habeas corpus was presented to the superior court of this state in and for the county of Marin. The petitioner was represented by his attorney Mr. Califro. The people of the state of California were represented by Mr. Greer, the district attorney of Marin county, The people were the only respondents and Mr. Greer did not represent any one else. When the trial court announced its judgment granting the application and ordering the petitioner discharged, Mr. Greer, as recited in the minutes, announced in open court that "an appeal is taken at this time." The record does not show that he specially designated his client by name. Assuming, without deciding, that he should have done so, we may not presume that he did not perform his official duty. Code Civ. Proc., § 1963, subd. 15. It follows that the appeal was taken by the people of the state of California.

[2] Later a document headed "Specifications of Grounds of Appeal," was filed in the trial court. The petitioner makes several attacks thereon, claiming it does not comply with rule 2, section 7, of the judicial council. We understand the petitioner to refer to Rules of the Supreme and District Courts of Appeal. The petitioner does not quote and we have not found any passage in said section addressed to appeals in habeas corpus proceedings. True it is that the section refers to orders "made after judgment." However, from the context it appears that the passage refers to orders made after judgment in the original action and does not refer to orders made in a collateral proceeding. On the other hand, if we assume for the purposes of this decision that rule 2, section 7, is pertinent to this case, the result is the same. The "specifications" opens with the expression "Now comes the respondent, James B. Holohan, warden of the California State Prison at San

Quentin. * * *" The petitioner quotes the expression, and thereupon he states that the warden is not the respondent, and that the statute does not give the warden the right to appeal. The point may not be sustained, for it is patent that the respondent appealed, and that the words "James B. Holohan, warden of the California State Prison at San Quentin" were surplusage, but surplusage does not vitiate. The other attacks made on the specifications are merely stated by the petitioner, no argument in support of them is made, and no authorities whatever are cited. Therefore we pass to a consideration of the application on its merits.

[3, 4] On July 24, 1925, an indictment was filed in the superior court of the state of California in and for the county of Alameda, charging the petitioner with having committed the crime of grand larceny. On September 2, 1925, he pleaded guilty and was sentenced to be imprisoned at San Quentin "for the term prescribed by law, that he be remanded to the custody of the sheriff of the county of Alameda, to be by him delivered to the warden of the state prison at San Quentin, California." He was received at the prison February 10, 1926, and on August 14, 1927, his term was fixed at ten years. In his first point the petitioner asserts that. if he had been delivered at the prison on September 2, 1925, his term would have expired on March 2, 1932, and in justice it should be so ordered. In this connection he intimates that the trial court sitting in Alameda county made some order in excess of its jurisdiction. He does not state affirmatively what that order was, but he negatives several other possible orders. If any erroneous order prejudicial to his rights was made after final judgment, he had his remedy, but he was not entitled to acquiesce therein and raise his objection at this time in this proceeding. The warden's powers are provided by statute, and he is bound to estimate the term of a prisoner from the date the prisoner is received in his custody. Pen. Code, § 670; In re Forbes, 108 Cal. App. 683, 292 P. 142; In re Sichofsky, 201 Cal. 360, 257 P. 439, 53 A. L. R. 615.

[5, 6] In his brief the petitioner asserts that the state board of prison directors, without evidence or hearing, fixed the term of the petitioner at ten years, and without right or privilege of parol. However, these attacks are not supported by any record. When the respondents filed their return, the record does not disclose that any answer or traverse was filed. Neither does it show any stipulation that the petition should stand as a traverse to the return. The burden of showing that the petitioner is unlawfully restrained of his liberty rested on him. That he did not make that showing in the trial court, and has not made it in this court appears from the transcript. Under rule 22 of the rules hereinabove referred to "* * * the record on appeal shall consist of (1) a copy of the petition for the writ, (2) a copy of the return and of all other documentary evidence considered by the court on the hearing, (3) a transcript of the oral evidence, if any, taken upon said hearing, and (4) a copy of the order of the court made in the final determination of the matter." On taking their appeal the respondents asked for said transcript. Thereafter one was prepared, certified and filed, and no objection has been made thereto. It follows that the attacks made by the petitioner on the manner in which his term was fixed are not before us and may not be considered.

The order granting petitioner's application and ordering him discharged is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 591

COADY v. LEGG.

Civ. 7073.

District Court of Appeal, Second District, Division 2, California.

June 30, 1932.

1. Judgment ⇐815.

Where record disclosed valid foreign judgment sued on, such judgment must be upheld in absence of showing of fraud (Code Civ. Proc. §§ 1905, 1916).

2. Evidence ⇐35.

Courts take judicial notice of laws of sister states, permitting judgment without personal service, where pleading is sufficient to permit application of doctrine (Code Civ. Proc. § 1875, subd. 3).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by P. H. Coady against F. M. Legg. From a judgment for plaintiff defendant appeals.

Affirmed.

C. A. Stice, of Los Angeles, for appellant.

Morris McLaughlin, of Los Angeles, for respondent.

CRAIG, J.

A judgment rendered against the appellant in Illinois was assigned to the respondent, who commenced an action thereon in the superior court of Los Angeles county. Recovery by the plaintiff in the second suit resulted in the instant appeal.

[1, 2] It is contended that the defendant in the original action was not served with process, that he was without the jurisdiction of the court, and that a judgment by confession in such a case is not recognized in this state. Judgment was rendered therein upon a promissory note embracing express power of the promisor, appellant herein, to "confess judgment himself or by attorney duly authorized either in term or vacation without process," in accordance with the governing statutes. Neither the validity of such power nor the appearance and confession of judgment by the authorized attorney is disputed. Measured by the laws of Illinois, no jurisdictional fact appears to have been omitted in the complaint upon which the judgment was based, and the record presents a valid judgment in the first instance. Blanck v. Medley, 63 Ill. App. 211; Conkling v. Ridgely, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204. And in the absence of a showing of fraud it must be upheld. Code Civ. Proc., §§ 1905, 1916; Weir v. Vail, 65 Cal. 466, 4 P. 422; Lewis v. Adams, 70 Cal. 403, 11 P. 833, 59 Am. Rep. 423; First Nat'l Bank v. Terry, 103 Cal. App. 501, 285 P. 336. With respect to appellant's claim that the law of Illinois permitting a judgment without personal service should have been pleaded, this is now unnecessary. Courts take judicial notice of the laws of sister states in those cases, such as this, where the pleading is sufficient to permit application of the doctrine. Code Civ. Proc. § 1875, subd. 3.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 617

BECHTEL v. BECHTEL.

Civ. 8541.

District Court of Appeal, First District, Division 1, California.

July 2, 1932.

1. Divorce ⇐245(1).

If court in divorce decree orders alimony payments at stated periods, it may modify order and increase or decrease amount (Civ. Code, § 139).

2. Divorce ⇐245(1), 247.

In divorce decree, court may order alimony payments for limited period, but has power to require payments after expiration of period, or to increase amount (Civ. Code, § 139).

3. Divorce ⇐245(1).

Court requiring alimony payments in divorce decree may modify decree in such respect, though no power to modify was reserved (Civ. Code, § 139).

4. Divorce ⇐235.

In divorce decree, limiting alimony payments to period of five years *held* not abuse of discretion (Civ. Code, § 139).

There was no abuse of discretion, since court did not, by such limitation, foreclose its power to modify order by requiring, if necessary, suitable payments to be made after expiration of five-year period.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Winnifred Belle Bechtel against Warren A. Bechtel, Jr. From certain unsatisfactory portions of a decree in favor of plaintiff, plaintiff appeals.

Affirmed.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, and Nat Schmulowitz, all of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

In the above action the trial court by its interlocutory decree granted a divorce to plaintiff on the ground of defendant's extreme cruelty. The decree awarded to plaintiff certain real property upon which the parties resided, with the contents of a dwelling house thereon, subject, however, to the incumbrances upon the property. It further provided that defendant pay as permanent alimony the sum of $150 each month, commencing on September 1, 1930, for the period of five years, when the payments should cease. Plaintiff has appealed from portions of the decree, and claims that the court by limiting the alimony payments to the period mentioned abused its discretion, and asks that the error be corrected by this court.

[1-3] Section 139 of the Civil Code provides that where a divorce is granted for an offense of the husband the court may compel him to make such suitable allowance to the wife for her support during her life or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively, and may from time to time modify its orders in these respects. If the court orders payments of alimony at stated periods it may modify its order (McCaleb v. McCaleb, 177 Cal. 147, 149, 169 P. 1023; Wolff v. Wolff, 102 Cal. 433, 36 P. 767, 1037), and the amount may be increased or diminished (Ex parte Spencer, 83 Cal. 460, 23 P.

395, 17 Am. St. Rep. 266; Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Duffey v. Duffey, 79 Cal. App. 734, 251 P. 218). Furthermore, it may make the order for a limited period (Brown v. Brown, 206 Cal. 7, 272 P. 1052). But this is not conclusive upon its power to require payments to be made after the expiration of the period or to increase the amount (Smith v. Sup. Ct., 89 Cal. App. 177, 264 P. 573); and no reservation of power to modify its order need be contained in the decree (1 Cal. Jur., Alimony, p. 1032; Soule v. Soule, supra).

[4] The award made was not in the circumstances unreasonable; and it is clear from the foregoing that the court may modify its order by requiring, if necessary, suitable payments to be made after the expiration of the five-year period notwithstanding the limitation contained in the decree. No abuse of discretion has been shown, and the decree should be affirmed.

The portions of the decree appealed from are affirmed.

MAGGIO BROS. CO., Inc., v. WOOD. *

Civ. 880.

District Court of Appeal, Fourth District, California.

June 24, 1932.

Rehearing Denied July 23, 1932.
Hearing Granted by Supreme Court Aug. 22, 1932.

1. Sales ⇐479(7).

Seller in claim and delivery action, alleging that buyer purchasing truck and agreeing to pay therefor by hauling for seller, refused to continue hauling, must show buyer broke hauling contract in order to recover.

2. Sales ⇐479(7).

Evidence in claim and delivery action did not sustain finding that buyer refused to do agreed hauling for seller in payment for truck purchased.

Under purchase contract, buyer could make all payments on truck out of work and hauling to be done for seller, and could also do hauling for other persons, and facts disclosed that the hauling the seller permitted buyer to do for it was irregular and not of any particular amount, and that at no time did buyer refuse to do any hauling requested by the seller.

3. Sales ⇐476.

Purchase contract requiring truck buyer to hold himself open to undertake hauling for seller did not require buyer to remain at seller's place of business, but permitted buyer to haul for others, unless his services were required by seller.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Maggio Bros. Company, Inc., against Pearl W. Wood. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

William M. Morse, Jr., and S. A. Shoop, both of Los Angeles, and Ray D. Johnson, of El Centro, for appellant.

Kendall B. Perkins and Utley & Nuffer, all of El Centro, for respondent.

BARNARD, P. J.

[1] This is an appeal by the defendant from a judgment in favor of the plaintiff in an action in claim and delivery for the return of a truck. The truck in question was sold by the respondent to the appellant under a contract which provides that it shall be paid for "in monthly payments," although the contract neither provides for any particular amount per month, nor, in view of its other terms, for any regularity in making the payments. The contract provides that the buyer shall have the right to make any and all payments upon the truck "out of work and hauling to be done by second party with said truck for the first party." The contract also provides: "And it is the intention of the two parties that the first party shall employ the second party, from time to time hereafter, as a truck driver to make certain trips with said truck about the State of California in hauling fruit and produce for the first party. That the second party shall, from the proceeds accruing to him from such trips, be enabled to make monthly payments on the said purchase price of said truck, to first party, until said truck of $3200.00 has been fully paid; and that during the time from this date until said full purchase price has been fully paid, the second party shall hold himself open at all time to undertake such work with said truck, for the first party." Another contract was entered into at the same time between the parties providing that the appellant shall do "certain hauling" for the respondent for a period of two years, but failing utterly to make any provision as to what hauling, the amount thereof, when it is to be done, or that it shall be done with any regularity. While this contract fixes the price to be allowed for trips to various sections of the state, nothing is mentioned as to how many trips shall be made or when. These contracts did not even provide that the respondent should give all of its hauling to the appellant, and it fully appears from the evidence that a large part of its hauling was given by respondent to other persons, when cheaper rates could thereby be obtained. The vagueness of these contracts is only exceeded by the indefiniteness of the complaint filed. While the action pur-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 13 P.2d 694.

ports to be in claim and delivery, the complaint neither alleges title in the plaintiff, right of possession in it, nor that demand has been made and possession refused. The prayer does ask for possession of the truck. However, the essence of the complaint seems to be that the respondent sold the truck to the appellant, to be paid for by hauling done therewith by the appellant for the respondent, and that the appellant had broken the contract by refusing to do any more hauling for the respondent. If any cause of action is set up by the complaint, proof that the appellant has broken the contract in this particular respect is essential to a recovery by the respondent. The court found that the appellant complied with all of the terms of the contracts up to March 7, 1930, and that he then failed and refused to do any more hauling for the respondent, and took the truck to "parts unknown" and absconded therewith.

[2] The only point presented which need be considered is that the evidence does not support this finding, which contention we think must be sustained. It appears that the appellant lived at Puente while the respondent had its principal place of business at El Centro. While the appellant did not haul for the respondent continuously, and while much of respondent's hauling was given to other parties, no difficulties arose until in March, 1930. It is conceded by the respondent that the appellant was given specific permission to use the truck in hauling for other people during the months of January and February, 1930. The court correctly found that the appellant fully lived up to the terms of the contracts until March 7, 1930. However, it appears that in September, 1929, the respondent signed and delivered to the appellant the pink registration certificate applying to this truck, and the appellant reregistered the truck in his own name, both as legal and registered owner. The respondent contends that this was done only for the purpose of enabling the appellant to take out insurance on the truck. In any event, the matter was not seriously questioned until March 6, 1930, when the president of the respondent company told the appellant to bring back the pink slip. While the respondent contends the appellant agreed to bring this back on March 10th, the appellant testified that he said he would bring it back either on that day or as soon thereafter as he came to El Centro. While the appellant had previously complained to the respondent of the fact that the respondent was giving its hauling work to others at a lower price instead of calling upon the appellant under these contracts, it is fully apparent that this action arose out of a dispute over the return of this pink slip. The appellant did not return the pink slip on March 10th, as on that day he was using the truck to haul a load of hay to Ontario. On that day respondent's president and manager called the sheriff's office, and also ordered all his employees to watch for the truck. On the same day, one of respondent's agents saw the appellant with the truckload of hay in Brawley, whereupon he tried to induce an officer to take possession of the truck, asked appellant to immediately return the truck to El Centro, told appellant that he had no interest therein, and threatened him with arrest. Appellant replied that he had to deliver the load of hay, but would return with the truck to El Centro the next day. Before he could return, he was arrested and this action was started.

The respondent does not call our attention to a word of evidence and we have been unable to find any evidence in the record that even tends to support the finding of the court that the appellant failed and refused to do any hauling for the respondent, or that the respondent ever at any time requested the appellant to do any hauling which was not done. The court found that the appellant had fully complied with the contract up to March 7th. Respondent's president and manager testified that he had no conversation with appellant in the month of March, 1930, concerning hauling. The evidence as to a conversation between the president of the respondent company and the appellant on March 6th shows that it related entirely to the return of the pink slip by the appellant. The evidence as to the conversation between respondent's agent and the appellant on March 10th related to this pink slip, the ownership of the truck, and the demand for its possession and the claim that the appellant had no further interest therein. There is not a word of evidence that on either occasion the appellant was asked to do any hauling or that he refused any such request.

[3] Apparently respondent relies upon the contention that the clause in the contract to the effect that the appellant "shall hold himself open at all time to undertake such work" required the appellant to be at respondent's place of business at all times with the truck; that respondent's permission to use the truck in hauling for others was limited to two months, which had expired; and that appellant breached the contract when he failed to come to respondent's office in El Centro on March 10th. No such an interpretation of the contracts is tenable. Under the terms of the contracts, the appellant had the absolute right to haul for other parties at any time he chose, unless his services were required by the respondent, and any special permission to so haul was both unnecessary and immaterial. The respondent did not agree to give him any particular amount of hauling or with any regularity. The parties lived at different places, and, under the vague and loose provisions of the contract, the clause as to holding himself in readiness must be given a reasonable interpretation in the light of its other provisions. It was not incumbent

upon the appellant to sit in respondent's office waiting until they should need him and he was entitled to be notified when his services were required. The provision that he should hold himself in readiness, the absence of a provision that he should report regularly for duty, the fact that he lived in a city many miles away, the indefiniteness as to when his services would be required, and the fact that the other party to the contract was left free to give him much or little of its hauling, all import the necessity for a reasonable notice to appellant when his services with the truck were required. This is especially true, in view of the additional evidence that he had been particularly told that work was slack with the respondent, and that he might obtain work elsewhere during the next "couple of months." Both the terms of the contract and the nature of this consent demanded a reasonable notification when his services were required before he could be put in default and his interest in the truck taken from him. Even if he had been notified at the conversation on March 10th that his services were then required, under the circumstances, it would have been a sufficient compliance with the contracts for the appellant to have delivered the load he then had upon the truck and reported to the respondent for work the next day. However, no such notice was given him, and the action was started at a time when all of the evidence in the record shows he was not in default.

All of the evidence being contrary to this particular finding, and there being no other findings to support the judgment, the judgment is reversed, with directions to enter a judgment in favor of the appellant.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 607

ALEXANDER v. SHELL CO. OF CALIFORNIA.

Civ. 890.

District Court of Appeal, Fourth District, California.

June 30, 1932.

Rehearing Denied July 30, 1932. Hearing Denied by Supreme Court Aug. 29, 1932.

1. Damages ⇐189.

Defendant voluntarily breaching contract cannot demand proof of plaintiff's resulting damages with great particularity.

2. Sales ⇐417.

Where plaintiff purchased gasoline in open market on defendant's breach of contract to sell, plaintiff's gallonage requirements for determining damages should be fixed by amount so purchased, not shown as insufficient for normal demand (Civ. Code, §§ 3308, 3354).

3. Sales ⇐417.

Plaintiff's sale of 300 gallons of gasoline for single day at 3 cents per gallon below current retail price *held* insufficient to establish probable gallonage requirements under defendant's contract to sell, for determining damages from breach thereof (Civ. Code, §§ 3308, 3354).

Facts disclosed that defendant breached his contract to sell plaintiff all the gasoline plaintiff needed at his service station, for 6 cents per gallon below the current retail price; that plaintiff went out and purchased gasoline in the open market; and that 300 gallons or the amount plaintiff sold in a single day at 3 cents per gallon less than the retail price before defendant's breach of his contract was used as a basis for estimating the gallonage plaintiff would have purchased under the contract with defendant for determining damages, rather than the amount plaintiff had purchased in the open market.

4. Appeal and error ⇐1214.

Plaintiff proceeding upon erroneous damage theory in suit for breach of contract had right to produce upon retrial additional evidence showing damages sustained.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by M. J. Alexander against the Shell Company of California. From a judgment for plaintiff, defendant appeals.

Reversed.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for appellant.

M. W. Conkling, of San Diego, for respondent.

SCOVEL, Justice pro tem.

This is an action for damages for breach of contract. On March 21, 1927, plaintiff and defendant entered into a written agreement for a period of one year during which time plaintiff agreed to buy from defendant and defendant agreed to sell to plaintiff all the gasoline the latter might require for use or resale at his service station located east of Holtville in Imperial county at a price of 6 cents per gallon less than the current retail price thereof in Holtville. Deliveries were made under the contract until May 28, 1927, at which time defendant refused to make further deliveries. At the trial it appeared that subsequent to May 28, 1927, and until March 21, 1928, plaintiff purchased gasoline for sale in his service station from va-

rious other dealers and it was stipulated that he could at all times have purchased as much gasoline as he desired at the retail price of 23 cents. It also appeared that plaintiff on one day prior to the breach of the contract by defendant sold three hundred gallons of gasoline at the price of 20 cents per gallon, which was 3 cents under the current retail price. The total amount of gasoline purchased for resale during the period above mentioned was 17,955 gallons, the price paid therefor by plaintiff being approximately 2 cents per gallon more than he would have paid had defendant furnished gasoline in accordance with the contract. The jury returned a verdict in plaintiff's favor in the sum of $3,000. From the judgment entered thereon defendant appeals.

It is the contention of defendant that the verdict is not supported by the evidence, asserting that the damages sustained by plaintiff are capable of exact measurement under sections 3308 and 3354 of the Civil Code. Section 3308 of the Civil Code provides that the damage caused by the refusal of a seller to deliver personal property where the price has not been paid in advance is the excess in the value thereof to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled.

Section 3354 of the Civil Code provides that in such a case the value of the property to a buyer is deemed to be the price at which he might have bought an equivalent thing in the market nearest the point of delivery at such time after the breach as would suffice with reasonable diligence for him to make such a purchase. Defendant asserts that plaintiff's damages therefore are the difference in the price he actually paid for gasoline purchased subsequent to the breach and the price that he would have paid had the gasoline been purchased from the defendant under the contract.

Respondent admits that the two foregoing sections lay down the proper rule for estimating the damages, but claims the amount of damages must be determined by the estimated gallonage that he would have purchased under the contract had it not been broken by defendant and that to estimate such gallonage the testimony of plaintiff as to the amount sold on one day at 20 cents per gallon, or 300 gallons, is sufficient to support the verdict of the jury. In other words, plaintiff having on one day sold 300 gallons of gasoline the jury were at liberty to assume that he might have sold the same amount every day during the term of the contract and that his damages are therefore the product of such total amount multiplied by the difference between his retail price and the contract price, or 3 cents a gallon.

Respondent in his brief states that his selling cost was 3 cents per gallon, from which it appears that upon the day selected by him to estimate the gallonage the resale was made at no profit. Had defendant continued therefore to furnish him gasoline under the contract, and had sold the same at such price no profit whatsoever would have resulted. If plaintiff's theory is true and constitutes the proper method of estimating the amount of damages, then through a breach of the contract he makes a profit of approximately $3,000, while had the contract been fulfilled no profit whatsoever would have resulted. That such is not the proper rule to be applied seems self-evident. A party may not recover more from the breach of a contract than he would have received through its performance. Civ. Code, § 3358.

[1-3] It is true that defendant having voluntarily breached the contract is in no position to demand proof of plaintiff's damages by reason thereof with great particularity or exactness. Pye v. Eagle Lake Lumber Co., 66 Cal. App. 584, 227 P. 193. It is also true that plaintiff, upon defendant's failure to deliver under the contract, need not have bought the gasoline that he required in the open market. He might have refused to purchase at all and based his damages upon the difference between the cost of the gallonage he would have required under the contract at the contract price and the market price therefor. However, having gone into the open market and purchased gasoline, we are of the opinion that his gallonage requirement would be fixed by the amount so purchased, in the absence of any showing that this amount was not sufficient to fill his reasonable, normal demands. Certainly to estimate plaintiff's requirements over a period of ten months for the purpose of determining the damages by basing it upon one day's sale at no profit would be to indulge in the wildest speculation and conjecture. As well might the amount be measured by the quantity of gasoline that he could give away on any one day.

Plaintiff in his brief states that apparently the jury accepted 300 gallons per day as his reasonable requirements. If this be true, an allowance of some 3 cents per gallon was made in arriving at the verdict of $3,000. However, under such construction of the verdict plaintiff receives a substantial profit by the breach of the contract while he would have received no profit had it been completed. If plaintiff desired to base the probable gallonage requirements under the contract upon previous sales, he should have produced evidence as to the amount of such sales over a reasonable period of time prior to the breach made during the usual course of business and not the volume of sales made under particular circumstances or at a "sale price." We are of the opinion that the verdict is not supported by the evidence.

[4] Defendant insists that since the actual amount of gasoline purchased by plaintiff after the breach of the contract, together with the actual amount paid therefor by him, appears in the record, we should order judgment entered in favor of plaintiff for the difference between the actual cost thereof and what it would have cost under the contract. Upon a retrial of the matter, however, it might appear that by reason of transportation difficulties, or for other reasons, the amount of gasoline actually bought by plaintiff was not sufficient to supply his reasonable and normal market requirements, in which case he would be entitled to show what such amount would have been. Having proceeded under an erroneous theory, we do not feel that plaintiff should be precluded from producing, upon a retrial, such additional and proper evidence as may be available.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

ACME INVESTMENT CORPORATION v. THOMPSON.*

Civ. 892.

District Court of Appeal, Fourth District, California.

June 30, 1932.

Rehearing Denied July 30, 1932. Hearing Granted by Supreme Court Aug. 29, 1932.

1. Chattel mortgages ⇐127.

Mortgage of crop by tenant *held* to cover only tenant's interest in crop to exclusion of share to which landlord was entitled.

2. Bills and notes ⇐518(1).

In action on note, evidence *held* insufficient to support finding of lack of consideration for note.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Acme Investment Corporation against J. D. Thompson. Judgment for defendant, and the plaintiff appeals.

Reversed, with instructions.

Hickcox & Trude, of El Centro, for appellant.

Frank Birkhauser, of El Centro, for respondent.

BARNARD, P. J.

This is an action on a promissory note given for $487; the complaint being in the usual form. The answer admits the execution of the note; alleges that the same was obtained from the defendant by the plaintiff by means of false and fraudulent representations; and alleges that there was no consideration therefor. The court found that all of the allegations of the complaint are true, except only the allegations that the note was given for a valuable consideration and "that same is due and owing from defendant to plaintiff"; that no false or fraudulent representations were made by the plaintiff or its agents; and that there was no consideration for the note. Judgment was entered for the defendant, followed by this appeal.

The appellant argues that the findings to the effect that the note in question was given without consideration are mere legal conclusions and not properly findings at all. While the findings upon this subject are open to criticism, we will, for the purpose of this opinion, take them as sufficient and consider the main point presented, which is that the evidence is not sufficient to sustain any such finding or conclusion, which contention we think must be sustained.

It appears from the evidence that one Jackson was in possession of certain real property in Imperial county under a lease dated April 15, 1926, and expiring February 1, 1927, upon which land he raised a crop of cotton during the year 1926. While the lease was not introduced in evidence, being only marked for identification, it appears from other evidence that appellant was to receive one-fourth of the crop produced, in return for the use of the land. The respondent made certain advances to Jackson and took a crop mortgage covering this crop of cotton. After harvesting of the crop had started, an agent of the appellant, who had heard that the crop was being delivered to the respondent, called upon him and asked him about the landlord's share. This agent testified that at that time it was agreed between them that the respondent should go ahead and sell the crop and turn in one-fourth of the proceeds to the appellant. While the respondent testified he could not remember whether such an agreement was made, it is undisputed that he then said that he would come in as soon as the crop was sold and "make return." The harvesting of the crop continued through the fall of 1926 and the early part of 1927, and at its conclusion the respondent came in and reported to appellant's agent the amount of the proceeds. At that time respondent and appellant's agent took these returns and figured out "what the one quarter share would be." The money was not paid, and on September 24, and again on September 29, 1927, the appellant's agent wrote to the respondent demanding immediate payment of the money, and threatening suit. On October 1, 1927, the respondent replied as follows:

"Your letter of September 29th received

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 14 P.2d 87.

and note what you have to say regarding Jackson-Polle rent.

"I am sorry to say I cannot pay this at this time, as things have been very bad this year, however, if it is satisfactory I will give you my personal note if you or your people will wait until the harvesting of the barley crop as that will be the only chance I have of collecting the money. Jackson has no money at all so if it will be satisfactory I will make you a note at 6% interest payable June 15th, 1928. * * * Please let me know if this will be satisfactory as it is all I can do at this time."

On October 19, 1927, the appellant's agent wrote the respondent that they would take his note for the amount due, being $457, if he would include interest from the preceding December, "about the time the money was due," and inclosing a note for $487, which was signed and returned. The respondent testified that this note represented one-quarter of the proceeds of the crop sold plus "some interest." He also testified that at the time he considered that the appellant "was entitled to its rent," that the appellant had threatened to sue him, and that he gave the note because he could not afford to be sued at that time. While there is some conflict in the testimony, there is no conflict on the essential facts.

[1, 2] Under well-settled rules the crop mortgage held by the respondent covered only Jackson's interest in the crop and did not cover the one-fourth share in the same to which the appellant was entitled. Sunol v. Molloy, 63 Cal. 369; Woodsend v. Chatom, 191 Cal. 72, 214 P. 965. While we think the evidence shows an agreement on the part of the respondent to sell the crop and turn over one-fourth of the proceeds to the appellant, regardless of whether or not such an agreement was made, respondent was obligated to turn over to appellant one-fourth of such proceeds, since he had sold that part of the crop to which he had no right and which belonged to the appellant. In such a situation he offered to give the note if he were given time to pay, which offer was accepted. It also appears that he gave the note to avoid being sued, which, as he says, he could not afford to have happen at that time. It not only appears that there was ample consideration for the note, but the record is without any evidence to sustain a finding and conclusion to the contrary. The respondent points out that he answered "None whatsoever" to a question as to whether there was any consideration for his signature to this note. This conclusion, of course, is not evidence.

Some contention is made by the respondent that the evidence shows that the note was given upon a representation that the appellant would let the same tenant have the land to put into a crop of barley the succeeding year. While respondent's letter of October 1, 1927, indicates that he hoped to get some money from a barley crop, it falls far short of making the note conditional upon such an event. If this contention could be sustained, it would not establish an absence of consideration; there being ample consideration, otherwise, for the note. Had such a promise been made by the appellant, it would appear to be without consideration, since the amount of the note was due from the respondent anyway. If such a representation had been made, it might have been material to a defense of misrepresentation, but the court found that no misrepresentations were, in fact, made. Furthermore, the evidence does not show a misrepresentation in this respect. When asked if the appellant or any of its agents had ever told him either he or Jackson could have the land for the purpose of putting in a barley crop, the respondent replied that he did not remember, but that he thought one of these agents said "he would help us out." Not only is there no satisfactory evidence that such a representation was made, but there is no evidence that, if made, the appellant did not do all within its power to comply therewith. When asked how he happened to execute this note, the respondent answered: "Because when Jackson and Polle had failed that $420.00 of paying me what they owed me, I thought possibly if we could get Jackson to put this barley in, his partner had died, he got killed accidentally while this transaction was pending, to put this same piece of ground into barley, we could get the rent for the Acme Investment Corporation and I could get my $420.00, which I was in the hole on the cotton crop previous. That was my idea in signing this note and sending it to them, and Jackson failed to put the barley in."

The respondent also testified that he understood that Jackson "could not get finances to put the barley in." The respondent asks us to consider two affidavits which were filed in connection with a motion he made asking to reopen the case for further evidence. Not only are these affidavits not in the record and not properly before us, but we may add that, if they were to be considered, they would only strengthen the view we have here taken.

The note provided for an attorney's fee, and the court found, in accordance with the allegation of the complaint, that a reasonable attorney's fee in this case is $100.

The judgment is reversed, with instructions to enter a judgment for the appellant for the amount of the note, with interest and attorney's fees.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 478

MOSER et al. v. PEARCE.

Civ. 8291.

District Court of Appeal, First District, Division 1, California.

June 24, 1932.

1. Specific performance ⇐121(11).

Complaint and evidence *held* to support judgment for specific performance of contract to purchase realty, as against objection that it was neither pleaded nor proved that plaintiffs were able to perform, but affirmatively appeared that title to property was in their vendor, in view of admission that latter's deed to defendant was placed in escrow.

2. Specific performance ⇐96.

Vendors *held* not required to deliver in escrow recorded deed to purchaser, failing to deposit balance of price as agreed, in order to compel specific performance of contract.

3. Specific performance ⇐131.

Judgment against purchaser of realty for balance due on condition that vendors deposit deed to defendant within 30 days after judgment became final *held* erroneous in form.

4. Specific performance ⇐92(1).

Court may allow vendor, suing for specific performance of contract, of which time is not essence, reasonable time to perform his agreement, if no injustice will be done vendee.

5. Specific performance ⇐127(1).

Judgment declaring balance due on purchase price of lots valid lien thereon *held* erroneous, where record showed that property belonged to vendor's vendor.

6. Liens ⇐11.

One may not have lien on his own property.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by R. L. Moser and another against Orin A. Pearce. Judgment for plaintiffs, and defendant appeals.

Reversed, with directions.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Koenig & Brunton, of Los Angeles, for respondents.

KNIGHT, J.

The defendant, Orin A. Pearce, appeals from a judgment rendered against him in an action for the specific performance of an agreement relating to the purchase and sale of two groups of lots. The grounds urged for reversal are that the amended complaint and the evidence are insufficient to support a judgment for specific performance and that the form of judgment rendered is erroneous.

The plaintiffs, R. L. and Carliss Moser, were purchasing the lots in question from the Bank of Italy under separate executory contracts of sale, upon which there was a balance due of less than $3,000 on the first group, and of less than $4,500 on the second group. In that situation and in March, 1929, they entered into an agreement with defendant whereby they agreed to sell and defendant agreed to buy the first group for $3,500 and the second group for $5,000. In furtherance of such agreement defendant paid to plaintiffs a deposit of $500 on each group, evidenced by two so-called sales deposit receipts, identical in form except as to amounts, descriptions of the property, etc. After acknowledging the payment of the deposit, each receipt provided, among other things, that upon the payment of the balance of the purchase price a grant deed should be delivered to the purchaser, together with a guaranty of title made by an approved title company, showing free and clear title; also that an escrow should be opened at the Wilshire National Bank for the consummation of the sale, and that defendant should have thirty days within which to pay to the depositary the balance of the purchase price. Attached to each receipt was the signed agreement of the vendee and the vendors to purchase and sell the property on the terms and conditions stated therein. On the day following the payment of the deposits the escrow was opened with the Wilshire National Bank as contemplated by the terms of the sales deposit receipts. It was evidenced by written instructions, the essential portions of those relating to the first group of lots reading as follows: "March 26th, 1929. The Wilshire National Bank I will hand you on or before Thirty (30) days from this date, Three Thousand ($3,000.00) Dollars. I have paid outside of escrow Five Hundred ($500.00) Dollars. You are authorized to deliver the above to the order of R. L. Moser and Carliss Moser, husband and wife as joint tenants, when you hold for Orin A. Pearce (1st) Recorded deed, covering the following described property: * * * (2) Guarantee or Certificate of Title, or Policy of Title Insurance with liability of Title Company limited to $3,500.00 showing record title to property described in said deed to be vested in Orin A. Pearce, free and clear from encumbrances, * * * In the event that the conditions of this escrow have not been completed within or before May 10th, 1929, you are instructed to complete the same at the earliest date possible thereafter, unless I have made a written demand upon you for the return of the money and instruments deposited by me. * * * [Signed] Orin A. Pearce."

Continuing, the instructions read: "The conditions as set forth herein are hereby approved and the demands of the seller are hereby agreed to. The provision for extension of time within which this escrow may be closed applies equally to me. I herewith hand you Contract of Sale between me as purchaser under contract, and the Bank of Italy, and authorize you to obtain from said Bank of Italy, Deed, conveying the property herein described to Orin A. Pearce, * * * Three Thousand ($3,000.00) Dollars. I acknowledge receipt of $500.00 as paid outside of escrow. And when you hold, subject to order of the grantors * * * I will furnish a Guarantee or Certificate of Title, or Policy of Title Insurance as herein set out, showing title in the condition as herein set forth * * *. Pay to Bank of Italy their demand for Deed together with interest to date in accordance with said demand * * *." (Signed) R. L. Moser and Carliss Moser.

The escrow instructions relating to the second group of lots were admittedly in the same form.

Soon after the escrow was opened, plaintiffs executed and delivered to the Wilshire National Bank two deeds conveying the lots to defendant; they also procured and delivered to said bank, so the findings declare, "a report on a title search to said property, with the purpose of obtaining a certificate of title as required by said agreement and instructions." The Bank of Italy also deposited in escrow with the Wilshire National Bank its deeds of the property to plaintiffs, with instructions to deliver the same to plaintiffs upon the payment of the balance due the bank on the property. On April 5, 1929, the depositary bank notified defendant of the receipt of said documents and stated that it was in a position to complete the escrow when he deposited the $7,500 cash purchase price as called for in the escrow agreements; but defendant failed to come forward with the purchase price. On April 30, 1929, plaintiffs notified defendant that the balance of the purchase price was due, and demanded that the same be paid forthwith, but defendant did not comply with the demand, nor has he ever paid or offered to pay said balance or any part thereof; and on May 8, 1929, plaintiffs filed this action to obtain a decree requiring specific performance of the agreements.

[1] Defendant's attack upon the sufficiency of the complaint and the evidence is based upon the contention that it was neither pleaded nor proved that plaintiffs were able to carry out the terms of their agreements; that on the contrary it affirmatively appears that title to the property was at all times vested in the Bank of Italy. This objection is fully answered by the admitted fact that the deed of the Bank of Italy was placed in escrow with the Wilshire National Bank, ready for delivery upon the payment by defendant of the balance of the purchase price, which payment was never made.

[2] Nor is there any merit in defendant's further contention that plaintiffs failed to perform their part of the agreement because they did not deliver to the depositary a recorded deed conveying the property to defendant, or any certificate of title or policy of title insurance showing record title in defendant clear and free from incumbrances. As will be noted from the escrow instructions, the first step required to be taken in the consummation of the sale was that defendant deposit with the Wilshire National Bank the balance of the purchase price, amounting to $7,500, which he agreed to do within thirty days, but which admittedly he has never done; and it would be a most unreasonable and unusual construction to place upon the escrow instructions to hold as defendant contends that plaintiffs were required to deliver in escrow a recorded deed to defendant, thus vesting absolute title in defendant before he deposited the purchase price therefor.

[3] The judgment decreed in substance: First, that plaintiffs recover from the defendant the respective balances due under the agreements of sale, to wit, $3,000 and $4,500; second, that each sum "is a valid lien upon the land" agreed to be sold; third, that the land or so much thereof as may be necessary to satisfy such lien be sold by the sheriff; fourth, that the proceeds of the sale be applied to the payment (a) of the costs of the sale, (b) of plaintiffs' costs, (c) of the amount of plaintiffs' liens; (d) that any surplus be paid to defendant, or if there was a deficit, that it be docketed against defendant; and the concluding provision of the judgment was as follows: "This judgment is conditioned upon the plaintiffs' depositing with the Clerk of this Court, with thirty days *after this judgment shall become final*, a Grant Deed to the defendant, to the property hereinbefore described together with a Certificate of Title of a reputable title company, * * * with a Guarantee in the sum of Thirty-five Hundred Dollars * * * and in the sum of Five Thousand Dollars * * * showing title vested in the defendant, free and clear of incumbrances * * *." (Italics ours.)

It is evident from an analysis of the judgment that the trial court deemed it essential that plaintiffs tender to defendant a deed to the property together with a certificate showing clear title or a policy of title insurance, as a condition to awarding judgment against defendant for the balance of the purchase price, thus affording defendant an opportunity to avoid the entry of judgment against him by accepting the tender and paying for the property; otherwise it would not have incorporated the condition in the judgment; but as will be seen, the form of judgment rendered does not accomplish that purpose, because it pro-

vides that the condition imposed shall be performed within thirty days "after this judgment shall become final." In other words, after the judgment against the defendant for the balance of the purchase price has become final, the plaintiffs may or may not perform the condition imposed by the decree. It cannot be assumed that they will, and if they do not, the judgment in their favor and against the defendant for the balance of the purchase price will nevertheless stand. The effect of the judgment as rendered is therefore to compel defendant to perform his part of the agreement by imposing upon him a final judgment for the balance of the purchase price without compelling plaintiffs to perform their part of the agreement by tendering a deed and a certificate of clear title or a policy of title insurance, as called for in their agreement. We are of the opinion, therefore, that the judgment in its present form cannot be sustained.

[4] However, as held in McKevitt v. City of Sacramento, 55 Cal. App. 117, 203 P. 132, where, as here, time is not of the essence of the contract and there is a positive agreement to buy and not a mere option depending upon sufficiency of showing of title, it is within the jurisdiction of the court to allow the vendor in a suit for specific performance a reasonable time within which to perform his part of the agreement, providing to do so will work no injustice to the vendee. In that case the purpose was attained by the entry of an interlocutory decree; and the same course may be followed here, by directing that within a specified number of days after notice of the entry of the interlocutory decree plaintiffs deposit the necessary documents with the clerk of the court, and that defendant be granted a specified number of days thereafter within which to pay the balance of the purchase price and accept said documents; or upon defendant's failure so to do, that final judgment be entered against him for the balance of the purchase price, and that such additional relief be granted as may be necessary to execute the judgment.

[5, 6] Furthermore, the form of the judgment rendered appears to be objectionable upon the additional ground that it creates a vendor's lien upon the property in favor of plaintiffs with directions to foreclose the same and out of the proceeds of the sale to pay plaintiffs the amount due them on the balance of the purchase price; whereas, the record upon which the judgment is based affirmatively shows that the property at all times belonged to, and for aught the judgment decrees title will continue to remain in, the Bank of Italy; that plaintiffs are still indebted to the bank for the balance of the purchase price, amounting to some $7,500; and no provision was made in the judgment to liquidate the balance due the bank from plaintiffs, nor was the bank made a party to the action. On the other hand, if it be deemed that as between the bank and plaintiffs the latter are the owners of the property, then that portion of the judgment creating the lien thereon cannot be sustained, because under well-settled principles one may not have a lien on property of which he is the owner. 16 Cal. Jur. 311. In any event this, too, is a matter which may be corrected if an interlocutory decree be entered.

It is ordered, therefore, that the judgment be reversed, with directions to enter an interlocutory decree in accordance with the view herein expressed; and that thereafter such further proceedings be taken in the action as may be necessary and proper to a final disposition thereof.

We concur: TYLER, P. J.; CASHIN, J.

In re CALDWELL'S ESTATE. *

CALDWELL v. BROWN et al.

Civ. 8439.

District Court of Appeal, Second District, Division 2, California.

June 30, 1932.

Rehearing Denied July 29, 1932. Hearing Granted by Supreme Court Aug. 29, 1932.

1. Judgment ⇐199(1).

Making and denial of motion for directed verdict *held* condition precedent to judgment notwithstanding verdict (Code Civ. Proc. § 629).

2. Appeal and error ⇐664(1).

Recital in judgment that motion for directed verdict was made and denied *held* controlled by reporter's duly certified transcript showing neither making nor denial of motion (Code Civ. Proc. § 629).

While a recital in the judgment is conclusive as to the actions of the trial court where there is no bill of exceptions or reporter's transcript or other portion of the record showing the facts, this is not the rule where the record on appeal, as here, includes the reporter's transcript duly certified as comprising a full, true, and correct transcript of all rulings, instructions, acts, and statements of the court.

3. Judgment ⇐199(1).

Counsel's statement of intention to request directed verdict and court's reply that he preferred case to go to jury *held* not "motion" for and "order" denying directed verdict prerequisite to judgment notwithstanding verdict (Code Civ. Proc. §§ 629, 1003).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 16 P.2d 139.

"Motion" is an application for an "order," while an "order" is a direction of a court or judge, made or entered in writing, and not included in a judgment.

[Ed. Note.—For other definitions of "Motion" and "Order," see Words and Phrases.]

4. Judgment ⇐199(1).

Requested instruction for verdict and refusal thereof *held* not equivalent to "motion" for directed verdict, and "order" denying motion prerequisite to judgment notwithstanding verdict (Code Civ. Proc. §§ 629, 1003).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

In the matter of the estate of John Caldwell, deceased. Will contest by Gladys Anna Caldwell, a minor, by her guardian ad litem, Theresa Caldwell Allen, opposed by H. T. Brown and another, contestees. From a judgment notwithstanding the verdict, contestant appeals.

Reversed, and remanded with directions.

Frank G. Howe and Ernest P. Wellman, both of Los Angeles, for appellant.

F. D. Catlin, of Los Angeles, for respondents.

FRICKE, Justice pro tem.

This is an appeal from a judgment notwithstanding the verdict of the jury.

[1] Appellant's first point is that the order granting a motion for judgment notwithstanding the verdict is erroneous for the reason that such a motion can only be granted where the moving party before verdict has requested the court to direct a verdict in his favor.

Section 629, Code of Civil Procedure, providing for the granting of a judgment notwithstanding the verdict, so far as it applies to the question before us, reads: "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict." By the language of this provision the making and denial of a motion for a directed verdict is made a condition precedent to the entry of a judgment notwithstanding the verdict. In the absence of such a motion and its denial the court was not authorized to grant a motion for judgment notwithstanding the verdict. In re Estate of Easton (Cal. App.) 5 P.(2d) 635, 636.

Respondents do not urge that this is not the law but contend that a motion for a directed verdict was made, and in support of this contention refer to three matters in the record—a recital in the judgment; a statement by counsel and the court's response; and the refusal of a requested instruction to the jury to find for defendants.

[2] Respondents contend that the recital in the judgment that a motion for a directed verdict was made and denied is conclusive. While a recital in a judgment is conclusive as to the actions of the trial court where there is no bill of exceptions or reporter's transcript or other portion of the record showing the facts, this is not the rule where the record on appeal, as here, includes the reporter's transcript duly certified as comprising a full, true, and correct transcript of "all rulings, instructions, acts and statements of the court," and such transcript shows neither the making nor the denial of a motion for a directed verdict, evidence quite conclusive that no such motion was ever made or ruled upon by the trial judge. Where the record shows, as it does here, that an essential prerequisite to the entry of a judgment notwithstanding the verdict did not exist, the record must prevail over the recital in the judgment where such judgment is attacked upon the ground that the prerequisite had no existence and that the recital in the judgment is not sustained by the record. Stow v. Superior Court, 178 Cal. 140, 144, 172 P. 598; Houghton v. Tibbets, 126 Cal. 57, 58 P. 318.

[3] The nearest support for respondents' claim appearing in the reporter's transcript is a conversation between court and counsel had in the chambers of the judge at his request in which, in addition to a discussion of other matters, the following appears: "Mr. Catlin: Why, Your Honor, we intend to ask for an instructed verdict. It seems that the court under the circumstances in a case of this kind—it would take up the time of the Court, if they were not to follow the instructions and evidence, and immediately the court would— The Court (interposing): Well, I will be frank with you. As far as I am concerned, I prefer to let it go to the jury, but I don't hesitate to tell you, as far as that is concerned, what my position is on the matter under the evidence, but I would prefer to let the matter go to the jury. I have my prerogatives after the jury get through." This statement of respondents' counsel that he intended to ask for an instructed verdict was not a motion for an instructed verdict. A motion is an application for an order (section 1003, Code Civ. Proc.), and counsel's statement of what he intended to do was not an application for an order. Neither can the language of the court, though indicating perhaps that his opinion on the facts favored the cause of respondents, be considered an order. An order is a direction of a court or

judge, made or entered in writing, and not included in a judgment. Section 1003, Code Civ. Proc.

[4] Respondents' contention that the refusal of a requested instruction for a verdict in their favor is the equivalent of a denial of a motion for a directed verdict is not supported by authority and the case of In re Estate of Easton, supra, is authority directly against that contention. Respondents suggest that no such ruling was intended by the opinion in the Easton Case. A reading of that opinion contradicts this contention, for the court there says: "Evidently, therefore, the main purpose of the statute in requiring such a motion [for a directed verdict] to be made as a condition precedent to the exercise of the court's power to render judgment non obstante veredicto is to give the party against whom the motion is directed an opportunity to introduce whatever further and additional evidence he may have at hand to overcome the grounds of the motion." Furthermore, the act of handing to the court of a proposed instruction is not a motion, nor is the refusal of a requested instruction an order denying a motion. Section 1003, Code Civ. Proc.

The judgment is reversed, and the cause remanded to the trial court with directions to enter judgment in conformity with the verdict.

We concur: WORKS, P. J.; CRAIG, J.

124 Cal.App. 321

BLACK et al. v. SOUTHERN PACIFIC CO. et al.

Civ. 8023.

District Court of Appeal, First District, Division 1, California.

June 16, 1932.

Rehearing Denied July 16, 1932. Hearing Denied by Supreme Court Aug. 15, 1932.

1. Municipal corporations ⇐819(1).

Defendant city engineer's testimony in action for injuries to motorist in collision with railroad crossing signal standard that road across railroad tracks was widened and paved for city by its board of public works as contractor under witness' direction was sufficient to show such fact (St. 1919, p. 756; Palo Alto City Charter, arts. 2, 3, art. 5, §§ 2–4 [see St. 1909, pp. 1177, 1179, 1182, 1183], and art. 9, § 10, as added [see St. 1911, p. 2042]).

2. Municipal corporations ⇐790.

Notice to city officials that proposed improvement will be reasonably certain to endanger public, unless cautionary measures are taken, is not condition precedent to their liability for resulting injuries (St. 1919, p. 756).

3. Statutes ⇐225.

Statute requiring lighted automobile headlights when light is insufficient to render objects on highway 200 feet ahead clearly discernible must be read with statute requiring headlights producing ample driving light under normal atmospheric conditions (St. 1923, p. 546, § 99, and § 101, as amended by St. 1925, p. 407, § 12).

4. Automobiles ⇐286.

Statute requiring lighted automobile lamps when light is insufficient to render objects on highway 200 feet ahead clearly discernible does not regulate quantity or quality of lights, nor establish distance to be lit thereby (St. 1923, p. 546, § 99).

5. Automobiles ⇐308(11).

It is not always negligence as matter of law to operate automobile at night too rapidly to stop it within radius illuminated by its lights; question depending on atmospheric conditions and known condition of highway (St. 1923, p. 546, § 99, and § 101, as amended by St. 1925, p. 407, § 12).

6. Trial ⇐165.

Evidence must be construed most favorably for plaintiff on motion for nonsuit.

7. Automobiles ⇐308(11).
Railroads ⇐350(15).

Whether driver of automobile, colliding with railroad crossing signal standard near center of highway on dark, rainy night, proceeded with due care, *held* for jury (St. 1923, p. 546, § 99, and § 101, as amended by St. 1925, p. 407, § 12).

8. Municipal corporations ⇐821(14).

Negligence of city officials in failing to take precautions to warn travelers of danger from encroachment of railroad signal device on traveled portion of widened highway *held* for jury (St. 1919, p. 756; Palo Alto City Charter, arts. 2, 3, and art. 5, §§ 2–4 [see St. 1909, pp. 1177, 1179, 1182, 1183], and art. 9, § 10, as added [see St. 1911, p. 2042]).

9. Railroads ⇐303(1).

Generally, railroad company must maintain street crossings in good condition.

10. Eminent domain ⇐120.

Railroad company's right of way cannot be taken without its consent under power of eminent domain without provision for reasonable compensation.

11. Eminent domain ⇐168(2).

Railroad Commission may exercise power of eminent domain and make award in proceedings involving taking of public utility's property (St. 1915, p. 137, § 43).

12. Railroads ⇐359(1).

Persons going on railroad tracks except at public crossings, streets, or highways or private crossings maintained for their use,

without railroad company's consent, are trespassers, to whom it owes no duty except to use ordinary care to avoid injuring them after seeing them in dangerous position.

13. Railroads ⇐98.
Railroad company need not widen crossings without order from Railroad Commission (St. 1915, p. 137, § 43).

14. Railroads ⇐357.
Railroad company need not warn travelers on public highway of danger of crossing right of way at other places than established crossings.

15. Highways ⇐199.
Owner exercising ordinary care in use of property is not liable for injuries incidentally resulting to travelers on abutting highway.

16. Highways ⇐199.
Municipal corporations ⇐808(1).
Property owner is not liable for injuries resulting from defects in abutting streets or highways not caused by his affirmative act.

17. Railroads ⇐303(5).
Railroad company owed travelers on street widened by city no duty to warn of danger of striking signal standard left near center of street as improved if they deviated from established crossing.

18. Railroads ⇐303(1).
Railroad company owed travelers on street widened by city no duty to fence right of way along newly paved portion of street.

19. Railroads ⇐303(3).
Railroad company was not bound to anticipate that persons traveling on paved highway crossing tracks would collide with signal device near center of highway as widened by city.

20. Railroads ⇐243.
Railroad Commission had exclusive jurisdiction over crossing of railroad tracks by street and location, maintenance, and use of warning devices thereat (St. 1915, p. 137, § 43).

21. Railroads ⇐346(1).
Burden was on plaintiffs in action for injuries to motorist, colliding with railroad signal device, to show that device was situated in highway as complaint alleged.

22. Dedication ⇐51.
Highways ⇐47.
Statute requiring highways at least 40 feet wide applies to highways laid out by formal acts of public authorities, not those created by dedication (Pol. Code, § 2620).

23. Municipal corporations ⇐79.
Opening of public street is "municipal affair" within constitutional provision exempting city from control by general laws in such affairs, and charter provisions supersede general law on subject (Const. art. 11, § 6; Palo Alto City Charter, arts. 2, 3, and art. 5, §§ 2–4 [see St. 1909, pp. 1177, 1179, 1182, 1183], and art. 9, § 10, as added [see St. 1911, p. 2042]).

24. Evidence ⇐84.
There is no presumption as to how public acquired right to cross railroad tracks or extent of such right.

25. Evidence ⇐60.
Innocence of crime or wrong, such as location of railway crossing signal within highway, and obedience to law, are presumed (Code Civ. Proc. § 1963, subds. 1, 33; Pen. Code, § 370).

26. Property ⇐9.
Presumption is that person exercising acts of ownership over property is owner thereof.

27. Evidence ⇐53.
Presumptions have effect of evidence, and jury is bound to find in accordance therewith, unless controverted.

28. Trial ⇐142.
Where only one conclusion may be drawn from evidence, trial court may so instruct, though not authorized to invade jury's province by charging on fact questions.

29. Railroads ⇐351(2).
Instruction that railroad company may place mechanical devices at crossing to warn travelers of danger and cannot be held negligent in maintaining them, if not so placed as to obstruct traveled portion of highway, *held* not error, in view of evidence.

30. Railroads ⇐351(2).
Instruction that plaintiffs, alleging that railroad signal device, with which automobile collided, was situated in highway, failed to maintain cause, if jury found that it was situated on defendant railroad company's private property, *held* warranted by evidence.

31. Appeal and error ⇐1068(3).
Erroneous instructions as to plaintiff's duty and negligence in operating automobile, which struck railroad signal device, and burden of proof, *held* not ground for reversal, in absence of evidence of defendant railroad company's negligence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Harry F. Black and wife against the Southern Pacific Company and others. From a judgment for named defendant and a judgment of nonsuit as to the other defendants, plaintiffs appeal.

Judgment for named defendant affirmed, and judgment of nonsuit reversed as to certain defendants and affirmed as to remaining defendants.

Daniel A. Ryan and Thomas C. Ryan, both of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellants.

Louis Oneal, William F. James, and Arthur G. Shoup, all of San Jose, for respondent Southern Pacific Co.

Norman E. Malcolm, of Palo Alto, and Leon T. David, of Los Angeles, for other respondents.

PER CURIAM.

An appeal by plaintiffs, who are husband and wife, from a judgment entered upon a verdict in favor of defendant Southern Pacific Company, and from a judgment of nonsuit entered in favor of the other defendants.

On January 19, 1927, plaintiff Florence M. Black was injured when an automobile which she was driving collided with the standard of a wigwag signal near the tracks of the Southern Pacific Company where the same are crossed by the Embarcadero road in the city of Palo Alto. The Embarcadero road was formerly paved with a strip of macadam 18 feet in width extending from the highway, known as El Camino Real, easterly across the railroad tracks. The wigwag signal mentioned was situated on the east side of the tracks of the company a few feet south of the macadamized strip, which crossed the same. Previous to August, 1926, proceedings were taken to widen the Embarcadero road, and before the date of the accident mentioned its width to the westerly line of the railroad right of way had been increased to 90 feet, and a concrete pavement laid thereon, which was approximately 50 feet wide. This pavement extended from El Camino Real to the westerly line of the railway right of way, but it is not contended that the road or the pavement was widened east of said line. When work was completed in September, 1926, the wigwag signal was nearly on the center line of the new pavement had the same been extended across the railroad tracks. The railroad right of way south of this line was surfaced with rock and gravel, but, so far as appears, the macadam strip crossing the same was not changed. The lower part of the signal was painted black and the upper part white. Two 100 candle power lights were maintained near the crossing, but on the easterly side of the track. The night of the accident was dark and rainy, and there were no barriers, lights, or other devices at the end of the concrete pavement to warn those using the highway. Mrs. Black drove along the south side of the pavement to the right of way, and then continued her course a distance of about 55 feet, when the automobile struck the standard of the signal device, with the result that she was injured.

The complaint alleged in substance that at all the times therein mentioned the defendants other than Southern Pacific Company, Marx, Hare, and Byxbee, were members of the city council of the municipality; that defendants Marx and Hare were members of its board of public works, and that defendant Byxbee was its city engineer; that prior to January 19, 1927, they paved an additional 20 feet in width on said Embarcadero road extending to the easterly side of the railroad right of way, approximately doubling the width of the paved portion of the road; that, when the work was complete, the said signal device encroached on the southerly side of the traveled portion of the highway where the same crosses the right of way, and was approximately in the center of the highway as projected across said right of way, and at all times constituted a danger to persons using the highway; that defendants negligently failed to take any precautions to warn travelers of the danger caused by the acts and conditions described, or to place any barriers or lights, or to give warning of the conditions there existing.

The defendants other than Southern Pacific Company joined in an answer, in which it was not denied that they were the officers of the municipality as alleged in the complaint at the time of the accident, but it was denied that they or any of them paved the Embarcadero road, or had charge or control of the public streets of the municipality at any of the times mentioned in the complaint. They also denied the negligent acts and the injury alleged. The Southern Pacific Company also denied that the alleged injury was due to its negligence, and both answers averred as separate defenses the contributory negligence of plaintiff Florence M. Black.

The action was not brought against the municipality, but against its officers named; and the law appertaining to the liability of such officers is found in Act 5618, Deering's General Laws 1923, St. 1919, p. 756, which provides that "no officer of any district, town, city, city and county, county, or of the State of California, shall be liable for any damage or injury to any person or property hereafter resulting from the defective or dangerous condition of any public street, highway, bridge, building, work or property, unless it shall first appear: (1) that the injury sustained was the direct and proximate result of such defective or dangerous condition, (2) that such officer had notice of such defective or dangerous condition or that such defective and dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner, (3) that he had authority and it was his duty to remedy such condition at the expense of the state or of a political subdivision thereof and that funds for that purpose were immediately available to him, and (4) that, within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to

do, or failed to take reasonable steps to give adequate warning of such condition; and then only when it shall further appear that such damage or injury was sustained while such public street, highway, bridge, building, work or property was being carefully used, and that due care was being exercised to avoid the danger due to such condition; provided, however, that this act shall not be construed as enlarging the duty or liability of any public officer."

The charter of the city of Palo Alto was adopted in 1908 and approved by the Legislature in 1909 (see St. 1909, p. 1175). It created a city council and a board of public works. The municipality was empowered "to establish and change the grade and lay out, open, extend, widen, change, vacate, pave, re-pave, or otherwise improve all public streets and highways, * * *" and all powers so granted were vested in the city council except as therein otherwise provided (Charter, arts. 2, 3). The board of public works was authorized to carry out the above powers, namely, to widen, change, pave or repave all public streets and highways (Charter, art. 5, § 2), and to appoint as its executive officer an engineer, who should also be the street superintendent (Charter, art. 5, § 4). The duties of the engineer were to supervise, manage, and construct, operate, and maintain the properties and all things under the control of the board of public works (Charter, art. 5, § 4). Section 3 of article 5 of the charter provides that, "whenever any street work or other improvement is to be done or performed and the cost of the whole or any portion thereof is to be paid by any special assessment levied upon property, all such proceedings shall be had and carried on by the council upon the recommendation of the board of public works;" and an amendment to section 10 of article 9 of the charter (see St. 1911, p. 2042) provides: "In the erection, improvement and repair of all public buildings and works, in all street and sewer work, done under and by authority of the laws of the State of California creating a bonded indebtedness of the municipality, or done under and by authority of any of the street laws of the State of California, which laws are hereby made a part of this charter, the work shall be let to the lowest responsible bidder; provided, however, the council may reject any and all bids if deemed excessive, and readvertise for bids or provide for the work to be done by the department of public works. * * * When the estimate of the cost of said work by the city engineer shows that said work can be done for an equal or less cost than that of the lowest bid, then any of the work herein mentioned may be done by the department of public works, and the said department shall be deemed the contractor, with the right to enforce all liens, and with the same powers, rights, duties and obligations as are made and provided by the laws of the state for contractors who have entered into contracts to do such work as the lowest responsible bidder."

[1] The only evidence that the widening or paving of Embarcadero road was done by any board or officer of the municipality is the testimony of defendant Byxbee, the city engineer, who stated that the work was done for the city by its board of public works as contractor under Byxbee's direction. This was sufficient to show that the work was done as testified (Foutz v. Los Angeles, 167 Cal. 487, 140 P. 20), and it is undisputed that the same was completed about September 15, 1926.

It was held before the adoption of the above statute (Act 5618, Deering's Gen. Laws, 1923, St. 1919, p. 756) that, where the act done is one commanded by the municipality and is inherently wrong, both the municipality and the agent will be liable; but, if the injury results, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible; and a public corporation may or may not be responsible, depending upon the circumstances. Perkins v. Blauth, 163 Cal. 782, 127 P. 50. Here there is no claim that there were defects in the work done, but that, in view of the condition in which the crossing would be left in case the railroad company made no corresponding changes, the city and its officers, by omitting to make provision for warnings or barriers, rendered the improvement inherently dangerous, and the statute itself imposes a liability if the defective or dangerous condition is directly attributable to work done by an officer or under his direction in a careless or negligent manner.

[2] While the record discloses no evidence that the engineer or any member of the board of public works had knowledge or notice before the accident that the crossing had not been widened, it has been held that, where the dangerous condition is due to the negligent act or omission of the officers doing or directing the work, it is unnecessary to prove as a condition to liability that they had notice of the condition and the authority and duty with funds available to correct it. Moore v. Burton, 75 Cal. App. 395, 242 P. 902. Nor should a different rule prevail where a proposed improvement will be reasonably certain to endanger the public, unless precautionary measures are taken as a part of the projected work, and it is completed and left without the necessary safeguards. The board of public works was charged with the duty of carrying out the powers conferred upon the city respecting the opening, widening, and paving of streets; and, as stated, the engineer with the duty of supervising, managing, constructing, operating and maintaining the properties and things under the con-

trol of the board. There may have been a reason for leaving the work without barriers or warnings, but none appears; and the evidence was sufficient to justify the conclusion that the improvement was carelessly planned and executed, and that the omissions complained of constituted negligence on the part of the officers having charge of street work.

The statute, however, creates another condition to liability, namely, that it must appear that the damage claimed was sustained while the street was being carefully used and that due care was being exercised to avoid the danger.

It is contended that there was no evidence of due care in the operation of the automobile; that, on the contrary, its lights were such as to make its operation negligent as a matter of law.

According to Mrs. Black, she had not traveled this road for several months, the night was dark and foggy, and it was raining heavily; and, due to atmospheric conditions, she was unable to see more than 15 feet ahead. She also testified that the car was stopped at a point about 200 feet from the crossing to wipe the windshield, and that she and her son, who was riding with her, looked ahead to avoid danger as they proceeded toward the end of the pavement, but failed to observe the conditions there until too late to prevent the collision.

[3-5] Section 99 of the California Vehicle Act (St. 1923, p. 546) then provided: "Every vehicle when upon any public highway within the state during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible a person, vehicle or other substantial object on the highway at a distance of two hundred feet ahead, shall be equipped with lighted lamps and lighted headlights as herein respectively provided for different classes of vehicles, and subject to such exceptions as are set forth in this act"; and section 101 of the act (as amended by St. 1925, p. 407) that "the headlights of motor vehicles shall be so constructed, arranged and adjusted that they will, at all times mentioned in section ninety-nine and under normal atmospheric conditions, produce ample driving light for the use of the operator of such vehicle. * * *" Failure to conform to the statute with respect to the use of headlights has been held to be negligence per se. Fouch v. Werner, 99 Cal. App. 557, 279 P. 183. But the two sections above are to be read together. The requirement as to the sufficiency of the lights has reference to normal atmospheric conditions (Olden v. Babicora Development Co., 107 Cal. App. 399, 290 P. 1062), and the first does not regulate the quantity or quality of the lights nor establish 200 feet as the distance which must be lit by such lights, but merely states the conditions under which lighting is required. Sawdey v. Producers' Milk Co., 107 Cal. App. 467, 290 P. 684. Nor in all cases is it negligence as a matter of law for one to operate a motor vehicle at night at a speed greater than that which will permit the vehicle to be brought to a stop within the radius illuminated by his lights, as this question depends upon atmospheric conditions and the known condition of the highway. Sawdey v. Producers' Milk Co., supra; Ham v. County of Los Angeles, 46 Cal. App. 148, 189 P. 462.

[6-8] We are convinced in this connection also that, in view of the testimony and the circumstances disclosed by the evidence, which on a motion for nonsuit must be construed most favorably to her, it cannot be said as a matter of law that Mrs. Black was not proceeding with due care, nor that the condition of the lights on her car was such as to negative that conclusion.

For the above reasons, we believe that the questions both of the negligence of defendant members of the board of public works and the city engineer, and of the care used by Mrs. Black in the operation of her car, were properly for the jury.

At the close of plaintiff's case, the court granted a nonsuit as to defendant officers, after which the case proceeded as against defendant Southern Pacific Company. The jury returned a verdict in favor of the company, and from the judgment entered thereon plaintiffs have appealed, claiming that the court erred in certain of its instructions to the jury.

They were instructed that no duty rested upon the railroad company to place or maintain any barrier at the end of the new pavement adjoining its right of way or give warning of the conditions there.

[9, 10] Where the right to open a street across a railroad right of way has been acquired, it is the duty of the company at its own expense to make the necessary structural changes, such as placing planks between the rails and two feet outside the same, and other crossing changes, in order that the railroad may be safely operated, and as a general rule it must maintain such crossings in good condition. City of Oakland v. Schenck, 197 Cal. 456, 241 P. 545. But it is well settled that a railroad right of way is so far private property as to be entitled to the protection of the Constitution, and that it can only be taken without its consent under the power of eminent domain, a condition precedent to such taking being that provision be made for reasonable compensation to the company. Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; City of Oakland v. Schenck, supra.

[11] Section 43 of the Public Utilities Act (St. 1915, p. 137) provides that no public road, highway, or street shall be constructed across the track of any railroad corporation at grade without having first acquired the permission of the Railroad Commission, and that the commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, use, and protection of each crossing; further to prescribe the installation, use, maintenance, and operation of safety devices and appliances (Public Utilities Act, §§ 42, 43). It may also exercise the power of eminent domain in proceedings involving the taking of the property of public utilities, with the power of making awards in such cases. Public Utilities Act, § 43; Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; City of San Jose v. Railroad Commission, 175 Cal. 284, 165 P. 967; S. H. Chase Lumber Co. v. Railroad Commission, 212 Cal. 691, 300 P. 12.

[12] It is undisputed that the traveled portion of Embarcadero road before it was widened was macadamized and that the same width of macadam extended over the crossing. There is no evidence that previous to the accident the right to widen the crossing was acquired or that the company was under a duty to do so, nor, so far as appears, was any order made by the commission before that date permitting or requiring this, or a change in the location of the signal device. The record discloses no right in persons using the highway to pass over the right of way other than at the place previously established and in use; and it is the rule that persons who go upon a railroad track or right of way except at public crossings, or in public streets or highways, or at private crossings maintained for their own use and benefit without the consent of the company, are trespassers, to whom the company owes no duty to facilitate the trespass or render it safe, although bound to use ordinary care to avoid injury in the operation of its road after seeing the trespasser in a dangerous position. Green v. South San Francisco, etc., Co., 181 Cal. 392, 184 P. 669; 52 Cor. Jur. §§ 1772, 2105, pp. 177, 536. Accordingly it was held in Hildebrand v. Director General of Railroads, Hines, 270 Pa. 86, 112 A. 875, 14 A. L. R. 1393, that a railroad was not liable to a pedestrian who on a dark and foggy night, in seeking to cross its tracks, left the cement sidewalk provided, and, while passing over another portion of the right of way, fell and received injuries. So in Overton's Adm'x v. City of Louisville, 221 Ky. 289, 298 S. W. 968, it was held that a railroad company was under no duty to warn against danger where a public street, if extended, would pass over its right of way into a stream. To the same effect are the following cases: Gulf, M. & M. R. Co. v. Pistole, 218 Ala. 695, 120 So. 159; Shahan v. Northern Texas Traction Co. (Tex. Civ. App.) 266 S. W. 850; Gulf, C. & S. F. R. Co. v. Woods (Tex. Com. App.) 290 S. W. 729.

[13-18] It is clear that a railroad company is not obliged to widen its crossings without an order from the Railroad Commission or to warn travelers upon the public highway of the danger of attempting to pass over its right of way at places other than the established crossing. It is also the rule that where an abutting owner has exercised ordinary care in the use of his own property, he is not liable for injuries incidentally resulting to a traveler on the highway (29 Cor. Jur. Highways, § 443, p. 679; 13 Cal. Jur. Highways, § 80, p. 397; Rozell v. Northern Pacific R. Co., 39 N. D. 475, 167 N. W. 489), or for an injury resulting from defects in streets or highways not caused by his affirmative act (43 Cor. Jur. Municipal Corporations, § 1866, p. 1103; Eustace v. Jahns, 38 Cal. 3; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760). And while in the present case the condition in which the street was left after the improvements were made was likely to mislead travelers as to the width of the crossing, this condition was not created by the railroad company or upon its property, and it was under no duty to warn of the danger of deviating from the established crossing; nor as between the company and plaintiffs was there a duty to fence its right of way along the newly paved portion of the highway. 12 Cal. Jur. Fences, § 5, p. 493.

In Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481, relied upon by plaintiffs—which was an action for damages for personal injuries sustained as the result of an automobile striking a stone pier erected and maintained in the middle of the highway as a support for an overhead bridge upon which the railroad was operated—it was held that, while the erection of the bridge and pier were authorized by statute, it was a question for the jury whether the pier was maintained in such a way as to afford security for life and property where the prevalence of heavy fogs at night in that locality was shown, and there was an absence of lights or other danger signals on or near the pier, which was not painted a color tending to make it visible during foggy weather. In the present case, however, all the things which the court in the Barrett Case held to be necessary for proper maintenance had been done. The crossing was lighted; the signal was painted different colors and situated a sufficient distance south of the macadamized way to allow vehicles operated with ordinary care to pass over without danger. Moreover, the instruction complained of

referred to conditions at the end of the new pavement on the Embarcadero road and not to the signal device.

[19] What we have said applies equally to another instruction, stating in substance that the company was not bound to anticipate that any person lawfully traveling upon the paved highway as it crossed the tracks would come in contact with the signal device.

[20] In view of the above, both of these instructions were proper, as was also an instruction that the Railroad Commission had exclusive jurisdiction over the crossing and the location, maintenance, and use of warning devices thereon, which could not be changed without its authority. Public Utilities Act, §§ 42, 43.

By two other instructions the jury was told that a railroad company is justified in placing mechanical devices at a crossing for the purpose of warning travelers of the dangers at that point, and that, if such device be not so placed as to be an obstruction in the traveled portion of the highway, the company cannot be held to be negligent in maintaining it; also that plaintiffs alleged that the signal device was situated in the highway, but, if the jury found that it was situated on the private property of the company, plaintiffs had failed to maintain their cause in that particular.

The latter contend that, while it is admitted that the signal device was south of, and not an obstruction to, the traveled portion of the highway, namely, the macadamized strip which crossed the tracks, the question of its negligent maintenance in the highway was nevertheless one for the jury; further, that there was no evidence that the device was upon the private property of the company, and the second instruction was consequently erroneous.

[21-29] The complaint alleged that the signal device was situated in the highway; and the burden rested upon plaintiffs to show the fact (29 Cor. Jur. Highways, p. 637); but the record is silent as to how or when the public acquired the right to cross or the extent of the right. So far as shown, this was limited to the way actually in use; namely, the macadamized strip. It has been held that, where a highway has been laid out pursuant to statutory proceedings, it will be presumed that it was for the full legal width (Lenhart v. Wright, 286 Pa. 351, 133 A. 495; McGarry v. Runkel, 118 Wis. 1, 94 N. W. 662; Taylor v. Austin, 83 Neb. 581, 119 N. W. 1123; Hentzler v. Bradbury, 5 Kan. App. 1, 47 P. 330); and plaintiffs urge that the same rule applies here, as the statute requires every highway to be at least 40 feet wide (Pol. Code, § 2620); but, as held in Mulch v. Nagle, 51 Cal. App. 559, 197 P. 421, this section has application to such highways as are laid out by formal act of the public authorities and not those created by dedication. The charter of the city of Palo Alto empowered its board of public works to lay out, open and extend all public streets and highways. Charter, art. 5, § 2, subd. 3; see St. 1909, pp. 1175, 1183. The opening of public streets is a municipal affair within the meaning of section 6 of article 11 of the Constitution (Byrne v. Drain, 127 Cal. 663, 60 P. 433), and the charter provision will supersede the general law (Sunter v. Fraser, 194 Cal. 337, 228 P. 660). In addition, as stated, the Railroad Commission had the power to prescribe the conditions upon which a highway at grade might be constructed, and to require the installation and maintenance of a signal device at the crossing. There is no presumption as to how the right was acquired or its extent, nor could the inference that it was in excess of actual use be justified by any of the facts shown. Moreover, the location of the signal within the highway would have constituted a public offense. Pen. Code, § 370. It is presumed that persons are innocent of crime or wrong, and that the law has been obeyed (Code Civ. Proc. § 1963, subds. 1, 33); also that a person exercising acts of ownership over property is the owner. McGovern v. Mowry, 91 Cal. 383, 27 P. 746. Presumptions have the effect of evidence (Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529); and, unless controverted, the jury is bound to find in accordance therewith (Stafford v. Martinoni, 192 Cal. 724, 221 P. 919; In re Jolly's Estate, 196 Cal. 547, 238 P. 353); and, while the trial court may not invade the province of the jury by charging on questions of fact, nevertheless, where only one conclusion may properly be drawn from the evidence, it may so instruct. (People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. Welch, 49 Cal. 174; Wheaton v. North British, etc., Ins. Co., 76 Cal. 415, 18 P. 758, 9 Am. St. Rep 216). Such was the effect of the first instruction; and, in view of the evidence, it was not error.

[30] The same is true of the second, as the physical facts were sufficient to support a finding that the signal device was situated upon the private property of the company.

[31] Plaintiffs complain of other instructions as to plaintiff's duty in the operation of the automobile, the question and effect of her negligence, and the burden of proof in that regard. We agree with plaintiffs that these instructions were in some respects erroneous, and under ordinary circumstances would have been prejudicial; but, in view of our conclusion that no negligence on the part of the railroad company was established, and that a verdict against it would have been contrary to the evidence, the giving of the erroneous instructions is not ground for reversal. 2 Cal. Jur. Appeal and Error, § 611, p. 1026; Hughes v. Wheeler, 76 Cal. 230, 18 P. 386; Bechtel v. Chase, 156 Cal. 707, 106 P. 81.

For the foregoing reasons, the judgment entered upon the verdict in favor of defendant Southern Pacific Company is affirmed. The judgment of nonsuit entered in favor of defendants C. D. Marx, M. H. Hare, and J. F. Byxbee is reversed, and the same judgment in favor of the remaining defendants is affirmed.

124 Cal.App. 593

MERCANTILE ACCEPTANCE CORPORATION et al. v. PIONEER CREDIT INDEMNITY CO. et al.

Civ. 4526.

District Court of Appeal, Third District, California.

June 30, 1932.

1. Automobiles ⇐19.

Officer's possession of automobile under execution *held* valid where one of two judgment debtors held interest therein subject to execution, though registration certificate was not issued to other debtor until after execution (St. 1923, p. 525, § 45[e], as amended by St. 1929, p. 514).

Facts disclosed that judgment ran against both daughter and mother as judgment debtors; that the daughter was the registered owner of the automobile and had sold it to the mother who negotiated a loan thereon; and that, before the registration certificate was issued to mother, the automobile was levied on under a judgment running against both mother and daughter as joint judgment debtors.

2. Execution ⇐179.

Filing of third party claim by conditional seller did not release lien created by levying of execution where judgment creditor delivered bond securing seller (Code Civ. Proc. §§ 689a, 689b).

3. Chattel mortgages ⇐6.

Second conditional sales contract on automobile given by owner to secure loan *held* mortgage not entitling holder thereof to possession as against owner's judgment creditor (Civ. Code, § 2924).

Appeal from Superior Court, Sutter County; E. P. McDaniel, Judge.

Action by Mercantile Acceptance Corporation and another against the Pioneer Credit Indemnity Company and E. L. McCune, as Constable of Yuba Township. From a judgment for plaintiffs, defendants appeal.

Reversed.

E. E. Cullen, of San Francisco, for appellants.

Ray Manwell, of Marysville, for respondents.

R. L. THOMPSON, J.

The defendants appealed from a judgment in favor of the plaintiffs in a suit to replevin an automobile which was seized by an officer under a writ of execution. The court found that the plaintiffs were the owners and entitled to the possession of the car, and that the defendants wrongfully and unlawfully took and retain the possession thereof. It is claimed the findings and judgment are not supported by the evidence. This contention must be sustained.

In June, 1929, Norma J. Podva purchased a Nash sedan automobile on a conditional contract for $1,185 from the plaintiff Chavalis, who operated an agency for the sale of Nash machines under the name of New Fruitvale Nash Company, at Oakland. This contract was assigned to the plaintiff Mercantile Acceptance Corporation. This corporation was the registered legal owner of the car. The purchase price had been fully paid, except the sum of $168. The purchaser was the registered owner thereof.

On November 1, 1930, Norma J. Podva executed a bill of sale of the Nash sedan automobile to her mother, Mrs. George Chiflakos, in consideration of an existing indebtedness for money previously advanced for her schooling. November 5th, Mrs. Chiflakos called upon the agent, Chavalis, and requested a loan to be secured by the automobile. He loaned her a sum of money in excess of $600. From this sum of money he paid the Mercantile Acceptance Corporation $168, which was the entire balance of the original purchase price of the car. At the same time he executed a new conditional contract with Mrs. George Chiflakos, payable in eighteen monthly installments of $41.91. This new contract was dated November 5th. On the last-mentioned date, this new contract was assigned to the Mercantile Acceptance Corporation. There was no change in the registered legal ownership of the car. The registered certificate of ownership was not issued to Mrs. Chiflakos until November 20th. The plaintiff Chavalis testified with respect to the last transaction: "Mrs. Chiflakos * * * said she wanted to borrow some money on the automobile. * * * I paid off the car (the amount) that was due to the Mercantile Acceptance Corporation, and also signed the new contract with it to the Mercantile Acceptance Corporation."

Prior to November 1, 1930, when the bill of sale was executed to Mrs. Chiflakos, the defendant Pioneer Credit Indemnity Company procured a judgment in the justice's court of Red Bluff township, Tehama county, for the

sum of $210.51, against both Norma J. Podva and her mother. On November 13th an execution was issued from the justice's court in that suit and levied by the officer McCune upon the automobile. December 17th, the Mercantile Acceptance Corporation filed its verified third-party claim to the machine, under the provisions of section 689 of the Code of Civil Procedure. No tender of the unpaid portion of the loan was made by the officer pursuant to section 689b of that Code. The plaintiff Chavalis filed no third-party claim in his own behalf.

[1] The respondents contend that the execution which was levied on November 13th was ineffectual because the registered certificate of ownership was not issued to Mrs. Chiflakos until November 20th, and that the attempted transfer of the machine to her conveyed no title which was subject to execution prior to the issuing of the certificate of title. It is true that a bill of sale to an automobile, accompanied by actual delivery of the machine, passes no title until the certificate of registration is actually issued. Section 45(e), California Vehicle Act (as amended by St. 1929, p. 514, § 13); General Motors Acc. Corp. v. Dallas, 198 Cal. 365, 370, 245 P. 184; True v. Crane (Cal. App.) 7 P.(2d) 357. But the judgment of the justice's court was against both Norma J. Podva and her mother. Assuming that the title did not pass to Mrs. Chiflakos prior to the levying of execution because of the delay in issuing the certificate of registration, there was still an interest held by Norma J. Podva, one of the joint judgment debtors, which was subject to execution. The possession of the machine by the officer, who held it under this levy of execution, was therefore valid and lawful.

[2] Finally, the respondents contend that the filing of a third-party claim by the Mercantile Acceptance Corporation under the provisions of section 689 of the Code of Civil Procedure entitled the seller of the machine to "full payment of all sums due or to accrue to him under the agreement," from the officer, as provided by section 689b of the same Code, in order to authorize the sale of the automobile under the execution.

Since the adoption of section 689a of the Code of Civil Procedure in 1921, "Personal property in possession of the buyer under an executory agreement for its sale * * * may be taken under attachment or execution issued at the suit of a creditor of the buyer, notwithstanding any provision in the agreement for forfeiture in case of levy or change of possession." The following section of that Code provides: "The officer levying on such property must within five days after being served with a verified written claim containing a detailed statement thereof, pay or tender to the seller full payment of all sums due or to accrue to him under the agreement, above set-offs, with interest to date of tender. * * * Until such payment or deposit is made, or an undertaking delivered to the officer, the property cannot be sold under the levy; but when made * * * the title shall pass to the buyer and the property may be sold * * * free of all lien or claim of the seller."

There are two reasons why the filing of this so-called third-party claim did not release the lien created by the levying of the execution. After the claim was filed by the Mercantile Acceptance Corporation an indemnity bond was filed by the judgment creditor, Pioneer Credit Indemnity Corporation, pursuant to the provisions of section 689 of the Code of Civil Procedure. Section 689b, supra, provides that, when a third-party claim has been filed, "until such payment or deposit is made, or an undertaking delivered to the officer, the property cannot be sold under the levy." The clear inference from this language of the statute is that when the undertaking is delivered to the officer that becomes the security for the third party, and the property may then be sold under the levy. The evidence in the present case is undisputed that this bond was duly delivered to the officer. He testified in that regard:

"Q. And did you * * * receive a bond from the plaintiff (defendant) indemnifying you? A. Yes.

"Q. And you now hold that bond? A. Yes, sir.

"The Court: Q. You mean from who? A. From E. E. Cullen, doing business as the Pioneer Company."

[3] The undisputed evidence in this case shows that neither the Mercantile Acceptance Corporation nor Chavalis was the seller of the Nash sedan automobile in the transaction involved in the final conditional contract under the terms of which they claim the right of possession of the machine. The final payment of $168 on the original purchase price of the machine was paid by Mrs. Chiflakos from the money which she borrowed from the plaintiff Chavalis. When this payment was made, the original contract of sale was extinguished. In spite of the fact that the loan of some $600 was made to Mrs. Chiflakos by Chavalis and secured by the execution of a document which purported to be a second conditional contract of sale of the machine, the evidence is uncontradicted that this instrument became a mere declaration of security upon the machine for a loan of money. In other words, it was a mere mortgage, and did not entitle the holder thereof to the possession of the property. Section 2924, Civ. Code; Commercial S. Corp. Cons. v. Lindsay Mercantile Co., 92 Cal. App. 91, 267 P. 766; Bonestell v. Western Auto-Motive Finance Corp., 69 Cal. App. 719, 232 P. 734, 735. In the last case cited, the court said: "The whole transaction, though couched in the form of a bill

of sale * * * and a conditional agreement of sale * * * was simply a device to secure the repayment of the sum of $750 loaned by the appellant to the said Chrisman. There was no transfer of possession of the touring car * * * at the time of the execution of the conditional agreement of sale. * * * We think the transaction, which we have outlined in brief, comes within the provision of section 2924 of the Civil Code. * * * The property thereafter was impressed only with a lien, the legal title to the car remained in Chrisman, and the defendant was not entitled to possession unless authorized by the express terms of the mortgage."

This language is peculiarly applicable to the present case. The second contract was a mere mortgage, and entitles neither of the plaintiffs to the possession of the machine. It necessarily follows that the findings and judgment are contrary to the facts and the law.

The judgment is reversed.

We concur: PLUMMER, Acting P. J.; PARKER, Justice pro tem.

124 Cal.App. 611

GENERAL PAINT CORPORATION v. SEYMOUR et al.

Civ. 8284.

District Court of Appeal, First District, Division 1, California.

July 1, 1932.

1. Contracts ⇐137(4).

Statute invalidating certain contracts in restraint of trade *held* to make such contracts void only as to excess beyond its provisions (Civ. Code, §§ 1673–1675).

Civ. Code, § 1673 provides that every contract by which any one is restrained from exercising lawful profession, trade, or business of any kind, otherwise than provided by next two sections, is to that extent void.

2. Contracts ⇐116(1).

Statute invalidating contracts in restraint of trade must be construed in light of tendency to view such contracts with greater liberality than heretofore (Civ. Code, §§ 1673–1675).

3. Contracts ⇐167.

Law forbidding contracts in restraint of trade *held* part of contract (Civ. Code, §§ 1673, 1674).

4. Evidence ⇐65.

It must be presumed parties contracted with knowledge of fact that law respecting contracts in restraint of trade forms part of contract (Civ. Code, §§ 1673, 1674).

5. Contracts ⇐153.

Contract forbidding seller's re-engaging in like business must be so interpreted as to hold it lawful, if possible (Civ. Code, §§ 1643, 1673, 1674).

6. Contracts ⇐147(1).

Contract must be interpreted to extend only to things as to which parties intended to contract (Civ. Code, § 1648).

7. Contracts ⇐137(4).

Agreement by seller of business, including good will, not to re-engage in like business within state for five years, *held* valid to extent of Los Angeles county (Civ. Code, §§ 1643, 1674).

While seller's agreement not to re-engage in like business within state was not entirely valid, in view of Civ. Code, § 1674, which provides that seller may agree to restrain from carrying on similar business within specified county, city, or part thereof, yet, since contract recited that seller had been engaged in same business in city of Los Angeles and elsewhere in state, and that agreement provided that seller would not injure business, it was apparent that aim of contract was to prevent seller from competing with business within its territorial limits, and that such limits included county of Los Angeles; and hence agreement was valid in so far as county of Los Angeles was concerned.

8. Good will ⇐7.

Buyer's measure of damages for seller's re-engaging in like business contrary to agreement is value of business lost to buyer, not seller's gain.

9. Good will ⇐7.

In action by buyer of business for damages caused by seller's re-engaging in like business contrary to agreement, buyer's gain may be considered in evidence, but should be shown to correspond wholly or partly with seller's loss.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the General Paint Corporation against Edward W. Seymour and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed in part, and reversed in part, with instructions.

Frank L. Borden, of Los Angeles, for appellants.

A. J. Getz, of Los Angeles, for respondent.

GRAY, Justice pro tem.

On and prior to February 18, 1928, appellants were the owners of, and were conducting, a paint and varnish business, with their factory and principal place of business in the city of Los Angeles. On that date they sold to respondent's assignor, the California Paint Company, this business, including its good will. As part of the sale, appellants executed and delivered their written agreement, hereafter fully set forth, agreeing not to engage in such business for a period of five years. Subsequently the California Paint Company assigned all of its rights to respondent. From and after the above date the California Paint Company and respondent, as successor in interest, continued to operate, and are still operating, the business so purchased. For a year after the sale, appellants, as employees of the purchaser, assisted in the management and operation of the business. Then they left such employment, established their own business of the same kind, and continued therein until trial. After trial, the court enjoined appellants from engaging in such business and awarded respondent damages. Appellants question the validity of the agreement as support to the injunction, and the award of damages.

The agreement, which forms the basis of this action, reads as follows:

"This agreement entered into as of this 18th day of February, 1928, between Edward W. Seymour and Walter A. Seymour, First Parties, and California Paint Company, a Corporation, Second Party,

"Witnesseth:

"Whereas, First parties have been engaged in the paint and varnish business in the City of Los Angeles and elsewhere in the State of California for five years prior hereto, or thereabouts; and

"Whereas, An agreement has been entered into between the parties hereto for the sale by said first parties to second party of the entire good will, stock in trade, fixtures and accounts of their said paint and varnish business; and

"Whereas, A material inducement to second party to purchase and acquire said entire business, including said good will, was and is the undertaking and agreement of first parties to refrain from further engaging in the paint and varnish business as hereinafter set forth;

"Now, Therefore, in consideration of the foregoing, and other valuable consideration, the receipt whereof is hereby acknowledged, first parties do hereby jointly and severally promise, undertake and agree with second party, as follows:

"1. That they will not at any time hereafter, directly or indirectly, by themselves or with or through any other person, firm or corporation, or in any other manner, for a period of five (5) years from and after the date hereof, engage in the manufacture, sale or distribution of paints or varnishes, or any like products, within the limits of the State of California, nor aid nor assist anyone else so to do within said limits, nor have any interest, directly or indirectly, in the business of manufacturing or selling paints or varnishes or like products within said limits, except as employees of second party, or except as they may be expressly permitted so to do by second party.

"2. First parties further agree that neither they nor either of them will, at any time after the date hereof, directly or indirectly, or in any manner, do or cause to be done any wilful act or thing to the prejudice of the trade or business of second party, including the business and good will of first parties purchased and acquired by second party as aforesaid.

"3. This agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto."

Section 1673 of the Civil Code reads as follows: "Every contract by which anyone is restrained from exercising a lawful * * * business * * * otherwise than is provided by the next two sections, *is to that extent void.*" (Italics ours.) Section 1674 provides: "One who sells the good-will of a business may agree with the buyer to refrain (1) *from carrying on a similar business* (2) *within a specified county, city, or a part thereof,* (3) *so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein.*" (Italics and numbers ours.) We are not concerned with section 1675, making an exception in favor of partnership arrangements.

[1-7] Appellants argue that the agreement prohibited them from engaging in the paint and varnish business within the state, and that, since this territorial limit exceeded that permitted by section 1674, the entire agreement is void. In More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621, upon which appellants principally rely, a contract not to engage in a particular business "in the City and County of San Francisco, or State of California" was held void. But this case was distinguished and explained in City Carpet, etc., Works v. Jones, 102 Cal. 506, 36 P. 841. Section 1673 does not say the entire contract is void, but merely provides that its excess beyond the provisions of section 1674 is void. Brown v. Kling, 101 Cal. 295, 35 P. 995; City Carpet, etc., Works v. Jones, supra; Ragsdale v. Nagle, 106 Cal. 332, 39 P. 628; Shafer v. Sloan, 3 Cal. App. 335, 85 P. 162. Section 1674 creates limitations both as to space and

time. In Brown v. Kling, supra, where the contract was limited as to space, i. e., territory, but unlimited as to time, the court, construing the contract with reference to the circumstances of the parties and the object to be attained, severed a reasonable time from the unlimited time, and held the contract valid to that extent. In the course of its discussion, the court approved the doctrine of Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23, where a contract unrestricted as to time and place was held valid as to territory covered by plaintiff's business. The seller, in City Carpet, etc., Works v. Jones, supra, agreed not to engage in business in the counties of San Francisco, Alameda, and San Mateo. The court held that the invalid addition of the two counties of Alameda and San Mateo did not void the restriction as to the city and county of San Francisco, in which the property and business were located. The court in Gregory v. Spieker, 110 Cal. 150, 42 P. 576, 578, 52 Am. St. Rep. 70, upheld a contract not to manufacture and sell bitters, limited to the county of Sacramento, but without time limit, by construing it to cover a time permitted by law. A contract not to engage in business within a radius of ten miles of a certain store in the city of Oakland, which literally would include parts of Contra Costa and San Francisco counties, was held valid as to Alameda county. In Stephens v. Bean, 65 Cal. App. 779, 224 P. 1022, the seller agreed to not at any time in the future enter into business in competition with purchaser. It was held that the intention of the parties to limit the contract to the city where the business was located could be ascertained by a consideration of the terms of the contract as a whole, viewed in the light of the surrounding circumstances. It was further held that the lack of limitation as to the kind of business might be supplied by a reasonable construction. See, also, notes, 24 L. R. A. (N. S.) 913-941. "While contracts of this nature receive strict construction, yet, in construing them, their legitimate aim and end are not to be lost sight of. They are designed to secure to the business of one person immunity from rivalry and consequent damage at the hands of another, who would be a dangerous competitor by reason of his skill, energy, and popularity." Meyers v. Merillion, 118 Cal. 352, 357, 50 P. 662, 664. Sections 1673 to 1675 of the Civil Code are to be construed in the light of the tendency of the modern decisions to view with greater liberality contracts claimed to be in restraint of trade. Grogan v. Chaffee, 156 Cal. 611, 105 P. 745, 27 L. R. A. (N. S.) 395.

Considering the entire contract and giving due weight to the recital as to the location of appellants' former business and to the covenant not to injure the business sold, it is apparent that the aim and object of the contract was to prevent appellants from competing with the business sold within its territorial limits, and that such limits included the county of Los Angeles. The bill of sale shows that the stock in trade, accounts, factory equipment, furniture, automobiles, literature, and lease—in fact, everything sold—were located in Los Angeles county. The law formed part of the contract, and it must be presumed that the parties contracted with knowledge of that fact. The contract must be so interpreted as to hold it lawful, if possible (Civ. Code, § 1643), and to extend only to those things as to which the parties intended to contract (Civ. Code, § 1648). Upon reason and the authorities, the trial court correctly held the agreement was valid as far as the county of Los Angeles was concerned.

[8, 9] Appellants complain of the award of damages which amounted to 7½ per cent. of their total sales during the period they were in competition with respondent. The correct rule is stated in Gregory v. Spieker, supra, as follows: "In cases like the present the damages are rarely susceptible of accurate proof, but the measure, expressed generally, is the value of the business lost to plaintiff, not the gain of defendant, which may be more or less than plaintiff's loss, though such gain may be considered in evidence. It should be shown to correspond, in whole or in part, with the loss of plaintiff." Note, Ann. Cas. 1914A, page 1153. One of the appellants testified that their gross sales, during the competitive period, were $7,315.83; that respondent would have made a profit of 7½ per cent. on such volume; that the merchandise so sold was similar to that of respondent; that such sales were not confined to Los Angeles, but extended up and down the Coast, although sold through the Los Angeles office; that only a percentage of such sales were to former customers of the business purchased by respondent. He further testified that appellants in the new business used labels similar to those used in the business they sold; that they solicited business from former customers; that they canceled the old telephone listing and obtained a new one under the old name at a new address and wrote the postmaster to forward mail addressed in the name of the old business to them at their new address. This evidence merely shows that they did a business, an undetermined portion of which came from former customers, for an undetermined amount of similar articles. Whether respondent suffered a corresponding loss is purely speculative. The testimony also shows that appellants lost on this business, so it does not even show their gain, which is admissible under the above rule. While the court correctly stated the above rule to counsel during trial, its award is not in accord therewith.

The judgment is affirmed as to the granting of the injunction, but is reversed as to

the award of damages, with instructions to allow evidence on this issue and thereupon to award damages in accordance with the above rule. Each party is to pay their or its costs on appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

In re VIZELICH'S ESTATE.*

ALLEN et al. v. MORRILL et al.

Civ. 4631.

District Court of Appeal, Third District, California.

June 30, 1932.

Rehearing Granted July 30, 1932.

1. Wills ⇐470.

Testatrix' intention must be ascertained from language used in entire will.

2. Courts ⇐89.

Precedents are of great weight in aiding in construction of will, but are not of controlling force.

3. Wills ⇐547.

Under will providing that in case of death of any of testatrix' sons and daughters, without issue, their share should go to testatrix' surviving children, children of daughter who survived testatrix, but predeceased son, dying without issue, took interest in son's share.

4. Wills ⇐545(1).

Will subjecting estates vesting in testatrix' children to conditional limitation, terminating estates in event of their death without issue, *held* intended to apply only until date of final distribution.

Will directed that all of testatrix' real property should be retained by executor until such time as testatrix' children named as legatees and devisees should agree that it would be to best interest of all of them that realty should be sold, and that in case of death without issue of any of the testatrix' sons, daughters, and grandchildren, their shares should go to testatrix' surviving children; hence it was reasonable to suppose that testatrix in creating the conditional limitation was providing for contingencies which might arise prior to final distribution of her estate, and that she did not intend that the estates which her children and grandchildren would receive on final distribution should be tied up indefinitely by being made subject to the defeasance clause.

5. Wills ⇐629.

Law favors vesting of interest in devised property.

6. Wills ⇐629.

Every interest in devised property will be presumed to be vested unless contrary intention clearly is manifest (Civ. Code, § 1341).

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Proceedings between Penelope J. Bruce Allen and another, and Mrs. Kate Morrill and others, involving the distribution of the estate of Nellie Harding Vizelich, deceased. From a portion of the decree of distribution, the former appeal.

Decree reversed, with directions.

See also (Cal. App.) 11 P.(2d) 870.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellants.

Clark, Nichols & Eltse, of Berkeley, R. C. Minor, of Stockton, C. Victor Smith and Harvey S. Craig, both of Oakland, and McNoble, Parkinson & Coblentz, of Stockton, for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

The decedent, Nellie Harding Vizelich died testate February 1, 1918, leaving six children, Amelia, Kate, Nellie, Nicholas, Henry, and Stanley, surviving her. Nicholas, Stanley, and Amelia died prior to the final distribution of the estate. Of the said three children who died, only Amelia left any issue. Her children are the appellants herein. The decree of distribution did not distribute to these appellants any part of the share of the estate left to Stanley. This appeal is taken from said decree, it being contended by appellants that the entire estate should have been distributed in four equal shares; one-fourth to these appellants jointly, and one-fourth to each of the three surviving children of decedent. Respondents Jennie Vizelich Marr, as executrix of the will of Nicholas Vizelich, deceased, and Anita Vizelich, as administratrix of the estate of Stanley Vizelich, have filed a separate brief herein. Under the decree, no part of the estate goes to them, or either of them. As this contest is between other parties who succeed to the estate, and the appeal is taken from that portion of the decree of final distribution which affects only such other parties, and does not affect the last-named two respondents, we hold that they are not interested in this appeal. If the portion of the decree appealed from were reversed, they would not be affected.

This appeal involves the construction of the will of Nellie Harding Vizelich, which reads as follows:

"Firstly: I direct that all my just debts be paid as my executor and executrix herein-

after named have sufficient funds in their hands for that purpose.

"Secondly: I direct that all the real property of which I may die seized or possessed be retained in the hands of my executor or executrix hereinafter named until such time as my children who are hereinafter named as my legatees and devisees shall agree that it will be to the best interest of all of them that said real property be sold. When such sale is agreed upon by my said sons and daughters, I direct that said property be sold, and that from the proceeds thereof, after the payment of all debts, charges and expenses of administration remaining unpaid, by said executor and executrix shall pay the following special legacies: To Nellie Vizelich, my daughter, $500.00; to Nicholas James Vizelich, my son, $1000.00; to Fred Vizelich Bartlett, the son of my deceased daughter, Mrs. Bessie Bartlett, $1000.00; to Bernice I. Vizelich and Lloyd Carleton Vizelich, the children of my deceased son Stephen Vizelich, the sum of $1000.00 each. After the payment of said special legacies, I direct that the remainder of the proceeds, together with all other property, whether real, personal or mixed, of which I may die seized or possessed, be divided equally, share and share alike, among my sons and daughters, to-wit: Mrs. Amelia Bruce, of Oakland, California; Mrs. Kate Morrill, of Berkeley, California; Nellie Vizelich, Nicholas James Vizelich, Stanley Vizelich and Henry Vizelich, of Stockton, California.

"Thirdly: In the event of the sale by me in my lifetime of my real property, then the proceeds thereof remaining at the time of my death, or any other property of which I may die seized or possessed, shall be applied to the payment of the legacies herein directed to be paid, and the residue of my estate, of every kind and nature, divided equally, share and share alike among my sons and daughters hereinabove named.

"Fourthly: After my death and before the sale of the real property of my estate as aforesaid, I direct that the income of said property shall be regularly collected by my said executor and executrix, and that every six months the net profits thereof be equally divided between my said sons and daughters.

Fifthly: I further direct that in case of the death without issue of any of my said sons and daughters and grandchildren herein mentioned, their share and shares herein devised and bequeathed shall go to my surviving children, that is to say, my sons and daughters herein named, share and share alike.

"Lastly: I hereby nominate and appoint my son Nicholas James Vizelich, and my daughter Nellie Vizelich, both of Stockton, California, the executor and executrix of this my last will and testament, and direct that no bond be required of either of them as such, and the authority is hereby given them, when selling the real property as hereinbefore directed to be sold, that the same be sold without the order of the court and at either public or private sale, and with or without notice, as my said executor and executrix may determine."

The briefs of both appellants and respondents are devoted almost entirely to a discussion of the meaning of the term "death without issue," the time of death referred to, and the application of the survivorship provision, as there terms are used in the fifth paragraph of the will.

Nicholas died without issue on March 18, 1920. Amelia died on October 13, 1926, leaving these appellants as her sole issue. Stanley died without issue on March 8, 1927. The decree of distribution did not distribute to appellants any part of the share left to Stanley, and it is now contended that such a construction of the will was erroneous.

The corpus of the estate consisted entirely of real property (excepting personal property appraised at $100). Acting pursuant to the provisions of the will, the executrix, on July 29, 1929, sold all of said real property for the sum of $65,000. The record shows that this sale was agreed to by the three then surviving children of decedent, and appellants herein. The property finally distributed was this sum received for the real property, and the personal property.

It will be noted that Amelia died before Stanley, and, when the latter died, appellants, who were children of Amelia, were living. As Stanley died without issue, he had no vested interest in the estate which would pass to his widow or collateral heirs. Unlike Stanley, Amelia left issue surviving her. The contingency of "death without issue" therefore had no application to her share. Hence, her share did not lapse, or, expressing it more properly, it was not defeated. We have a situation where, although the fifth paragraph of the will provides that in case of the death without issue of any of her children or grandchildren mentioned, their share and shares should go to the surviving children, there is no provision for a devise over in case of death leaving issue. Shall we hold that as to Stanley's bequest, under these circumstances, a share of it should pass to the children of Amelia (appellants herein), or shall it be determined that such bequest passed to the three surviving children of the testatrix, to the exclusion of appellants? This is the question here presented.

[1, 2] In determining testator's intention as expressed in a will, courts are often asked to decide the case in dispute in the same way as some previous case in which somewhat similar expressions were employed. While such a method of construction is very tempting, it is radically at variance with the funda-

mental rule that the intention of the testator is to be ascertained from the language used in the entire will. An attempt, therefore, to construe the separate phrases and clauses in a will in strict accordance with precedents is often likely to lead to a total disregard of testator's intention. It thus follows that while precedents are of great weight in aiding construction, they have not the controlling force that they have in most branches of the law. As Judge Whitehouse, in the case of Wentworth v. Fernald, 92 Me. 282, 42 A. 550, observed: "The analogies afforded by precedents are helpful servants, but dangerous masters." And so, in the disposition of the issues in this case, we have endeavored to give paramount consideration to the question of intention.

The chief contention made by appellants is that there was a bequest of an equal share to the issue of Amelia by implication. They state that, "by applying this doctrine of implied bequest, the will would be construed as though there were added to the fifth clause a provision that in case of the death of any of my said sons and daughters and grandchildren leaving issue, the shares that they would have taken, if living, should go to such issue." In effect, this would necessitate a finding that, by the use of the words "surviving children" in said clause, the testator intended to include the issue of her said children. We do not agree with respondents in their contention that the will indicates an intention and purpose upon the part of the testatrix to discriminate against the grandchildren, who were or might be the issue of the children named in the fifth paragraph. On the contrary, it appears to have been the intention to dispose of the entire estate; that her children should be treated equally; that her estate should go only to her lineal descendants; that there should be no devise over in the event of the death of a child leaving issue; and that there was evident a clear intent that an issue of a deceased child should take the "share and shares" which its parents would have taken if living. This question has been before the Supreme Court of this state in Re Estate of Blake, 157 Cal. 448, 108 P. 287. In that case the testator by his will had left the residue of his estate to trustees in trust, with directions, after payment of a number of bequests, to convert the rest of his personal estate into money and invest the same in improved real estate, and to hold the trust estate and pay the net income in equal shares quarterly to two daughters and a granddaughter until they respectively arrive at the age of thirty years, "and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue as her distributive share. And if either of said daughters or granddaughter shall die without issue and before she receives her distributive share, it is my desire that her share shall go to the surviving daughter, daughters or granddaughter as the case may be."

The two daughters attained the age of thirty years and received their distributive shares. The granddaughter died before attaining that age, leaving surviving her a husband and two children. She having thus left issue, and there being no express provision in the will for the disposition of her one-third in that event, the devise over to the surviving daughters in the event of her death without issue did not obtain. Under this situation the two daughters claimed that, as respects the one-third so bequeathed to the granddaughter, Blake had died intestate, that therefore they, as his heirs, should receive two-thirds of her third, and that only the remaining one-third of this third portion should go to the issue of the granddaughter, as heirs of Blake. The court, however, declined to accept this view, and held that, although the granddaughter had never acquired any vested interest in the estate because she did not attain the age of thirty years and that she therefore had had only a contingent remainder which was divested by her death, yet, inasmuch as there was a devise over only in case of her dying without issue, the testator thereby implied a devise over of this share to her issue in the event of her death before attaining the prescribed age leaving issue, and that therefore her issue, under a devise by implication as donees or purchasers direct from the testator, were entitled to the distributive share which she would have received had she attained that age. In applying this doctrine of devise by implication, the court in its opinion says:

"Bequests by implication have from remote times been sustained where no direct language in a will is found to support them but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest. As said in 29 Am. and Eng. Ency. of Law, p. 382: 'Implication may arise under a recital, reference of (or) elliptical expression which necessarily implies something else as contemplated by the testator. * * *'

"Looking this devise over, it would appear to be absurd to say that while the testator provided that in the event of death 'without issue' of a contingent devisee a remainder over is to take effect, yet if the contingent devisee leave issue the devise over shall be defeated and without benefit to either parent or child. * * *"

"Is it at all reasonable to say that, when the testator provided that a beneficiary should take an absolute estate on attaining the age of thirty, that in providing for a devise over if she should die 'without issue' he had no devising purpose when referring to issue, but that such issue were only to take

by right of representation a share in the portion of the trust property devised to their mother, as estate of which the testator had died intestate, along with the surviving beneficiaries who might have actually attained the required age and already received their two-thirds of the entire trust estate, as is exactly the situation here? Or to take one of the illustrations of counsel for the minor appellants. If one of the daughters of testator had died before attaining the age of thirty, leaving a numerous family, and the two other beneficiaries had attained thirty, married and died, never having had issue but leaving their respective husbands surviving them, this situation would be presented: The children of the deceased beneficiary would divide two twenty-sevenths of the trust fund among their number; their father would take one twenty-seventh thereof; and the remaining eight-ninths might pass forever away from the line of Francis Blake. Of course, it is insisted by respondents that this only presents a situation which the testator should have provided against but has omitted to do. But he has met this situation and provided against such consequences if a devise can be implied from the elliptical expression as to issue, and these circumstances and consequences afford circumstances which naturally support this as the implied intention of the testator. In making his will the testator recognized that his daughters and grandchildren were the natural objects of his bounty and he devised his estate to them, contingent, however, on their reaching a designated age. Having bequeathed the interest which they should severally take in his estate and designated when it should vest, he then proceeded to provide for its disposition over should the contingency upon which they should take not be met. In making such provision it naturally suggested itself to him that a beneficiary might die before attaining the age when she would be entitled to her share of his estate, but might leave children. It is to be assumed that the testator would have the same natural solicitude for the issue of the child as for the child herself, and contemplating the possibility of issue he provided that in the event of issue the share of the deceased beneficiary should not go over. This was a natural provision. Such issue would be his lineal descendants and naturally entitled to the same consideration from him as their parent. He recognized that in the event of issue their welfare would be a matter of solicitude on the part of their mother, and having this in view, he provided that the share which would be hers if she attained the age of thirty years should go over only in the event of her dying without issue before she received her share of the estate. He had the possibility of issue in his mind, and as he intended that the parent should not take unless she attained the age of thirty years and intended that the devise over should not be effective if issue survived her, it seems the only reasonable inference to be deduced from the mention of issue at all that they were to take the share which otherwise their mother would have taken. As the devise over was to be ineffectual if the beneficiary died with issue and the testator intended to dispose of all his estate, this is the only effect which can be given to the mention of issue, if any effect is to be given at all."

Here, also, the testator had the possibility of issue in her mind, and the only reasonable inference to be deduced from the mention of issue at all was that they were to take the share which their mother otherwise would have taken. "The intent of the testatrix was that the children of a deceased child should take under the words 'surviving children' (Mullarky v. Sullivan, 63 Hun. [N. Y.] 156, 17 N. Y. S. 715)." "That the issue of a sister dying first should be cut off from participation in the share of a sister dying subsequently without issue would be giving an accidental and irrelevant fact an effect contrary to the manifest general intent." In re Fox's Estate, 222 Pa. 108, 70 A. 954. "What the testator meant was that a defeated share should lapse and then be added to the shares not defeated." Marvin v. Peirce, 84 N. H. 455, 152 A. 484.

[3] Our conclusion is that the testatrix intended that issue should take in the event of death leaving issue, and that appellants are therefore entitled to a one-fourth interest in the estate, instead of a three-fifteenths interest.

[4-6] Another question presented is whether or not the provisions of the fifth clause should be carried out in the decree of distribution. This paragraph operated to subject the estate which vested in the children named to the conditional limitation that such estate should terminate or be defeated in the event of their death without issue. It is the contention of respondents that the contingency mentioned should be enforced only until the date of final distribution, and the cash which then went to the legatees became theirs absolutely. This is a reasonable construction of the provision, and should prevail. We do not believe that the testatrix ever intended that the cash which her children and grandchildren would receive on final distribution should be tied up indefinitely by being made subject to the defeasance clause. It is more reasonable to suppose that she was providing for contingencies which might arise prior to the final distribution of her estate. "The law favors vesting of interest, and every interest will be presumed to be vested unless contrary intention clearly is manifest." In re Estate of Newman, 68 Cal. App. 424, 229 P. 898, citing numerous authorities, and Civ. Code, § 1341. If the position of appellants be sound, all the cash finally distributed to the children and

grandchildren of decedent would be virtually tied up in trust for a period which might not terminate for many years. We do not believe that the testatrix ever intended such a result.

The furniture of decedent was distributed entirely to the three surviving children of decedent. This was erroneous. For the reasons hereinbefore set forth, appellants are entitled to one-fourth of the same.

Other points raised, including that of the finality of the order made upon the settlement of the first account, have been given careful consideration, but we find them without merit.

Appellants being entitled to a one-fourth interest in the estate instead of a three-fifteenths interest given them by the decree of distribution, it is ordered that the portion of said decree appealed from be reversed, with directions to the trial court to enter a final decree of distribution in accordance with the views herein expressed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

124 Cal.App. 514

MELDRIM v. DOYLE et al.

DOYLE v. CARR et al.

Civ. 8295.

District Court of Appeal, First District, Division 1, California.

June 27, 1932.

1. Vendor and purchaser ⇐237.

Antecedent indebtedness constitutes valuable consideration as between vendor and purchaser within protection of equitable doctrine of bona fide purchase.

2. Appeal and error ⇐994(3).

Credibility of witnesses and truth of testimony are matters exclusively for trial court.

3. Trusts ⇐346.

Action to impress realty with resulting trust upon ground of fraud *held* not maintainable by assignee of mere right to sue, where assignee did not receive transfer of interest in property.

4. Appeal and error ⇐1040(5).

Order sustaining demurrer to cross-complaint *held* not prejudicial, where cross-complainant introduced no evidence, and cause of action alleged had already been adversely determined.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by G. D. Meldrim against R. M. Doyle and others, wherein the defendant named filed a cross-complaint against David Carr and another. From the judgment rendered, the defendant and cross-complainant R. M. Doyle appeals.

Affirmed.

John A. Jorgensen, of Los Angeles, for cross-complainant and appellant Doyle.

F. H. Whitfield, of Los Angeles, for respondent.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Dep. Co. Counsel, both of Los Angeles, for defendant William R. Traeger.

George L. Hampton, of Los Angeles, for cross-defendant Carr.

KNIGHT, J.

The defendant R. M. Doyle appeals from a judgment in an action to quiet title to real property arising out of the following facts, which are not disputed:

In March, 1928, George Hurley gave Doyle a mortgage on certain personal property to secure the payment of rent thereafter to accrue. In August, 1928, David Carr obtained possession of the mortgaged property and exchanged it with J. E. Gruben for three lots, the title to which is the subject of this action. On September 12, 1928, Carr conveyed the lots to the plaintiff G. D. Meldrim; the deed therefor being recorded on September 26, 1928. Claiming that Carr represented to Gruben at the time of the exchange that said personal property was clear of incumbrance, Doyle, on the day following the recordation of the Meldrim deed, obtained from Gruben an assignment of any cause of action which might have accrued to Gruben out of the transaction, and brought an action thereon against Carr to recover the value of the lots, and caused a writ of attachment to be issued and levied upon the same; whereupon Meldrim instituted this suit to quiet title, adding a second cause of action for damages for an alleged malicious attachment, and making Doyle and his attorney, and the sheriff who levied the attachment, parties defendant. They filed separate answers, and Doyle added a cross-complaint whereby he brought in Carr as a cross-defendant. The substance of the matters pleaded by Doyle as a defense, and the cause of action attempted to be set forth in his cross-complaint, were based upon allegations to the effect that Carr acquired the lots from Gruben through fraud; that the deed from Carr to Meldrim was made by Carr with intent to defraud Gruben and other creditors, and to defraud Doyle "of his attachment lien"; that the sole consideration for said deed was the discharge by Meldrim of an

antecedent debt due him from Carr, and that Meldrim acquired said lots with notice of all of the facts connected with the transaction. The relief prayed for in the cross-complaint was that Meldrim and Carr "be declared constructive trustees" of said lots; that the deed to the same be canceled, or that Meldrim and Carr be required to reconvey said lots to Doyle; that the attachment lien be declared superior to any right of Meldrim and Carr; that they be enjoined from asserting any claim to said lots, and that Doyle's title thereto be quieted. Carr demurred to the cross-complaint and his demurrer was sustained with leave to amend, but no amended cross-complaint was ever filed. Meldrim did not demur to the cross-complaint, but filed an answer thereto denying, among other things, the allegations of fraud, and admitting that the consideration for the Carr deed to him was the discharge of an antecedent debt due him from Carr.

At the beginning of trial Meldrim dismissed the second count of his complaint, based upon the charge of malicious attachment. He also dismissed the action as to Doyle's attorney and the sheriff. The action went to trial, therefore, on the issues raised by the first count of Meldrim's complaint and the answer thereto, and the issues raised by Doyle's cross-complaint and Meldrim's answer thereto. The court found that prior to the commencement of trial the attachment suit brought by Doyle had been dismissed by the court; that Doyle had taken no appeal from the judgment of dismissal, and had stipulated in open court at the trial of the present action that he claimed no right or interest whatever in said lots by reason of said attachment. The court further found that no evidence had been received in support of the cross-complaint, and for that reason the same was dismissed; and upon the issues raised by the complaint and Doyle's answer thereto the court found that Carr conveyed said lots to Meldrim without any intention of defrauding creditors, and that Meldrim acquired the same in good faith for a valuable consideration and in the due course of business, without notice or knowledge of any of the previous transactions relating to the property, or of any adverse claims thereto; that therefore Meldrim was the owner of said lots, and that Doyle had no interest therein. Judgment was entered accordingly.

[1, 2] Taking up appellant's points in the reverse order in which they are presented, one ground urged for reversal is that the evidence is insufficient to sustain the trial court's adverse finding on the issue of fraud. There is no merit in the point. As held in Smitton v. McCullough, 182 Cal. 530, 537, 189 P. 686, the law in this state is well settled to the effect that not only does an antecedent indebtedness constitute a valuable consideration for a transfer in satisfaction and discharge of said indebtedness, but it is also a valuable consideration, within the protection of the equitable doctrine of bona fide purchase, for a transfer merely as security for a pre-existing debt. 2 Pomeroy's Eq. Jur., (4th Ed.) § 749. See, also, Schumann-Heink & Co. v. U. S. Nat. Bank, 108 Cal. App. 223, 291 P. 684, 292 P. 547, wherein additional authorities are cited. Here respondent introduced in evidence his deed from Carr, and in support thereof testified that the consideration therefor was the discharge of an antecedent debt due him from Carr, and that he had no knowledge whatever of the circumstances under which Carr acquired the property until after the commencement of the present action. His testimony was not contradicted by any other witness, and, having been accepted by the court as true, it is legally sufficient to sustain the finding on the issue of fraud. Appellant calls attention to certain cross-examination of respondent bearing upon the circumstances under which respondent claimed the antecedent debt was created; and he argues that such cross-examination tends to show the unsoundness of respondent's claim of good faith. But the testimony relied upon at most goes only to the credibility of the witness and to the truthfulness of his testimony; and these were matters exclusively within the province of the trial court to determine.

Nor do we find any error in the trial court's rulings upon the admissibility of evidence. The specific complaint made by appellant is that he was precluded from eliciting certain testimony relating to the issue of fraud; but the record does not support such complaint. It shows that appellant was afforded full opportunity to establish fraud, but that he failed so to do.

[3] Appellant's final contention that the trial court erred in sustaining Carr's demurrer to the cross-complaint is also without merit. As stated, the sole purpose of the cross-complaint and of bringing Carr into the case was to impress certain real property formerly belonging to Gruben with a resulting trust for the benefit of appellant upon the ground that a fraud had been perpetrated by Carr against Gruben in acquiring the property from Gruben; but according to the allegations of the cross-complaint Doyle was seeking to maintain such cause of action as Gruben's assignee under a plain assignment unaccompanied by any transfer of interest in the property. As held in Kemp v. Enemark, 194 Cal. 748, 230 P. 441, where a right to sue for a fraud is incidental to a subsisting substantial property right which is itself intrinsically susceptible of legal enforcement, the assignment of the property interest carries with it the right to set up the fraud; but a bare right to sue in equity for fraud, separate and distinct from a property right,

is not assignable. Here, as indicated, appellant nowhere alleged, nor does he now claim, that Gruben ever assigned, transferred, or conveyed to him any interest in the property upon which he was seeking to impress a resulting trust in his favor. Therefore, under the law as declared in the case above cited, he was not entitled to maintain the cause of action attempted to be set forth in the cross-complaint.

[4] Aside from the foregoing point, however, the record clearly shows that the order sustaining Carr's demurrer to the cross-complaint did not preclude appellant from establishing a resulting trust, for the reason that the question was still an issue to be tried and determined under the allegations of the cross-complaint and the denials in Meldrim's answer thereto; and that in that state of the pleadings appellant abandoned all effort to establish the trust, because, as stated by the trial court in its findings, no evidence was received in support of the cross-complaint. As indicated by appellant's frank admission in his brief, one reason for such abandonment was that after filing the cross-complaint he ascertained that he was mistaken in his belief that under the law of this state an antecedent debt was legally insufficient as against third parties to constitute a valuable consideration for the transfer of real property. Moreover, the record shows that the charge of fraud upon which appellant relied as a basis for his claim of a resulting trust had been already adversely determined in the attachment suit brought by appellant against Carr; and that from the judgment of dismissal entered therein appellant took no appeal.

It appears, therefore, that, regardless of the merits of the trial court's ruling on Carr's demurrer, appellant was not prejudiced thereby.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

COLTON v. O'BRIEN. *

Civ. 7152.

District Court of Appeal, Second District, Division 2, California.

June 27, 1932.

Rehearing Denied July 26, 1932. Hearing Granted by Supreme Court Aug. 25, 1932.

1. Pleading ⇐34(1).

Complaint must be construed as a whole.

2. Brokers ⇐82(1).

Complaint for commission for services for exchange of realty stated cause of action, as against contention there was no allegation that exchange was actually effected.

Complaint alleged that defendant employed plaintiff to exchange for her certain property and delivered to plaintiff an exchange agreement in which she agreed to pay plaintiff a commission of $3,000 for services rendered to become due on execution of agreement by all parties; that plaintiff secured an acceptance providing that a loan be placed on defendant's property; that defendant approved the exchange; and that defendant had paid plaintiff no part of agreed commission.

3. Trial ⇐29(4).

Ruling of trial court subject only to criticism that it is not in accordance with the law does not constitute judicial misconduct.

4. Trial ⇐29(1).

Trial judge *held* justified in admonishing defendant for shaking her head and making faces indicating disagreement with testimony of witness.

5. Trial ⇐133(1).

Trial court *held* to have properly admonished defendant's counsel against repetition of telling witness how to answer, where court asked defendant a question and counsel shook his head in manner implying negative answer.

6. Trial ⇐29(1).

Judicial admonition of defendant *held* not ground for reversal, where provoked by misconduct of defendant.

7. Appeal and error ⇐1015(5).

Findings by another judge, on hearing of motion for new trial, that trial judge was not guilty of judicial misconduct, *held* conclusive on appeal.

8. Appeal and error ⇐1008(1).

Findings of trial judge upon issues raised by pleadings *held* conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell and Marshall F. McComb, Judges.

Action by Leonard B. Colton against Mary T. O'Brien. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Burke, Catlin & Burke, of Los Angeles, for appellant.

Mott, Vallee & Grant, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Respondent brought an action to recover a commission for services. The complaint alleges that on about June 27, 1928, appellant employed respondent to exchange for her cer-

tain property, and executed and delivered to respondent an exchange agreement whereby she offered to exchange her equity, valued at $125,000, in certain real property in Portland, Or., to be accepted or rejected by noon of July 7, 1928, various other terms and conditions appearing in the instrument, including a paragraph authorizing respondent to act as agent for all parties thereto and agreeing to pay a commission of $3,000 for services rendered, to become due on the execution of the agreement by all parties. The complaint further alleges that on or about July 28, 1928, respondent secured from Lewis E. Gumplo and Irene M. Gumplo, his wife, a written acceptance of the offer, which acceptance included the following paragraph: "Provided that a loan of $35,000 dollars for 3 years at 6½% interest is placed on the Portland property during the life of this escrow." That plaintiff submitted this acceptance to appellant and that appellant accepted and approved said exchange upon all of the terms and conditions set forth in the offer of exchange and the acceptance and indorsed on the face of said offer and acceptance the words, "I hereby accept this deal as of this date July 30/1928 Mary T. O'Brien." The complaint concludes with an allegation that appellant has paid to respondent no part of the agreed commission of $3,000 and a demand for judgment with interest from July 30, 1928. Appellant interposed a demurrer challenging the sufficiency of the complaint and also claiming various ambiguities.

[1, 2] Appellant contends that the demurrer should have been sustained because the complaint alleges that respondent was employed to "exchange" property and that there is no allegation that an exchange was actually effected. The contract under which respondent claimed the right to a commission was set out in haec verba, and it shows that the commission became earned when appellant's offer of exchange was accepted. Reading the complaint as a whole it is evident that the word "exchange" was rather loosely used; but as the true contract appears on the face of the pleadings, and as the pleading must be construed as a whole, the point is not well taken. A further ground of demurrer is that the commission was to become earned when the offer was accepted, and that since the acceptance contained a proviso for the placing of a loan on the property there was no acceptance; hence no claim for commission ever arose. Appellant overlooks the fact, however, that after seeing the acceptance of the offer and its included proviso appellant indorsed on the offer and acceptance, "I hereby accept this deal as of this date July 30, 1928 Mary T. O'Brien," thereby consummating an agreement for exchange including within it, in addition to the original terms, the provisions for the loan on the property and the payment of the $3,000 commission. Appellant could have refused the proposed acceptance because it was not unconditional, but instead elected to consider it as an acceptance of her offer, and by the indorsement above quoted consented to the proviso as an addition to the agreement. It is next argued that there is no allegation that the proviso was to be carried out by appellant. As it was appellant's property which was to be incumbered, it is obvious that the proviso could be carried out only by and through her act and consent. The demurrer was properly overruled.

Appellant's next point is that the trial court found that the commission was for an exchange not effected, and that under such a finding the court could not give judgment for respondent. This is predicated on the erroneous and unsupported theory that a commission was not due until the actual exchange of property had taken place and is answered by what has already been said to the effect that the commission did not depend upon an exchange, but became due when appellant's offer of exchange was accepted. The point that the figure of $3,000 as the amount of commission to be paid was not inserted in the offer of exchange when first signed by appellant is immaterial. The court found, and the finding is not attacked, that at the time appellant received the acceptance of Mr. and Mrs. Gumplo the figure of $3,000 was inserted in the offer to exchange with the knowledge of appellant and she thereafter made her written indorsement accepting the deal, thus making the figure of $3,000 a part of the agreement.

The argument that the words "should this offer be accepted" as a condition for the payment of commission must have meant "should this offer be carried out" is not warranted by anything in the record.

The criticism that some of the findings of fact are really conclusions of law, if justified —and we are not to be understood as so holding—could bring little of hope or comfort to appellant, for independent of the language under criticism there is an ample finding of facts which sustains the judgment.

[3] The final point is that the court erred in denying appellant's motion for a new trial, which was based on alleged misconduct of the trial judge. Counsel has in some instances cited adverse rulings of the court as instances of misconduct. If such rulings were erroneous they should have been presented here as errors of law. A ruling subject only to the criticism that it is not in accordance with the law does not constitute judicial misconduct.

[4] During the cross-examination of respondent the court interrupted, saying: "Just a moment. Mrs. O'Brien, another exhibition

of that sort and you will be asked to leave the courtroom. Let the record show that the defendant, Mrs. O'Brien, is shaking her head and making faces and turning to some gentleman at her right, and indicating disagreement with the witness' testimony in those ways. If you cannot behave yourself, madam, you will have to leave this courtroom. Proceed, gentlemen." It should be noted that there was no denial of the fact that Mrs. O'Brien had been guilty of the conduct described in the court's statement, nor any effort on the part of her counsel to explain it. The trial judge was, under such circumstances, justified in his admonition, and in fact would have been neglectful of the respect due a court of law had the incident been allowed to pass without some action being taken to prevent its recurrence.

[5] During the direct examination of appellant the court asked her a question capable of a "yes" or "no" answer, and the record shows that, before she was able to answer, the court, addressing her counsel, said: "I saw you shake your head before the witness answered. Don't let me have to speak to counsel again about telling a witness how to answer." Counsel did not deny shaking his head, but limited his response to the words, "I disclaim any intention." The record is silent as to the intent actuating the movement of counsel's head in a manner commonly accepted as strongly implying a negative. The court, observing what to all appearances was a signal of what the answer should be, and unable to see the purpose of the movement in other than its obvious interpretation, very properly admonished counsel against a repetition. The fact that neither at that time nor subsequently when he made and filed his affidavit to support a motion for new trial did this counsel explain why he had shaken his head seems to us significant.

[6] During the testimony of appellant the court on several occasions admonished her to limit her answers to the subject-matter of the question and cautioned her against volunteering any testimony and against answering questions to which the court had sustained objections. One of these comments of the court was provoked by the reply of appellant to the first question propounded to her on cross-examination, viz., "I am tired of answering your questions." Charitable as we may feel towards a witness of advanced age, perhaps a stranger to courtrooms, we fail to see any just ground for criticism of the conduct of a trial judge because of judicial admonition provoked by misconduct of that witness.

[7, 8] Appellant sought to support her motion for a new trial on the ground of misconduct of the court by affidavits attacking the conduct of the trial judge toward appellant and her counsel. Not only are the statements in these affidavits mere conclusions of the affiants instead of statements of fact, but they are also contradicted by counteraffidavits. By consent of the trial judge the motion was heard by another judge of the superior court and by him denied, and his findings against appellant, by the denial of the motion, are conclusive on appeal, as are also the findings of the trial judge upon the issues raised by the pleadings. Appellant's effort to reargue these questions of fact cannot be considered by this court.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

COLTON v. GUMPLO. *

Civ. 7172.

District Court of Appeal, Second District, Division 2, California.

June 27, 1932.

Rehearing Denied July 26, 1932. Hearing Granted by Supreme Court Aug. 25, 1932.

Brokers ⊂⇒86(1).

In action to recover commission on exchange of real property, evidence *held* insufficient to support finding that owner arbitrarily abandoned proposed exchange.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Leonard B. Colton against Lewis E. Gumplo. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Woodruff, Musick & Hartke, of Los Angeles, for appellant.

Mott, Vallee & Grant, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The plaintiff and respondent instituted an action for commission alleged to have been earned in negotiating an exchange of real property belonging to the appellant for that of a third party.

The contract between the parties to this action, dated July 28, 1928, was predicated upon a provision of the escrow agreement "that a loan of $35,000.00 dollars for 3 years at 6½% interest" be placed upon the property to be received by the appellant; and it was agreed that said commission should be due and payable when said property should

be sold at a price satisfactory to the latter. The owner and the broker further agreed that in the event no trade be consummated, the appellant would be "under no obligation of any kind to said Leonard B. Colton." Upon the execution and deposit of the respective escrow agreements and instructions, application for said loan was made, and the same was approved and accepted, but the same was not further pursued, nor was the contemplated exchange completed. Following the introduction of evidence the trial court found that the defendant, "without cause, arbitrarily and capriciously abandoned said proposed exchange, declared his intention of proceeding no further therewith and instructed said California Bank to proceed no further with said escrow, and still refuses, to complete said exchange, or to take any steps whatever necessary thereto." "That by reason of the aforesaid acts and conduct of defendant, the completion of the exchange of the aforesaid properties and resale by defendant of the Portland property was made impossible."

A search of the record fails to reveal support in the evidence for the finding that the owner abandoned the proposed exchange without cause, arbitrarily or capriciously, or that he declared his intention of proceeding no further with the escrow even though a feasible compliance with the brokerage agreement were effected. It appeared from evidence adduced that said "loan was approved and would have been made, conditioned upon receiving the promise of Mr. Gumplo to reasonably recondition the building and rent same within a reasonable time. However, Mr. Gumplo refused to make such a promise, consequently the loan was not made. * * * Mr. Leonard B. Colton, acting as agent for Lewis E. Gumplo, was fully aware of and thoroughly understood said reconditioning requirement." The appellant was also informed by a telegram introduced in evidence by the respondent that said loan "has been accepted and will be made to you with understanding that apartment building will be reasonably reconditioned and rented for best possible price immediately following consummation of your deal." After the appellant had been informed of the terms upon which the loan could be made he stated, according to the respondent, that he was through with the deal, but on the same date he sent the following telegram to the mortgage company at Portland: "Negotiations for my acquiring Portland corner now in escrow subject to condition of $35,000 loan. * * * Application stating $500 monthly income incorrect. Actual income $40. Will not sign for more. Telegraph if loan will be approved and made on above conditions." On the following day the respondent wired to the same company as follows: "Gumplo about to withdraw escrow. Nothing in loan application regards reconditioning building and securing tenant. Security in ground no improvements. Must have definite wire immediately." Colton also testified that the reason he did not go to Portland and attempt to make a loan acceptable to Gumplo was that he did not have the money. All of this makes it clear that neither party understood that the appellant had refused to proceed. It appears also that the escrow was finally canceled by Mrs. O'Brien, and not by the appellant.

The controversy between the parties to this appeal is resolved into an interpretation of the language of the contract, in the light of Alison v. Chapman, 36 Cal. App. 759, 173 P. 389, 390. It was observed upon the facts there presented: "It may be conceded that, generally speaking, a broker has earned his commission when he has brought an acceptable purchaser to the vendor—one who is ready, able, and willing to buy the property upon the terms on which the agent is authorized to sell; or when a written contract acceptable to the seller has been entered into with a purchaser brought to the vendor by the agent. But there are special features in this case which indicate a different intention of the parties. This was not strictly a case of a broker employed to go out and find a purchaser on certain terms. The broker had found a purchaser and brought him to the vendor. A contract was thereupon entered into by which the purchaser became bound to the vendor to buy the property upon terms satisfactory to the vendor. The question of the ability of the vendee to carry out his contract to purchase the property may have been the very reason why the vendor agreed to this contract only upon condition that the commission should be paid when the deal was finally closed. The words 'when the sale is consummated,' could hardly have referred to the time when the written contract of sale was made because that was already completed simultaneously with this agreement as to the time of payment of the commission. Those words must have referred to some future event and not to the time of signing the contract of sale."

We do not feel required to do more than rule that had the respondent broker obtained the loan as a condition precedent to a sale of the property for the appellant, and thereafter procured a contract in writing for the purchase of the same, upon the terms agreed to by the parties, the foregoing authority might be said to have no application adversely to his cause. But it must likewise be conceded that he failed to produce a party ready, able, and willing to make the loan upon the terms prescribed by his contract with the principal. The instrument which forms the subject-matter of this action cannot be said to have required the appellant to "reasonably recondition the building" at whatever

cost might be found satisfactory to the lender produced by the broker. The findings of fact do not comport with the uncontradicted evidence as to the duties of the broker.

The judgment is reversed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

124 Cal.App. 598

In re TOWSON'S GUARDIANSHIP.

Civ. 4670.

District Court of Appeal, Third District, California.

June 30, 1932.

1. Insane persons ⇐2.

Evidence sustained finding that 65 year old widower was incompetent to properly care for his property, rendering appointment of guardian necessary (Code Civ. Proc. § 1763).

Facts disclosed that the alleged incompetent, a 65 year old widower, was possessed of property valued at about $10,000, that he became seriously ill, and, on his recovery, he transferred practically all of his property to a woman who was almost a stranger to him, had no claim on his bounty, but who claimed to have nursed him during his illness, and that before his illness and his meeting of such woman the alleged incompetent had always been very methodical in his habits and very conservative with reference to money.

2. Insane persons ⇐27.

Findings of trial court as to incompetence of person to manage estate, based on conflicting testimony, are binding on appeal.

Appeal from Superior Court, Solano County; William T. O'Donnell, Judge.

Proceeding for the appointment of a guardian of the person and estate of Allen Towson, an incompetent person. From an order appointing a guardian, contestants appeal.

Affirmed.

S. M. Dobbins, of Vacaville, and Huston, Huston & Huston, of Woodland, for appellants.

Thos. E. Reynolds, of Vacaville, and A. G. Bailey, of Woodland, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order appointing a guardian of the person and estate of an alleged incompetent person under the provisions of section 1763 of the Code of Civil Procedure. It is contended the evidence fails to support the findings of incompetency.

Upon petition of a brother of Allen Towson, the Bank of America National Trust & Savings Association was appointed guardian of his person and estate. The court found that the alleged incompetent person is "unable, unassisted to properly manage and take care of his property, and by reason thereof is likely to be deceived and imposed upon by artful or designing persons, and is mentally incompetent to manage his said estate."

The appellant is a farmer who resides at Vacaville. He is sixty-five years of age and a widower. His wife died about a year prior to the filing of the petition in the present proceeding. He has two brothers and a sister living near Vacaville. He was possessed of real and personal property of the approximate value of $10,000. "He had been very methodical in his habits, very conservative, with reference to money." During the last illness of his wife, in the fall of 1929, for the first time he met a practical nurse by the name of Mrs. Lillie L. Carr Cornelius. Apparently she was much younger than he and was unmarried. She attended the appellant's wife for two days before her death. Soon thereafter the appellant and Mrs. Cornelius began to associate. She exhibited considerable interest in him. The following fall his prostate gland was affected. He consulted a local physician. About November 8, 1930, he entered the Sutter Hospital at Sacramento, where he remained until January 1st. Under the care of Dr. Hart he was treated at the hospital and finally operated upon for the prostate gland affliction. During the time he was at the hospital he had full hospital care, including two professional nurses a part of the time. Immediately after he left the hospital he went into the home of Mrs. Cornelius at Vacaville, where he remained under her care and supervision for three months. He then became an inmate of the county hospital for a brief period, asserting that he did not have the means to pay for his care and treatment at a private institution. In company with Mrs. Cornelius and a married couple from Vacaville, he visited the Odd Fellows Home for Old Folks, with the purpose of becoming an inmate thereof. This institution is primarily intended for the care of impecunious members of the fraternal organization. In response to an inquiry as to who was seeking to interest him in the old folks' home, he said, "They have all talked about it."

Before going to the Sutter Hospital, the appellant drove over to Calistoga with Mrs. Cornelius. He saw her frequently. She visited his home before he went to the hospital. He said it was unnecessary for him to have been compelled to go to the Sutter Hospital.

He claimed he was "railroaded to the hospital." He seemed to entertain an enmity against his brothers and sister. After his return from the hospital, he was visited by one of his brothers and his sister. His home had been torn down, with the purpose of building a new one. This was done without consulting his relatives, and under the supervision of Mrs. Cornelius, who was then on the premises. She was a total stranger to his relatives. Without any criticism against her, and without assigning any reason therefor, he said: "A sister came out there that I didn't like. Now, I had a notion to order her off the place."

Before going to the Sutter Hospital, the appellant owned the Vacaville ranch, valued at about $8,000, subject to a $1,500 mortgage. He also owned one-sixth interest in another two hundred acre ranch. His wife died possessed of a small estate which was in the process of probating. He was the administrator of her estate. He owned a Willys-Knight automobile, and had in a bank about $1,500 in cash. He gave his radio to a man that worked on his ranch. He gave his automobile to Mrs. Cornelius. He "told her to keep it, it was hers." He claimed to have hired her to drive to the Sutter Hospital daily to see him. She claimed to have done so, remaining with him about an hour each day. He agreed to pay her $2,500 for her services as his nurse. During the brief period of time she was presumed to be acting as his nurse, she was also engaged in nursing two other sick persons. He also executed and delivered to this nurse a bill of sale of all his farm implements and other personal property. He directed his home to be torn down and a new one built. His explanation for this sudden radical change, in spite of his serious illness was that "it was not fit to be there, it was about to fall down." It was destroyed under the supervision of Mrs. Cornelius. He executed an absolute deed of his $8,000 ranch to the nurse. He claimed this was done only to secure the payment of the promised sum of $2,500 for her services. He said: "I had to pay her." He had been a customer of the First National Bank of Vacaville. That bank held the $1,500 mortgage on his ranch. He authorized Mrs. Cornelius to sell the ranch. She made a written agreement to do so through the cashier of the Bank of America. She was previously a customer of this bank. In this transaction "Mrs. Cornelius * * * did the talking." It was understood that, in the event of the consummation of this sale, the $1,500 mortgage was to be paid, and the balance of the purchase price was to be deposited in the bank "credited to the account of Mrs. Cornelius." He admitted "she had the right to draw on it."

During the time Mrs. Cornelius was dominating Mr. Towson's conduct, and procuring title to all of his property, he was a very sick man, and did not expect to live. His brother, Everett, testified that, when he visited him after his return from the hospital, the appellant said: "I will never be a well man again. * * * The nurse has told me so and the doctor has told me so." The brother described his appearance at that time as follows: "He appeared to be very nervous and strained; his eyes were glassy and unnatural, and they had a fixed stare." He was unable to work. The appellant testified in that regard: "I feel all right, but my feet: and if I work all day I cannot get around. hardly. Q. Have you been working? A. A few hours' work, I have tried a little * * around there on the flower garden where she (the nurse) lives. I have not done no real work since I came back."

[1] Regarding the appellant's mental capacity, Mr. Ripley, a brother-in-law, testified that he thought there was something wrong with his mind. On cross-examination this colloquy occurred:

"Q. Do you mean for us to understand that Mr. Towson has not sufficient intelligence to understand what he is doing, Mr. Ripley? A. Well, it looks that way to me. * * *

"Q. You do not intend to tell this court there is something wrong with Mr. Towson, do you? A. Well my opinion (is) there has been some undue influence used. * * *

"Q. I am asking you if you mean to tell Judge O'Donnell there has been anything mentally wrong with Mr. Towson? * * * A. Well, I think there is. * * * I think there is something mentally wrong with him."

With reference to appellant's mental condition, his brother Everett testified: "Judging from his acts, I would say he is not competent." This opinion that he was incompetent was based upon the unnecessary and unreasonable transfer of all of his property to a woman who was almost a stranger to him, and who had no claims upon his bounty, whereas he had theretofore been very "methodical in his habits, and conservative with reference to money." His conduct was not that of a rational man.

[2] The foregoing acts and conduct of the appellant furnish an abundance of evidence to support the findings and order of the court to the effect that the appellant is unable, unassisted, to properly manage or control his property, and that he is likely to be deceived and imposed upon by artful and designing persons. It conclusively proves he was so deceived and defrauded. There is a conflict of evidence regarding the essential facts of this case. But the rule of evidence with respect to the sufficiency thereof which will sustain a finding of incompetency is exactly the same as that which applies to a civil action of any other character. This rule is stated in Re Estate of Reed, 198 Cal. 148, 243 P. 674, approv-

ing the language used in Matter of Coburn, 165 Cal. 202, 131 P. 352, as follows:

"The findings of a trial court upon disputed issues of fact are not to be overturned on appeal unless they totally lack the support of substantial evidence. That rule is as applicable to a case of this character as to any other. It requires us to uphold the assailed finding if there is in the record evidence, which, with the aid of all inferences reasonably to be drawn from it, tends logically to establish the conclusion embodied in the finding."

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; PARKER, Justice pro tem.

WUTCHUMNA WATER CO. et al. v. SUPERIOR COURT IN AND FOR TULARE COUNTY et al.

L. A. 13438.

Supreme Court of California.

June 30, 1932.

As Modified on Denial of Rehearing July 29, 1932.

1. Contempt ⇐21.

No one may be punished for contempt for disobedience of void order.

2. Evidence ⇐83(6).

Presumption is that clerk's minute order for preliminary injunction in injunction proceedings correctly records court's judgment,

3. Injunction ⇐157.

Clerk's entry in minute book of judge's oral order granting relief substantially in language of motion for injunction made decision matter of record without judge's signature.

4. Judgment ⇐215.

Whether court's remarks at conclusion of hearing are rendition of decision or mere announcement of decision court contemplates making by signed order depends upon court's intention.

5. Injunction ⇐230(3).

In proceeding for contempt for violating injunction, evidence *held* to show judge intended oral pronouncement at injunction hearing to constitute decision on application rendering injunction valid.

6. Injunction ⇐219.

Court's oral order for preliminary injunction *held* not void even if clerk's minute order did not conform to true judgment in containing no reservation to dissolve injunction.

Such order was not void even if clerk's minute order did not conform to the true judgment in containing no reservation to dissolve the injunction, petitioner's remedy being to obtain an amendment or correction of the minute order by proper proceedings so that judgment should speak the truth.

7. Contempt ⇐63(1).

Unless affidavit constituting complaint in contempt proceeding upon its face charges contempt, order of contempt thereon is void and will be annulled on certiorari.

8. Injunction ⇐230(2).

Affidavits for contempt for violating preliminary injunction to restrict diversion of water from river *held* sufficient.

Affidavits considered together alleged facts showing that water in excess of the amount permitted by the preliminary injunction was diverted; that the contemnor made such diversions or permitted them to be made, knowing that the water diverted exceeded the amount permitted.

9. Injunction ⇐230(2).

Allegation in affidavit for contempt for violating preliminary injunction restricting diversion of water *held* not insufficient in not alleging described instruments used in measuring flow gave accurate measurement.

10. Injunction ⇐230(3).

Evidence *held* sufficient to sustain judgment of contempt for diverting water in excess of that permitted by preliminary injunction restricting diversion.

In Bank.

Proceeding in certiorari by the Wutchumna Water Company and others to review an order of the Superior Court of Tulare County, S. L. Strother, Judge, adjudging petitioners guilty of contempt of court.

Judgment affirmed.

Superseding 5 P.(2d) 905.

Walter M. Gleason and Norman J. Ronald, both of Oakland, Guy Knupp, of Porterville, and Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, for petitioners.

W. R. Bailey and Farnsworth, Burke & Maddox, all of Visalia, for respondents.

PER CURIAM.

This is a proceeding in certiorari to review a conviction of contempt imposing a fine of $500 on petitioner Wutchumna Water Company and a fine of $50 each on petitioners Heberling and Huff.

[1] The judgment of contempt is based on petitioners' violation of a preliminary injunction granted upon the application of plaintiffs in an action to restrain an alleged unlawful diversion of the waters of the Kaweah river by petitioners and others who were named as defendants in said action. It is petitioners' contention that said injunction is void. No one may be punished for contempt for disobedience of a void order. Harrison v. Hebbard, 101 Cal. 152, 35 P. 555; Maier v. Luce, 61 Cal. App. 552, 215 P. 399; 14 Cal. Jur. 281; 5 Cal. Jur. 918. The judge who found petitioners guilty of contempt also heard the application for an injunction. He did not sign a written order therefor, but on May 20, 1929, the clerk, in pursuance of proceedings had at the hearing, entered in her minutes an order for the issuance of a preliminary injunction which on its face is complete and regular in all respects unless, as petitioners contend, an order for an injunction is required to be signed by a judge. Petitioners also make the point that the minute order is void because it does not correspond to the oral pronouncement of the judge.

They allege in their petition for review that at the conclusion of the hearing the judge merely said: "The injunction will issue. Bond in the sum of $75,000. Usual conditions of course." The order as entered in the minutes is complete in detail and follows substantially the notice of motion for an injunction, restraining diversions by petitioners in excess of specified quantities depending on the flow of said Kaweah river.

[2] The presumption is that the minute order correctly records the judgment of the court. Petitioners' allegation as to the statement made by the court upon the conclusion of the injunction hearing is unsupported by the record before us. However, for the reason that the court in the contempt proceeding refused to permit petitioners to introduce in evidence the transcript of the injunction hearing, from which the oral pronouncement of the court would have appeared, and for the further reason that respondents' briefs virtually admit the correctness of said allegations, we prefer to dispose of the case as if they found support in the record.

[3] It has been declared to be the "almost invariable rule" that decrees in equity are signed by the judge. Wheeler v. Superior Court, 82 Cal. App. 202, 255 P. 275. This practice is due in part to the fact that such decrees may be of considerable length and complexity, and their careful formulation is as much a part of the court's decision as the indication of the party in whose favor the decision is to be rendered. But where the judge is satisfied that relief upon an application for a preliminary injunction may be granted in the language of the prayer or motion, there is no rule, statutory or otherwise, which requires that he make and sign a decision in writing. The entry of his order, announced orally in open court, in the clerk's minute book makes the decision a matter of record.

[4, 5] Whether remarks made at the conclusion of a hearing are a rendition of the court's decision on the matter before it, or a mere announcement or memorandum of the decision which the court contemplates making by signed order, depends on the intention of the court. 14 Cal. Jur. 856; 1 Freeman on Judgments, p. 81. It is vital that parties should not be misled to their prejudice by remarks of an equivocal nature. There is no precise formula in which the direction must be given to the clerk to enter an order for an injunction according to the terms of the applicant's prayer. That the judge in the instant case intended his oral pronouncement at the injunction hearing to constitute his decision on the application, is placed beyond the realm of speculation by his remarks while presiding at the contempt hearing now before us. That the applicants for the injunction thus understood it is evidenced by the fact that on June 20, 1929, they filed an undertaking and obtained a writ of injunction upon the clerk's minute order and caused it to be served on petitioners. Petitioners assert for the first time upon this review of the contempt judgment that the oral pronouncement was a mere indication of a decision to be thereafter rendered by signed decree. After the issuance of said injunction they made no attempt to have the minute order declared void. Instead they made objections to the sureties on the injunction bond, a number of which were sustained. Petitioner Wutchumna Water Company, in its answer to the affidavits initiating the contempt proceeding, claimed that the minute order did not correctly record the decision of the court, in that it did not reserve to the court the right to dissolve the injunction at any time, and on the contempt hearing petitioners sought to have it modified in this respect, thereby conceding that the oral pronouncement of the court had a judicatory effect. They did not allege that the oral pronouncement of the judge was not intended to be the decision of the court.

In support of the injunction order it must be presumed that the phrase "usual conditions" was intended to refer to the conditions of the undertaking in the sum of $75,000. Said undertaking was required to contain the usual conditions, which are those prescribed by statute.

Wheeler v. Superior Court, 82 Cal. App. 202, 255 P. 275, relied on by petitioners, is a case where remarks of the court, similar to those in the case herein, were intended by the court, and understood by all parties to be preliminary to a signed decree. It was properly held in that case that the signed decree was the judgment of the court.

[6] If the minute order as entered in the case herein failed to conform to the true judgment of the court, in that it contained no reservation of a right to dissolve the preliminary injunction, the judgment or decision was not thereby rendered void, but petitioners' remedy was to obtain an amendment or correction of the minute order by appropriate proceedings in order that the judgment should speak the truth. Halpern v. Superior Court, 190 Cal. 384, 212 P. 916; Takekawa v. Hole, 170 Cal. 323, 149 P. 593; City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am. St. Rep. 139; People v. Ward, 141 Cal. 628, 75 P. 306; 1 Freeman on Judgments, pp. 84, 287, 298. As a matter of fact, an order making this correction subsequent to the contempt hearing has been made a part of the record presented to us.

Nothing herein said is in conflict with Maier v. Luce, 61 Cal. App. 552, 215 P. 399, and Cosby v. Superior Court, 110 Cal. 45, 42 P. 460, which stand for the rule that no one may be held guilty of a constructive con-

tempt for refusing to comply with a mere verbal announcement of a direction or order which has no existence of record in the minutes of the court or otherwise. In the case herein there is no variance between the contempt decree and the order for an injunction as recorded in the minutes. The fact that the order as recorded may have improperly omitted a reservation of a right to dissolve the injunction did not release petitioners from complying with the main body of the order, which correctly set forth the direction of the court.

Petitioners also contend that the injunction is void for the additional reason that when the injunction matter came on for hearing on May 20, 1929, six days after the notice of motion therefor had been filed, the court denied petitioners' request for a continuance supported by an affidavit of one of their counsel that he had been unable to properly prepare his client's opposition due to the press of other important business. Petitioners cite section 527, Code of Civil Procedure, as requiring the allowance of one continuance as a matter of right. As we read said section, the provision for a continuance would seem to refer to a hearing of an application for a preliminary injunction upon an order to show cause after the granting of a temporary restraining order. In such a situation the applicant for the injunction has the protection of the temporary restraining order while the continuance is in effect. In the case herein a temporary restraining order had not been issued.

[7] There remain to be considered the questions of the sufficiency of the affidavits initiating the contempt proceedings, and the sufficiency of the evidence to establish the commission of a contempt. The principle that the affidavit or affidavits upon which the contempt proceeding is based constitute the complaint, and unless they, upon their face, charge facts constituting a contempt, the court is without jurisdiction to proceed, and the order of contempt is void and will be annulled on certiorari, has found frequent expression in decided cases. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127; Hutton v. Superior Court, 147 Cal. 156, 81 P. 409; Strain v. Superior Court, 168 Cal. 216, 142 P. 62, Ann. Cas. 1915D, 702; Lindsley v. Superior Court, 76 Cal. App. 419, 245 P. 212; In re Lake, 65 Cal. App. 420, 224 P. 126.

[8] The contempt proceedings herein are based on the affidavits of E. F. Hart, president of the Consolidated Ditch Company, one of the plaintiffs in the suit wherein the injunction was obtained, and of H. H. Holley, an hydraulic engineer, who installed a water measuring device for the Wutchumna Water Company in 1920 near its diversion canal, and has kept measurements of the flow of the Kaweah river and of the diversion made by the Wutchumna Water Company into its said canal continuously since that time. We regard said affidavits, considered together, as setting forth the requirements specified by petitioners as essential to the commission of a contempt, to wit, that water was diverted into the Wutchumna canal in excess of the schedule set forth in the preliminary injunction; that the accused made said diversions or permitted them to be made; that the accused knew that water in excess of the amount permitted by the temporary injunction was being diverted.

[9] Said affidavits are not subject to the criticism that they contain only conclusions of law. The allegations in the Hart affidavit that petitioners knowingly and intentionally violated the injunction clearly characterizes the acts of diversion set forth with more particularity in the allegations immediately following as having been done knowingly and intentionally in violation of the injunction. The Hart affidavit avers that at all times when the flow of water in said river did not exceed one thousand cubic feet of water per second, petitioners diverted more than 10 per cent. (amount allowed by injunction), and at all times when the flow was more than one thousand cubic feet, but less than two thousand cubic feet, they diverted more than one hundred cubic feet per second (amount allowed by injunction). It does not aver at what times the flow was under one thousand feet, and between one thousand and two thousand cubic feet. Petitioners object that the allegation is consistent with the fact that the flow at all times exceeded two thousand cubic feet per second. We do not so regard it. Furthermore, the Holley affidavit supplements the Hart affidavit by setting forth the flow of the stream and the amount of the diversion on all days between June 21 and July 10, the period covered by the affidavits. It appears therefrom that on seventeen days the flow was under one thousand cubic feet per second, and on three days over one thousand cubic feet, but under two thousand cubic feet, and that on all of said dates petitioners made an excessive diversion. The combined effect of the affidavits is to charge petitioners with responsibility for the diversion. We do not regard the allegations of the Holley affidavit as being insufficiently positive because Holley described therein the instruments and methods by which he measured the flow of the stream and the diversion without specifically averring that said instruments and methods gave true and accurate measurements.

[10] As to the question of the sufficiency of the evidence to establish the commission of a contempt, petitioners admit that there is a conflict in the evidence as to whether there was a diversion in excess of the injunction schedule, and in this situation the conclusion

of the trial court is final. They contend, however, that there is no evidence to prove the intent to divert in excess of the injunction schedule. In our opinion the evidence fully sustains the judgment of contempt. It would serve no purpose to review it at greater length.

The judgment is affirmed.

CLARK v. FOSTER.

S. F. 14137.

Supreme Court of California.

Jan. 16, 1931.

Mandate proceeding called.

Superseding opinion in 292 P. 135.

R. E. Thompson and M. J. Dooley, both of San Francisco, for petitioner.

Peirce Coombes and R. H. Kimball, both of San Francisco, for respondents.

PER CURIAM.

E. J. Torregano, on behalf of trustee in bankruptcy, asked leave to intervene pursuant to petition heretofore filed herein. Permission denied. Matter argued by Mr. Thompson and (by request of Messrs. Kimball and Coombes) Mr. Torregano, and submitted. Ordered that writ issue as prayed.

124 Cal.App. 567

GRAY et al. v. FRED B. NEUHOFF CO.

Civ. 4498.

District Court of Appeal, Third District, California.

June 29, 1932.

Rehearing Denied July 29, 1932. Hearing Denied by Supreme Court Aug. 25, 1932.

1. Vendor and purchaser ⇐214(6).

Assignor of contract for sale of property to whom defendant assignee was to make several payments, and then make payments to original vendor, *held* not limited to damages, but entitled to recover all unpaid installments due it, without tendering title (Civ. Code, §§ 3302, 3307, 3311).

Assignor was not limited to recovery under Civ. Code, §§ 3307, 3311, providing for recovery of damages for breach of agreement to purchase property, since the agreement only provided for the payment of two installments of the purchase price to the assignor, and installments of the purchase price were thereafter to be paid to the original vendor, and since, when the purchase money is payable in installments and the conveyance is to be executed on the day of the last payment, or on the payment of the whole price on any previous day, covenants to pay the installments falling due before the time for the execution of deed are independent, and suit may be brought thereon without conveying or offering to convey.

2. Vendor and purchaser ⇐214(6).

Assignor of contract for sale of property could recover payments due it from assignee, notwithstanding original vendor, on assignee's default, foreclosed assignee's rights.

3. Vendor and purchaser ⇐214(6).

That agreement involving assignment of contract for sale of property provided for other remedies, did not limit assignor's right to sue assignee for installments in default.

4. Corporations ⇐432(4, 5).

Corporation seal thereon raises presumption that instrument was executed by corporation's authority, and adversary party has burden to show signatory officers lacked authority.

5. Appeal and error ⇐1011(1).

Conflicting evidence regarding whether execution of instrument was authorized by corporation *held* for trial court.

6. Evidence ⇐53.

Presumption constitutes "evidence."

[Ed. Note.—For other definitions of "Evidence," see Words and Phrases.]

7. Appeal and error ⇐1012(1).

Weight of testimony is for trial court.

8. Appeal and error ⇐1011(1).

Trial court's finding, on conflicting evidence that execution of instrument was authorized by corporation, *held* conclusive on reviewing court.

9. Vendor and purchaser ⇐303.

In action for installments of purchase price of property, plaintiffs' tender of possession of property *held* sufficient, notwithstanding reference to controlling agreement in letter containing tender was indefinite (Code Civ. Proc. §§ 2074, 2076).

Letter referred to delivery of possession of realty and personalty in accordance with agreement between plaintiff and original vendor of property, contract for sale of which plaintiffs had assigned to defendant, instead of in accordance with agreement between plaintiffs and defendant, but the property referred to in both agreements was the same, and defendant was not misled.

10. Vendor and purchaser ⇐157.

Where purchaser was not present where property was situated, and did not object to form or substance of tender of possession, formal tender was unnecessary and purchaser could not urge technical objections to tender made.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Dallas H. Gray and others, as trustees in bankruptcy of California Co-operative Producers, against Fred B. Neuhoff Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Treadwell, Van Fleet & Laughlin, of San Francisco, for respondents.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of the court.

The plaintiffs in this action had judgment for the recovery of two installments in the total sum of $35,000, being a part of the purchase price of certain real property situate in the city of Lodi, upon which there was then and there standing a canning factory, including all machinery and equipment therein and belonging thereto, save and except a few specified articles. From this judgment the defendant appeals, and upon this appeal contends: (1) That the contract price, or that the amount of the two unpaid installments did not and do not constitute the proper measure of damages; (2) that the contract was not authorized by the defendant; in other words, that the contract apparently executed by the company is not in fact the contract of the corporation; (3) that no proper offer was made by the plaintiff to deliver possession; (4) that the contract was obtained by the fraudulent representations of one Williams as to the freight rate between the cities of San Francisco and Lodi; (5) that the plaintiff made some fraudulent representations regarding the boilers, a part of the equipment of the canning plant; (6) that there was a parol agreement to restore the plant after the spinach pack had been completed, i. e., to change the machinery for canning the spinach plant and installing in place thereof the machinery for canning fruit.

Appellant's contention as to the question of damages is based upon sections 3307 and 3311 of the Civil Code. These contentions are all resisted by the respondent.

The record shows that on or about the 7th day of June, 1927, the Lodi Canning Company, a corporation, being the owner of the real estate upon which the canning factory was located in the city of Lodi, and also of a large portion of the machinery and canning equipment contained therein, entered into a written agreement with the California Co-operative Producers, a corporation, for the sale and transfer to it of the property just referred to. This agreement between the Lodi Canning Company and the California Co-operative Producers Company provided for installment payments of the purchase price of the property involved in this action, in the sum of $150,000, upon which there had been paid at the time of entering into a contract between the California Co-operative Producers, a corporation, and the defendant, Fred B. Neuhoff Company, a corporation, a sufficient number of installments so that there remained only the sum of $112,500 still owing to the Lodi Canning Company on account of the purchase price of the property described in the agreement heretofore mentioned as dated June 7, 1927.

The agreement between the Lodi Canning Company, a corporation, and the California Co-operative Producers, a corporation, is expressly referred to and made a part of the agreement entered into between the California Co-operative Producers, a corporation, and Fred B. Neuhoff Company, a corporation, on the 27th day of February, 1929, whereby the California Co-operative Producers, a corporation, transferred all its right, title, and interest in, to, and under, and by virtue of the agreement existing between the Lodi Canning Company and the California Co-operative Producers, a corporation, dated June 7, 1927, paragraph 1 of the agreement reading as follows: "The first party does hereby transfer, assign and set over unto the second party all its right, title and interest in, to, under and by virtue of said agreement marked 'Exhibit A', it being understood, however, that there shall be excluded from such assignment any right to use the brands and labels of the Lodi Canning Company referred to in said 'Exhibit A'; it being further understood that with respect to Lodi Cannery lug-boxes, that the first party shall only be obligated to deliver to the second party at least 10,000 Lodi Cannery lug-boxes." Paragraph 2 of the agreement between the parties just referred to reads as follows: "The second party agrees to perform, at the time and in the manner provided in said 'Exhibit A,' all of the terms and conditions of said 'Exhibit A' on the part of the California Co-operative Producers, from and after the date hereof, to be performed, except the following:" (here follows some exceptions relating to the payment of taxes and street assessments, and not material to be considered herein). The contract then provides for placing of a number of instruments,

including bills of sale, deeds, agreements, etc., in escrow with the Lodi branch of the bank of America. The purchase price agreed to be paid by the defendant to the California Co-operative Producers was the sum of $37,500, $2,500 being paid upon the execution of the agreement; $20,000 was contracted to be paid on or before the 25th day of April, 1929, and $15,000 on or before the 15th day of June, 1929, upon which payments the defendant was entitled to receive full possession of all the real and personal property included in the contracts.

The record further shows that there existed a contract between the California Co-operative Producers, a corporation, and the Frank Smith Packing Company, by which the Frank Smith Packing Company agreed to sell certain machinery to the California Co-operative Producers, a corporation, upon a written contract of sale providing for partial payments. This contract appears to have been taken up by the defendant, and a new contract covering the machinery included in the first contract, executed between the Frank Smith Company and the defendant in this action; the record showing, also, that the California Co-operative Producers, a corporation, had assigned and set over all its right, title, and interest in and to the machinery, tools, equipment, office furniture, and fixtures, and everything included within its contract with the Frank Smith Packing Company.

The agreement between the parties hereto further provided that upon default of the defendant the party of the first part to the agreement might, at its option, re-enter into possession of the real and personal property referred to herein, and also be entitled to retain all moneys paid under the contract as liquidated damages for the nonfulfillment thereof, or the first party might, at its option, claim such damages for such breach, as it might be entitled to by law, or claim specific performance of the agreement.

In pursuance of the agreements to which we have referred, there was deposited with the Lodi branch of the bank of America, chosen as escrow-holder by the parties, copies of the contracts, title insurance policy required by the contract, appraisement referred to in the agreement, bill of sale of the personal property, deed of the real property from the Lodi Canning Company to the defendant, bill of sale from the Lodi Canning Company to the defendant, escrow instructions from the Lodi Canning Company, escrow instructions from the plaintiff, bill of sale to the defendant, and, as we have stated, a new contract was also entered into directly between the Frank Smith Packing Company and the defendant.

The contract also provided for a reassignment to the plaintiff, in the event of a breach by the defendant, and provided, further, that the California Co-operative Producers, a corporation, might remain in possession of the plant until it had finished the pack of spinach, full possession of the plant not to be delayed longer than April 25th. The plaintiff, under the agreement, likewise was allowed the use of certain warehouses until June 15th, for limited purposes.

All the papers in escrow were to be turned over to the defendant upon making the installment payments as provided for in the agreements. The installments on the purchase price provided by the agreements to be paid on the 25th day of April, 1929, and June 15, 1929, not having been made, this action was begun.

Prior to the 25th day of April, 1929, the California Co-operative Producers, a corporation, wrote to the defendant stating that it would be ready to turn over possession of the plant on the 25th day of April, 1929, according to its agreement, and likewise, later notified the defendant that it would be ready to surrender full possession of the warehouses, to which it had limited possession, on the 15th day of June, 1929, and in this manner also tendered to the defendant possession of all of the property of which it had any possession, included within the agreements to which we have referred.

The agreements to which we have referred obligated the defendant to pay to the Lodi Canning Company, in installments from time to time, the unpaid portion of the purchase price of the property mentioned in the agreements. Only two installment payments were to be made to the California Co-operative Producers, a corporation. These facts must be borne in mind in order to determine the remedies available to the plaintiffs in this action, and whether the correct procedure was followed.

Basing its contention on the theory that the contracts to which we have referred were wholly executory, appellant insists that this action is governed by sections 3307 and 3311 of the Civil Code, and that the detriment caused by a breach of the agreement to purchase an estate in any real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract, over the value of the property to him, and that, in so far as the personal property is involved, the damages suffered by the plaintiff under the provisions of section 3311 of the Civil Code can only be the difference between what the property might have been sold for and the agreed price, and that as there is no testimony showing any difference between the value of the property and the agreed price, and no showing of any resale of the personal property, the evidence fails to support any judgment for the plaintiffs.

In view of the fact that the agreements only provided for the payment of two installments of the purchase price to the California Co-operative Producers, a corporation, and a number of installments of the purchase price thereafter to the Lodi Canning Company, are the contentions of the appellants that sections 3307 and 3311 of the Civil Code governing this case, tenable, and is anything required to be done by the California Co-operative Producers, a corporation, other than the act performed by them, to wit, notification to the defendant that they would be ready to surrender full possession of the property to the defendant on the dates which we have named?

At the time of the beginning of this action for the collection of the two installments, none of the installment payments provided to be paid by the defendant to the Lodi Canning Company had become due. If the agreements entered into between the parties were valid, and the minor acts therein conditioned to be performed by the parties had been performed, then at the date of the beginning of this action the obligations of the California Co-operative Producers, a corporation, and the defendant, were as follows: (1) Surrender full possession of the plant to the defendant; and (2) payment by the defendant of the two installments. All of the papers to which we have referred were to remain in possession of the escrow-holder. Under the agreements, at the dates referred to, all that the California Co-operative Producers, a corporation, could do was to surrender possession; all that the California Co-operative Producers, a corporation, could demand of the defendant was the payment of the two installments mentioned in the agreement.

[1] That the right of action accrued upon the failure of the defendant to pay the two installments on the purchase price, although it be conceded as contended for by the appellant, that the contract as a whole is executory in character, is fully sustained by the cases hereinafter cited. The interest of the respondent corporation was limited to the two unpaid installments, and its interest was therefore independent and not limited to any part of the agreement providing for payment of subsequent installments to the Lodi Canning Company. The respondent corporation had assigned all its right, title, and interest in the contract with the Lodi Canning Company to the defendant. The defendant, by its agreement, had covenanted to pay all of the remainder of the purchase price of the property involved in this action, other than the two installments, to the Lodi Canning Company, and had assumed all the burdens theretofore borne by the respondent corporation. This assignment had been accepted by the Lodi Canning Company, and the defendant, by reason of the agreements, had been substituted in its relations to the Lodi Canning Company, in the place and stead of the respondent corporation. Thus, a complete novation had been effected.

The law governing actions to collect partial payments is thus stated in 25 California Jurisprudence, p. 600: "When the purchase money is payable in installments, and the conveyance is to be executed on the day of the last payment, or on the payment of the whole price on any previous day, the covenants to pay the installments falling due before the time for the execution of the deed are independent, and suit may be brought thereon without conveying or offering to convey."

In 6 California Jurisprudence, p. 367, we also find the following: "If, in a contract for the sale of land, the purchase money is to be paid by installments, and a deed is not to be given until the whole price is paid, the premises of the vendee are independent, and the vendor may sue upon all of them except the last, without averring a willingness to perform on his part or tendering a deed." The title, deeds, bills of sale, etc., placed in escrow were not to be delivered to the defendant until full performance of the contract with the Lodi Canning Company, to perform which, and to make the installment payments therein provided for, the defendant had covenanted and agreed to perform. Surrender of such possession only, as the respondent corporation held, was its only obligation, and its willingness to perform this act will be considered further on in this opinion.

In 27 Ruling Case Law, 460, § 173, the rule which we have stated is likewise affirmed. We quote: "Undoubtedly, the agreement to convey is independent as regards the payment of instalments falling due before the day set for the conveyance, and a recovery may be had therefor, without an offer to convey, and it has been held that even after the last instalment is due, the vendor may sue for the prior instalments as to which his agreement to convey is independent, without averring an offer to convey. The better view, however, seems to be that if the vendor allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition, and nonpayment alone does not put the purchaser in default."

In Hill v. Grigsby, 35 Cal. 656, the Supreme Court affirms the law as above stated, in the following language: "Where the purchase money is payable in installments, and the conveyance is to be executed on the last day of payment, or on the payment of the whole price, or at any previous day, the covenants to pay the installments falling due before the time for the execution of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey." To the same effect is the case of McCroskey v. Ladd, 96 Cal. 455, 31 P. 558.

A similar question was before the court in the case of Security Inv. Co. v. Bartram, 54 Cal. App. 540, 202 P. 337, and it was there said: "It is the contention of the appellant that plaintiff's only remedy is for damages as provided in section 3307, Civil Code, or for the specific performance of the contract. In this he is mistaken. The plaintiff has the right to sue to collect each unpaid installment as it becomes due. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; Glock v. Howard, etc., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. The action is not ex delicto, but ex contractu, and therefore damages need not be alleged."

If we agree with the contention of the appellant that the agreement involved herein is executory, nevertheless, the installment provisions constitute contracts for the direct payment of money, and the two installments to which we have referred being independent covenants, section 3302 of the Civil Code applies. That section reads: "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

A number of cases have been cited by respondent to the effect that, where the vendor tenders a deed, he may recover the full purchase price. We find this statement of the law supported in the following cases: Weisenberg v. Hirschhorn, 97 Cal. App. 532, 275 P. 997. The opinion in that case cites a number of authorities. See, also, North Stockton, etc., Co. v. Fischer, 138 Cal. 100, 70 P. 1082, 71 P. 438; Amaranth Land Co. v. Corey, 182 Cal. 66, 186 P. 765; Siem v. Cooper, 79 Cal. App. 748, 250 P. 1106. Other cases might be cited, but we deem the foregoing sufficient.

In Amaranth Land Co. v. Corey, supra, it is said: "A vendor retaining the legal title to land sold may waive his security and bring an action at law for the purchase money, or file his bill in equity for the specific performance of the contract." No questions as to the right of the appellant to possession of the title papers placed in escrow are involved in this proceeding. Such rights on the part of the appellant would accrue only upon its complete fulfillment with the Lodi Canning Company and its assumed obligations.

[2] We do not deem it necessary to review the cases cited by the appellant on the theory that the agreement is executory, and that tender of instruments of conveyance are dependent acts concurrent upon full payment by the vendee, for the simple reason that the theory advanced by the appellant, and in support of which the cases are cited, is not a correct view of the law involved in this action, and the right of the respondents to maintain this action is in nowise limited thereby. Nor do we need to follow the argument of counsel relative to the distinction between an agreement to sell and an agreement of sale. The fact that the appellant, by reason of its failure to comply with the conditions of the contract assumed by it with the Lodi Canning Company, and that the Lodi Canning Company, by reason of the failure of such payments, foreclosed all the rights of the defendant therein, is no bar to this action. All the right, title, and interest of the respondent corporation were assigned to the appellant for a consideration. The consideration for the assignment of such interest is a debt or an obligation due from the appellant to the respondent corporation, and may be collected irrespective of whether the appellant did or did not eventually secure title to the property, or allowed it to pass back to the original vendor by nonpayment of subsequent installments. See Ferguson v. McBean, 91 Cal. 63, 27 P. 518, 14 L. R. A. 65, where the rights of an assignor are held to be as above stated. See, also, McClintock v. So. Penn. Oil Co., 146 Pa. 144, 23 A. 211, 28 Am. St. Rep. 785.

[3] Nor does the fact that certain remedies are provided for in the contract limit the right of the respondents to maintain this action. Siem v. Cooper, supra; Newton v. Hull, 90 Cal. 487, 27 P. 429; Reed v. Hickey, 13 Cal. App. 136, 109 P. 38; Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am. Rep. 310; Smith v. Mohn, 87 Cal. 489, 25 P. 696; New Richmond Land Co. v. Ivanovich, 52 Cal. App. 222, 198 P. 221; Burg Bros. v. Bercut, 73 Cal. App. 114, 238 P. 166.

Is the agreement which we are considering the contract of the defendant corporation? The appellant's contention is to the effect that its execution by the president and secretary was unauthorized. An examination of the transcript shows that the agreements bear the signature of the corporation, by its president and secretary, and carried also the impress of the corporate seal. Attached to the agreement is what purports to be a copy of a resolution adopted by the board of directors of the defendant corporation, authorizing the president and secretary of the corporation to enter into the agreement referred to, and in behalf of the corporation to make, execute, and deliver any and all documents necessary to effectuate the purchase of the real and personal property referred to in this action.

[4] In 6 California Jurisprudence, 686, it is said: "The seal of a corporation affixed to an instrument is evidence that it is a corporate act. The modern and by far the more sensible rule is that the seal itself performs no further or greater function than to import prima facie verity of the due execution by the corporation of its written obligations, that is, it merely stands as prima facie evidence that the contracts made by the corporation are executed by its authority. And so where

the seal appears to be affixed to an instrument, and the signatures of the proper officers are approved, courts presume that the officers did not exceed their authority, and that the instrument was executed by authority of the corporation. It follows that the burden in such cases is shifted upon the adversary party to overcome the presumption by showing want of authority in such officers to execute the instrument as that of the corporation." See, also, Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094; Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L. R. A. (N. S.) 609.

Other cases might be cited, but the general rule, as we have stated, is supported by all of the California authorities which have examined, or which have been called to our attention.

Against the presumption to which we have referred, a member of the board of directors of the defendant corporation, named Bruch, testified that the contract was never authorized at a meeting of the board, and that no resolution was ever passed regarding it. Likewise, a stockholder by the name of Boyer testified that the matter was not passed upon by the board of directors. The secretary testified that the resolution attached to the contract was certified under her signature, but that she knew nothing of the resolution. On cross-examination the witness Boyer testified that he was present when the application to the commissioner of corporations was discussed, in which the Lodi plant was mentioned, and that he discussed the matter before the application to the commissioner of corporations was filed, and that Neuhoff may have reported to him the purchase of the Lodi plant immediately after the date of the contract.

[5, 6] The director Bruch testified that no action was taken by the board of directors after he had learned of the purchase of the Lodi property. This evidence raised only a conflict, and it was for the trial court to determine whether the evidence offered to overthrow the presumption was sufficient to effect that purpose. That a presumption constitutes evidence and may be considered as such by the court is so well settled by recent California cases that we do not need to cite them. We may, however, refer to the case of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529.

[7, 8] Again, the witnesses were before the trial court and the presiding judge thereof had an opportunity to weigh the testimony by the manner in which it was given, by the interest of the parties, and the demeanor of the witnesses, and had a right to disregard the oral testimony if such testimony appeared to be unworthy of belief. This was a matter for the trial court to determine, and the trial court having come to the conclusion that the presumption of validity carried by the instruments themselves had not been overcome, must be accepted by us as conclusive. This renders it unnecessary for us to consider at length the long list of cases having to do with the powers of officers of corporations, and the copious extracts from the opinions in such cases set forth in the appellant's brief.

We may further state that the record contains a number of letters written by the appellant corporation, in none of which do we find any reference to lack of authority to execute the agreements on the part of the officers of the corporation. Not until after this suit was instituted was the question of the validity of the agreements raised. Prior to that time the contention of the appellant appears to have been that it was under no obligations to pay the two installments involved herein, and that all it suffered was the loss of the $2,500 advanced as the first payment of the purchase price of the property covered by the agreement.

The contention is further made that the plaintiff made no proper offer to deliver possession of the premises, and that the letters written by the plaintiff corporation evidenced only a willingness, and did not amount to a tender. The finding of the trial court to the effect that the tender was of April 29th, instead of April 25, 1929, is so manifestly a clerical error that we give it no further consideration.

The contract with regard to possession provided for the delivery of certain portions of the property not later than April 25, 1929; as to the warehouses, not later than June 15, 1929. Thus, the vendor was given the privilege of delivering possession at any time before the dates mentioned.

In 55 C. J. 350 we find the following: "If the seller is given the option of delivering the goods at any time within a stated period, he must, to bind the buyer, give notice of his election to deliver before the last day of the period, or such last day will be the day of delivery, in which case no notice is necessary."

[9] The contention of the appellant appears to be, however, not that no notice was given, but that the form of it was insufficient. This letter dated April 22, 1929, addressed by the respondent corporation to the appellant, reads as follows: "We wish to notify you that we will be ready to turn over the buildings and equipment of the cannery at Lodi on April 25, 1929, in accordance with the terms and provisions of that certain agreement between ourselves and the Lodi Canning Company. We shall be pleased to confer with your representative prior to April 25th, if possible, in order to make arrangements for actually delivering this property

to you on that day. Yours truly." That this offer was sufficient in form and substance clearly appears from the following quotation which we take from 6 Ruling Case Law, page 949: "It may be pointed out that some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; but it means only a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability and notice are sufficient evidence of, and indeed imply, an offer or tender in the sense in which those terms are used in reference to mutual and concurrent agreements. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is, in its nature, conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement. All that is ordinarily required of a party to a contract who has agreed to deliver personal property upon the payment of a debt or price is that he shall put the property in some convenient place, subject to the disposal of the payer upon his compliance with the terms of the contract, and that he shall notify the promisor of the fact. However, the fact of readiness to perform locked up in the breast of one of the parties cannot give information to the other party or impose any duty on him."

The appellant quotes only the last sentence of the foregoing. The answer to the last sentence is found in the letter itself, that the willingness and readiness was not "locked up in the breast of one of the parties." The information was conveyed in terms sufficient to notify the appellant of the readiness and willingness of the plaintiff corporation to deliver possession of the property, notwithstanding the fact that the reference in the letter to the agreement was not as specific as it might have been. The property referred to in the different agreements was the same; hence, the defendant was not misled. The circumstances here are altogether different from the circumstances in the cases cited by the appellant.

Thus, in the case of Bidegaray v. Ormaca, 48 Cal. App. 665, 192 P. 176, the personal property was to be taken to a particular place for delivery, and as it was not taken there it was held that no delivery had been made, nor any actual offer. In the case at bar the real estate and personal property were at the same place. In fact, the personal property, as appears by the agreement, was all contained within the buildings or about the buildings situate upon the real estate, and the offer or tender of the possession of the real property carried with it the personal property contained therein or thereon. We think that the provisions of section 2074, Code of Civil Procedure, are applicable, by reason of the fact that the vendee did not accept the offer. That section reads: "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property." Likewise, the provisions of section 2076 of the same Code are applicable where it specifies that, if the party to whom the offer is made has any objections thereto, he must at the time state such objections.

[10] Again, a formal tender on the 25th day of June, 1929, was not necessary by reason of the fact that the buyer was not present where the property was situate. Not having attended at the place where the property was situate, and not having made any objections to the form and substance of the offer, we think it is too late now to urge any such technical objections.

As a final ground for reversal, the appellant urges certain representations as to freight rates between San Francisco and Lodi, made by one Williams, were untrue; "that the defendant was misled thereby, and is entitled to rescind on the grounds of fraud." In the consideration of the defendant's claim for relief on the grounds of fraud, what we have to say will be with reference to all of the remaining objections urged by the appellant.

In addition to a killing frost having occurred after the entering into the agreement herein first referred to, we may state that the record discloses the appellant had in view certain refinancing schemes, and that the condition of the stock market in the early part of 1929 centered the attention of all investors upon the stock board in the city of New York, and that by reason of such conditions, the appellant was not able to complete its refinancing efforts, and therefore found itself in a difficult situation, which the trial court was justified in taking into consideration in determining whether there was any merit in

the grounds set forth to support its attempted rescission.

It appears that one Williams, who was a general broker, stated to the appellant the freight rate from San Francisco to Lodi, and in so doing gave only the freight rate by water transportation from the city of San Francisco to the head of navigation in the city of Stockton. This rate did not include transportation from Stockton to Lodi.

The evidence shows that the appellant had every opportunity to learn the freight rates between the cities of San Francisco and Lodi, and it also leaves for the trial court to determine whether, at the time of making the statement, Williams was an agent of the California Co-operative Producers, a corporation. The evidence also leaves the question for determination by the trial court as to whether the statement was fraudulently made, and also whether the appellant was in fact misled. The record does show that no question was raised concerning the freight rates, no question was raised as to any fraudulent representations, and no attempt was made to rescind until the plaintiffs in this action sought recovery of the two unpaid installments. The evidence disclosed in the record is sufficient also to justify the trial court in holding that the attempted rescission came too late, and that the failure to rescind promptly, if otherwise meritorious, was sufficient to justify the denial of relief on any such grounds.

Some testimony was introduced as to the condition of the plant on April 25, 1929. We find it to be conflicting. Therefore, the conclusion of the trial court that it was in the condition contemplated by the agreements must be sustained.

The contention by the appellant that the findings of the trial court that the plaintiffs complied with all the terms of the agreement is not supported by the testimony does not appear to us to be well taken. This view is supported by what we have previously stated herein relative to the delivery in escrow of papers, condition of the plant, and offer to surrender possession.

The briefs submitted for our consideration in this cause are exceedingly voluminous and the citation of cases so numerous as to preclude a review of any considerable number of them. We have, therefore, only cited such cases, and set forth herein such matters, and expressed our views thereon, as we think decisive of this cause.

The judgment is affirmed.

We concur: PARKER, Justice pro tem; E. L. THOMPSON, J.

HOPKINS v. ANDERSON et al. *

Civ. 8283.

District Court of Appeal, First District, Division 1, California.

June 27, 1932.

Rehearing Denied July 27, 1932. Hearing Granted by Supreme Court Aug. 25, 1932.

1. Statutes ⇐196.

Qualifying phrase in statute is to be applied to word or phrase immediately preceding.

2. Courts ⇐163.

Superior court, prior to 1928 amendment to constitutional provision defining jurisdiction, *held* to have jurisdiction of action to foreclose chattel mortgage, involving less than $1,000 (Const. art. 6, § 5, amended in 1924 and 1928).

3. Courts ⇐163.

Municipal court *held* to have jurisdiction of action to foreclose chattel mortgage where amount involved is less than $1,000 (Civ. Code, § 2872 et seq.; Const. art. 6, § 11, amended in 1924).

4. Courts ⇐472(1).

Grant of original jurisdiction to particular court, of class of cases, without words excluding other courts from exercising similar jurisdiction, does not necessarily preclude concurrent jurisdiction.

5. Constitutional law ⇐24.

Repeal of constitutional provision by implication is not favored.

6. Courts ⇐52.

Jurisdiction of superior court remains, unless it appears with unequivocal certainty that people intended to take it away (Const. art. 6, § 5, amended in 1924).

7. Courts ⇐472(6).

Superior court and municipal court, prior to amendment in 1928 to constitutional provision defining jurisdiction of superior court, *held* to have concurrent jurisdiction of action to foreclose chattel mortgage involving less than $1,000 (Const. art. 6, § 5, amended in 1924 and 1928, and art. 6, § 11, amended in 1924).

8. Constitutional law ⇐23.

Constitutional provision is to be considered prospective and not retrospective in operation, unless contrary intention clearly appears.

9. Courts ⇐52.

Where action to foreclose chattel mortgage involving less than $1,000, was commenced in superior court prior to amendment in 1928 to constitutional provision defining jurisdiction, superior court *held* to have jurisdiction to thereafter render judgment (Const. art. 6, § 5, amended in 1924 and 1928).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

 *For subsequent opinion see 21 P.2d 560.

10. Chattel mortgages ⇐169.

Foreclosure of subsequent chattel mortgage, where holder of prior mortgage was dismissed as defendant before judgment, *held* conversion of mortgaged property.

11. Chattel mortgages ⇐178(1).

Measure of damages as against subsequent mortgagee who converted mortgaged property, is full amount due under first mortgage, including interest and attorney fees.

12. Chattel mortgages ⇐178(1).

Measure of damages to first mortgagee from second mortgagee's conversion of mortgaged personalty, being amount due under first mortgage, including interest and attorney's fees *held* applicable where sale price of mortgaged personalty, fixed value in excess of amount due under first mortgage.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Lucie B. Hopkins against Nellie G. Anderson and others, wherein the defendants J. W. Hahn and E. M. Hahn filed cross-complaints. From the judgment rendered, the cross-complainants appeal.

Affirmed.

Sherman & Sherman, of Los Angeles, for appellants.

Ray Howard, of Los Angeles, for respondent.

GRAY, Justice pro tem.

On April 5, 1928, respondent commenced in the superior court of Los Angeles county this action to foreclose a chattel mortgage, securing a note in the principal sum of $750, of which a balance of $550 was then due, owing, and unpaid. The action was tried on January 30, 1929. Findings of fact and judgment were signed and filed on June 8, 1929. Appellants urge for reversal the alleged lack of jurisdiction in such superior court to foreclose the chattel mortgage, because the amount involved was less than $1,000.

[1, 2] At the commencement of this action, the jurisdiction of the superior court was defined by article 6, § 5, of the state Constitution, as follows: "The superior courts shall have original jurisdiction in all cases in equity and in all cases at law, which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases, *except as hereinafter provided*, in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to a felony, and in all cases of misdemeanor *not otherwise provided for;* of actions for forcible or unlawful entry or detainer, *except as otherwise provided* in this article; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of divorce and for annulment of marriage; and of all such special cases and proceedings as are *not otherwise provided for;* and said courts shall have the power of naturalization, and to issue papers therefor." (Italics ours.) There are four exceptions, each one of which can only limit the class next immediately preceding, for, if each limitation is extended to all preceding classes, a needless repetition occurs, and an exception to an exception arises. It is a rule of statutory construction that a qualifying phrase is to be applied to the words or phrase immediately preceding. 36 Cyc. 1123. Obviously, by reason of its context, position, and punctuation, the first exception, that is, "except as hereinafter provided," can only apply to the phrase "in all other cases," and not to the first class described as "all cases in equity." An action to foreclose a chattel mortgage is a case in equity. Simon Newman Co. v. Woods, 85 Cal. App. 360, 259 P. 460. Hence the superior court, when the complaint was filed, had jurisdiction of its subject-matter.

[3-7] At the same time, section 11 of the same article provided: "Municipal courts shall have original jurisdiction, except as hereinafter provided, * * * in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less. * * *" From the inclusion of provisions as to chattel mortgages under the title of "Liens" in the Civil Code (title 14, § 2872 et seq.), it is apparent, as the Code commissioners stated, that "mortgages are liens, and, under the provisions of this code, nothing more." Hence it is clear that the municipal court had jurisdiction to foreclose a chattel mortgage of the amount here involved. Are these two grants of jurisdiction concurrent or exclusive? The grant of original jurisdiction in the Constitution, to a particular court, of a class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases. Courtwright v. Bear R. & A. W. & M. Co., 30 Cal. 573; Rosenberg v. Frank, 58 Cal. 387. There is nothing in section 11 which excludes the superior court of jurisdiction. Both sections were amended at the same time, and therefore neither can be held to have repealed the other. Furthermore, since repeals by implication are not favored, it cannot be said that the latter section pro tanto repealed the former. Ex parte Dolan, 128 Cal. 460, 60 P. 1094. The jurisdiction of the superior court remains, unless it appears with unequivocal certainty that the people intended to take it away. Mc-

Gregor v. Board of Trustees, 159 Cal. 441, 114 P. 566. We are satisfied, therefore, that both courts had concurrent jurisdiction at the time the action was commenced.

[8, 9] Thereafter, and before trial, to wit, on November 6, 1928, said section 5 was amended to read as follows: "The superior courts shall have original jurisdiction in all civil cases and proceedings [except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal * * * courts]. * * *" The language within the brackets clearly and certainly excluded the superior court from concurrently exercising jurisdiction as to matters confided to the municipal court by the terms of said section 11. Did this exclusion, however, prohibit the superior court from trying the present action of which it had jurisdiction when it was commenced? "Constitutions, like statutes, are to be considered prospective and not retrospective in their operation, unless a contrary intention clearly appears." 5 Cal. Jur. 561. "While it is the general rule that a cause of action or remedy dependent on statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute (Callet v. Alioto, 210 Cal. 65, 290 P. 438; Moss v. Smith, 171 Cal. 777, 155 P. 90; People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 P. 866), it is equally well settled and is a fundamental rule of statutory construction that every statute will be construed to operate prospectively, and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. (Callet v. Alioto, supra; Pignaz v. Burnett, 119 Cal. 157, 51 P. 48; Montecito County Water Dist. v. Doulton, 193 Cal. 398, 224 P. 747). There is nothing in the 1929 amendment of section 29 of the Municipal Court Act, supra, indicating that it was intended to have a retroactive operation. The better reasoned cases, we believe, are those that support the view that the change in the appellate jurisdiction of the District Courts of Appeal, in so far as appeals from judgments of municipal courts are concerned, was not intended to apply retroactively, and hence does not take from the appellate courts jurisdiction of appeals perfected at the time the amendment became effective. In this connection, see the cases of Jones v. Summers, 105 Cal. App. 51, 286 P. 1093, and Harris v. Moore, 102 Cal. App. 413, 283 P. 76." Berg v. Traeger, 210 Cal. 323, 325, 292 P. 495, 496. The same reasoning, applied to the instant case, requires a holding that the superior court has jurisdiction to render judgment in the present action.

[10-12] Appellants claim that the trial court erred in rendering a personal judgment against them for the amount due on the note, secured by the chattel mortgage, plus interest and attorney's fees, because their only interest in the litigation was that of subsequent incumbrancers. As the record consists solely of the judgment roll, consideration of this claim is limited to ascertaining whether the facts found support the judgment. 2 Cal. Jur. 690. The liability of appellants is founded, if at all, upon the facts that J. W. Hahn, as mortgagee, with notice under a subsequent chattel mortgage given by the same mortgagor upon the same property, judicially foreclosed his mortgage; that E. M. Hahn, with knowledge, purchased the property for $1,000; and that both appellants subsequently sold the property to an unknown person. Respondent, although originally named as a defendant in this last-mentioned foreclosure, was dismissed hence before judgment. These facts, so found, sufficiently established appellants' conversion of the property and rendered them liable in damages therefor. 11 Cor. Jur., p. 591. The measure of damages, as correctly applied by the trial court, was the full amount due under the first mortgage, including interest and attorney's fees, provided for therein. De Costa v. Comfort, 80 Cal. 507, 22 P. 218; Mitchell v. Wood, 37 Cal. App. 329, 174 P. 677. Since the sale price of $1,000 fixed the value of the property in excess of the amount due under the first mortgage, this measure was applicable. Sherman v. Finch, 71 Cal. 68, 11 P. 847.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 490

ANDERSON et ux. v. LUM SHOW et al. BROWN v. SAME.

Civ. 8369.

District Court of Appeal, First District, Division 1, California.

June 25, 1932.

1. Automobiles ⇐244(12).

In actions for injuries from collision when defendant's automobile collided with plaintiffs' as defendant turned to left to pass truck blocking highway, evidence *held* to sustain finding that defendant was not negligent in failing to properly signal for turn (St. 1923, p. 558, § 126, and § 130 as amended by St. 1925, p. 412, § 15a).

Defendant's testimony that he saw the truck 200 feet away, commenced to turn 75 feet from the truck, gave the signal before commencing to turn, and continued

giving it until he was struck by plaintiffs' car attempting to pass him was sufficient to support the finding that defendant was not negligent in violating St. 1923, p. 558, § 126, and § 130 as amended by St. 1925, p. 412, § 15a, relating to an automobile passing an overtaken car, section 130 as amended requiring a timely signal of an intention to make such a left turn to be given during the last 50 feet traveled before commencing to turn.

2. New trial ⇐70.

Motion for new trial for insufficiency of evidence is addressed to trial court's discretion.

3. Appeal and error ⇐979(1).

Order on motion for new trial for insufficiency of evidence cannot be disturbed, absent abuse of discretion.

4. New trial ⇐70, 72.

Trial court may grant new trial if satisfied that verdict is not supported by, or is contrary to, evidence.

5. Appeal and error ⇐979(2).
New trial ⇐70.

Trial court may grant new trial for insufficiency of evidence, although appellate court may differ as to weight thereof.

6. New trial ⇐70.

In actions arising from collision between automobiles passing truck blocking highway, evidence that truck blocked one-half of passing lane and had no lights showed no abuse of discretion in court's granting new trial for insufficiency of evidence to sustain verdict for truck driver.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Two actions, one by J. P. Anderson and wife, and the other by Robert L. Brown, against Lum Show and August Pausback. From the orders granting plaintiffs in each case a new trial as to defendant Lum Show, such defendant appeals, and plaintiffs appeal from the portions of the judgments in favor of defendant Pausback.

Orders and portions of judgments appealed from affirmed.

Norman S. Menifee and Ross & Ross, all of Redwood City, for appellants.

Edmund Scott, of Redwood City, for respondent.

PER CURIAM.

The above actions arose from an automobile accident which occurred on November 14, 1930, on the state highway near Belmont, Cal. Plaintiff Ocie R. Anderson, who is the wife of J. B. Anderson, was driving an automobile south along the highway, and plaintiff Robert L. Brown was a guest therein. The Anderson automobile was preceded by an automobile operated by defendant August Pausback. As the former was about to pass, Pausback turned his car to the left, and the front portion of the Anderson car came in contact therewith. The turn by Pausback was alleged to have been made because of the fact that the right half of the highway was blocked by a truck owned by defendant Lum Show. Each plaintiff filed a complaint against the two defendants named, and the cases were tried together; a verdict being rendered in favor of both defendants. The plaintiff in each case moved for a new trial, and the same was granted as to defendant Lum Show on the ground of the insufficiency of the evidence, but denied as to the defendant Pausback.

Lum Show has appealed from the orders, and plaintiffs from the portions of the judgments in favor of defendant Pausback.

We will first consider the appeals of plaintiffs, who claim that defendant Pausback was guilty of negligence as a matter of law, in that he violated the provisions of California Vehicle Act, § 126 and section 130 (as amended by St. 1925, p. 412, § 15a) by failing to give a timely signal of his intention to turn, and that he turned his car to the left without first ascertaining that such movement could be made in safety.

[1] It has been held that such omissions may constitute negligence. Litherbury v. Kimmet, 183 Cal. 24, 195 P. 660; Snyder v. Reeg, 86 Cal. App. 231, 260 P. 600. The act provided that the signal required before turning should be given continuously during the last fifty feet traveled by the vehicle. It is claimed that Pausback's testimony shows that he did not give the signal before turning or give the same continuously as required by the statute. From his testimony it appears that he saw the truck 200 feet away, commenced to turn when 75 feet distant, gave the signal before commencing to turn, and that the same was continuous until he was struck by the Anderson car. This testimony was sufficient to support a finding that he was not negligent in the particulars alleged, and the judgment in his favor for that reason cannot be disturbed. 2 Cal. Jur. Appeal and Error, § 542, p. 918.

[2-6] As to the appeal by defendant Lum Show, it was testified that his truck blocked approximately half of the west passing lane, and was facing at right angles to the highway; further, that there were no lights burning on the truck. This testimony, if believed by the jury, would have been sufficient, other things being equal, to have supported a finding of negligence as against said defendant. Sawdey v. Producers' Milk Co., 107 Cal. App. 467, 290 P. 684. It might be inferred from

their verdict that the jury believed other and conflicting testimony in this regard, or that plaintiff Anderson was guilty of contributory negligence; but, whatever may have been the conclusion of the jury, the rule is well settled that a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound discretion of the trial court, and its order may not be disturbed on appeal, unless there is a manifest abuse of such discretion. The trial court is not bound by the rule as to conflicting evidence (Smith v. Royer, 181 Cal. 165, 183 P. 660), and it may grant a new trial if it is satisfied that the verdict is not supported by or is contrary to the weight of the evidence (Gordon v. Roberts, 162 Cal. 506, 123 P. 288), since in passing upon the motion it must weigh and consider the evidence of both parties and determine for itself what conclusion should be drawn therefrom (Green v. Soule, 145 Cal. 96, 78 P. 337; City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496); and this is true, although the appellate court may differ in opinion from the trial court as to the weight of the evidence. (Wurzburger v. Nellis, 165 Cal. 48, 130 P. 1052). The record discloses no abuse of discretion in the present case.

For the above reasons, the orders and the portions of the judgments appealed from are affirmed.

124 Cal.App. 584

UNION LUMBER CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 4675.

District Court of Appeal, Third District, California.

June 29, 1932.

1. Master and servant ⇐404.

Verified report of examining physician located in foreign country, where certified by American consul, *held* competent evidence in compensation proceeding (St. 1917, p. 848, § 19(c).

2. Master and servant ⇐419.

Claim for permanent disability resulting from original injury and discovered subsequent to original award could be presented within 245 weeks after injury, as claim for "new and further disability" (St. 1917, p. 841, §§ 11, 11(c).

[Ed. Note.—For other definitions of "New and Further Disability," see Words and Phrases.]

3. Master and servant ⇐399.

Refusal to submit to medical examination *held* not waiver of compensation where no written request for examination was made by employer (St. 1917, p. 845, § 16(a).

4. Master and servant ⇐419.

Submission without notice to employer of claim for additional compensation after entry of order for taking interrogatories and for continuing cause for further hearing *held* prejudicial error.

5. Master and servant ⇐415.

On commission's countermanding order to take deposition in compensation proceeding, employer was entitled to notice.

6. Master and servant ⇐416.

Employer's privilege of notice of countermanding of commission's order to take deposition was not waived where employer formally petitioned for rehearing.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Sakari Palomaa and another, opposed by the Union Lumber Company. An award of compensation was entered by the Industrial Accident Commission of the State of California for permanent disability, and the employer brings certiorari.

Award vacated and cause remanded.

Mannon & Brazier, of Ukiah, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

This is a petition for a writ of certiorari to review an award of damages which was rendered on account of injuries sustained by Sakari Palomaa in the course of his employment with the petitioner.

Sakari Palomaa, known as A. Palomaa, was employed by the petitioner on August 1, 1928, in its lumber camp at Fort Bragg, as a laborer. On that date he received an injury consisting of a posterior dislocation of his left knee, as a result of being struck by a rolling log. The injury was sustained in the course of his employment. The petitioner carried its own accident insurance. The employer voluntarily paid the injured workman compensation to January 1, 1929, and also furnished him with an iron knee brace. It appears that Palomaa was so disabled from the injury that he was unable to work until November 8, 1928. He then attempted to resume his employment, but the injury prevented him from performing efficient service and he left the lumber camp. January 1, 1929, he again attempted to resume his employment, work-

ing on part time until about May 1, 1929. He then left and returned to his native country of Finland. He was never thereafter employed with the petitioner.

On December 3, 1930, J. Horton Beeman, of San Francisco, in behalf of Palomaa, filed with the Industrial Accident Commission a claim for compensation for the injuries received. The Union Lumber Company answered this petition, admitting the employment, the injury to the workman, and the voluntary payment of compensation as above related. The answer, however, denied that Palomaa was permanently or seriously injured. It denied that any permanent disability which he then suffered was the result of the dislocated knee which occurred in the course of his employment with the lumber company. It also asserted the claim was barred by the statute of limitations, as provided by section 11 of the Workmen's Compensation Act (St. 1917, p. 841).

The claim for compensation was first heard December 18, 1930. It was then continued to March 5 to permit the petitioner to furnish evidence of the identity of the claimant. At that time, over the objection of the Union Lumber Company, the certificate of T. E. Pajari, a physician of Raahe, Finland, where Sakari Palomaa resides, was admitted in evidence. This certificate was duly verified by Jarl Lindfors, the American Vice Consul of Finland. It certified to the identity of Palomaa, together with the nature, extent, and permanency of his injury. The further hearing of the case was then continued to October 21, 1931. At that time witnesses were examined and documentary evidence adduced. The claimant was not present at any of these hearings. He still remained in Finland. In addition to the defense on the part of the Union Lumber Company that the claim was barred by the statute of limitations, the point which was then most strenuously urged is that the serious, permanent disability of the employee, as it appears from the certificate of the Finland physician, is not proved to be the result of the injury which he received at Fort Bragg, in the course of his employment, on August 1, 1928. This petitioner then requested a continuance to enable it to rebut the assumption that the claimant was suffering from the result of his original injury, and to show that his present permanent disability of the kneejoint is the result of some subsequent injury. At the final hearing of this case at Ukiah on October 21, 1931, the referee made the following order: "The case will be referred to Mr. Britton for the purpose of preparing interrogatories, and when the same are prepared and forwarded, the parties will be allowed ten days thereafter to file with the commissioner cross-interrogatories. If this be not done within the expiration of that period the interrogatories will issue, and upon their return the * * * case *will be set for further hearing at Fort Bragg.*"

The interrogatories referred to in the order of the referee were for the purpose of taking a deposition in Finland, to be filed as evidence in the case. The interrogatories were never prepared or served on this petitioner. The deposition was not taken. Without notice to this petitioner, the cause was submitted. The commission then adopted findings to the effect that the claimant sustained an injury to his left knee while he was serving the petitioner in the course of his employment, and that "said injury caused permanent disability consisting of moderate instability of the left knee joint." Thereupon an award of $865.52 was rendered against the Union Lumber Company in favor of Sakari Palomaa. A petition for rehearing of the cause was subsequently made to the commission on the ground that the cause was submitted contrary to the order of the referee, without notice to the employer and without affording it the opportunity to adduce evidence to rebut the certificate of Dr. Pajari, to the effect that the claimant's injuries are permanent.

[1] The verified report of the examining physician, Dr. Pajari of Finland, was competent evidence at the hearing of the commission. The objection to the introduction of this document was properly overruled. It was duly certified by the American Consul of Finland. Subdivision (c) of section 19 of the Workmen's Compensation Act (St. 1917, p. 848) provides for a very liberal rule of evidence, as follows:

"The commission may receive as evidence, either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:

"(1) Reports of attending or examining physicians."

The case of Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24, upon which the petitioner relies for its assertion that the examining physician's certificate is incompetent evidence, was decided in 1915, when no such liberal rule of evidence as that which is above quoted was in existence. The above statute was enacted by the Legislature in July, 1917, and became effective January 1, 1918. That statute authorizes the consideration of an examining physician's report of the extent and nature of an injury, when it is properly certified. This is a radical departure from the customary rules of evidence, but it is clearly authorized by statute.

[2] Assuming that the present condition of the knee of Palomaa amounts to "permanent disability consisting of moderate instability of the left knee joint" is the natural result of the original injury which he received in the

course of his employment, without the aggravation of the injury by any subsequent accident or negligence in the care of the injured knee, the statute of limitations for presenting the claim does not bar the action "within two hundred forty-five weeks after the date of the injury," as provided by section 11 of the Compensation Act. The time for commencing the action in the present case was extended to the time last mentioned, by the payment of compensation from the employer. Nor did the statute of limitations which is announced in section 11 (c) of the Workmen's Compensation Act require the action to be commenced within six months after the accident occurred, on the theory that the permanency of the injury constitutes a "new and further disability." Conceding that an application for compensation on the ground of permanency of the injury, which permanent nature of the injury is discovered subsequently to the awarding of compensation or the voluntary payment of money based upon an original temporary injury, constitutes a "new and further disability" within the meaning of the statute, that act, nevertheless, provides that "nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury *upon the grounds that the original injury has caused new and further disability.*"

The latest expression of the Supreme Court upon this subject is contained in the case of Cowell L. & C. Co. v. Industrial Acc. Com., 211 Cal. 154, 160, 294 P. 703, 705, 72 A. L. R. 1118, as follows: "It was held in the cases of Hutchinson Lumber Co. v. Industrial Acc. Com., 77 Cal. App. 141, 246 P. 118; General Acc., etc., Corp. v. Industrial Acc. Com., 77 Cal. App. 314, 246 P. 570; and Ocean A. & G. Corp., Ltd. v. Industrial Acc. Com., 90 Cal. App. 725, 266 P. 556, that a permanent disability is a new and further disability within the provisions of the Workmen's Compensation Act. We are in full accord with this conclusion of the District Courts of Appeal. Many times the seriousness of the injury is not at first apparent, and from its very nature cannot be detected until considerable time has elapsed after its infliction. The clear intent of the statute in such cases is that the injured employee shall be entitled to compensation for his permanent disability notwithstanding the fact that he may in the early stages of his injury have been granted an award only for temporary disability, or may have been paid compensation voluntarily by his employer; provided, of course, that proceedings for the collection of such permanent disability shall have been commenced within two hundred forty-five weeks after the date of the original injury."

This completely disposes of the contention of the Union Lumber Company in this case that this action is barred by the limitation of time within which it may be commenced. The claim was presented in this case within the period of two hundred and forty-five weeks from the date of the accident. That procedure conforms to the clear language of the statute.

The rights and liabilities of neither party were impaired by the effort which was made to compromise the claim in the present action. Section 27 (a), Workmen's Compensation Act (as amended by St. 1923, p. 770).

[3] Nor was compensation waived by the refusal of the claimant to submit to medical examination. It is true that he left his employment and went to Finland, where he thereafter remained. Prior to his departure he submitted to repeated examinations by the physician representing the lumber company. No written demand or request was ever subsequently made upon him by the employer to submit to further examination. The waiver of a right to compensation provided by section 16 (a) of the Compensation Act (St. 1917, p. 845), is based upon a willful refusal to submit to an examination by a physician "upon the written request of his employer." The record discloses no such demand or request.

[4-6] It becomes necessary, however, to set aside the award which was rendered in this proceeding and remand the cause for further proceedings because of prejudicial error which occurred in submitting the cause without notice to the employer and without affording it an opportunity to adduce evidence to rebut the certificate of Dr. Pajari of Finland as to the cause of the alleged permanency of the injury. Upon application on the part of the employer to be afforded this opportunity by means of a deposition to be formally taken, the referee entered the minute order above quoted. This order recited that interrogatories would be prepared by the commission and served on the respective parties who should be given a specified time in which to prepare and serve amendments to the proposed questions to be propounded. It was then ordered that the cause would then be continued for further hearing at Fort Bragg at a specified time to be subsequently set. Without notice the cause was submitted and determined. This petitioner for a writ of review was misled by relying on the prescribed procedure for supplying evidence respecting the cause of the permanency of the injury. In the event of countermanding the order to take the deposition by the commission, the employer was entitled to notice so that it might have the opportunity of otherwise supplying the evidence if it was able to do so. This privilege was not waived, since the em

ployer formally petitioned the commission for a rehearing of the cause.

The award is therefore vacated, and the cause is remanded for further proceedings in accordance with the foregoing suggestions.

We concur: PLUMMER, Acting P. J.; PARKER, Justice pro tem.

124 Cal.App. 534

REEVES et ux. v. WATSON et al.

Civ. 492, 876.

District Court of Appeal, Fourth District, California.

June 27, 1932.

1. Landlord and tenant ⇐291(13).

Evidence in unlawful detainer action sustained finding lessee's bill of sale of cantaloupe crop to transferee was to secure loan and did not constitute sale.

2. Landlord and tenant ⇐139(1).

Where lessee remained unlawfully in possession, title to crops vested in lessors, subject to claims of lessee and transferee under bill of sale on their payment of unlawful detainer judgment, though transferee advanced money on crop before it was taken over by receiver (Code Civ. Proc. § 1174).

3. Receivers ⇐56.

Lessee and transferee of crop under bill of sale could not complain of illegal appointment of receiver to take over crops, where lessee unlawfully detained land (Code Civ. Proc. §§ 566, 1161).

Lessee growing crop, and his transferee thereof under bill of sale, could not complain of appointment of receiver to take over crops without lessors executing bond required under Code Civ. Proc. § 566, because it was stipulated that the rent was unpaid from which it followed that, after service of three days' notice under Code Civ. Proc. § 1161, lessee was guilty of unlawful detainer of the leased property; hence lessee and transferee could not object to appointment of receiver, since property no longer belonged to them, in that title thereto had vested in lessors.

4. Receivers ⇐200.

Court properly permitted receiver to deduct compensation and attorney's fees from sums collected for crops, where lessors were entitled to crop proceeds and it could not be known whether other claimants would pay lessors' unlawful detainer judgment against lessee (Code Civ. Proc. § 1174).

5. Appeal and error ⇐781(4).

Where lessee was guilty of unlawful detainer and title to crops vested in lessors, all questions on appeal from denial of lessee's and crop claimants' objections to receiver's appointment, and of petition to vacate appointment, became moot (Code Civ. Proc. § 1161).

6. Appeal and error ⇐1043(4).

Alleged errors in findings in order denying petition for revocation of receiver's appointment *held* immaterial, where all questions concerning such order became moot.

7. Appeal and error ⇐870(4).

Alleged errors in order confirming account and report of receiver not appealed from cannot be reviewed.

Appeals from Superior Court, Imperial County; A. C. Finney, Judge.

Action by A. W. Reeves and wife against Wiley L. Watson, A. B. Monks, and others. From a judgment for plaintiffs, and from an order denying motion to vacate order appointing receiver in an action in unlawful detainer, named defendants appeal.

Appeal from order dismissed. Judgment affirmed.

Stearns, Luce & Forward, of San Diego, for appellants.

Harry W. Horton, of El Centro, for respondents.

SCOVEL, Justice pro tem.

This is an action in unlawful detainer. It appears from the transcript that in 1928 plaintiffs, who were the owners of the real property involved herein, leased the same to defendant Watson for a period of approximately two years commencing July 20, 1929. Watson went into possession of the property upon the execution of the lease in 1928, and at said time executed a note in the principal sum of $2,000 as evidence of the amount of the rental, which, under the terms of the lease, fell due April 1, 1929. Neither the note nor the rental it evidenced were paid. A three days' notice demanding payment of the rental or possession of the premises was thereafter duly served upon Watson. More than three days having expired, and neither the rental having been paid nor possession of the property delivered to plaintiffs, the complaint in this action was filed. In addition to the foregoing facts it was alleged that defendants A. Giraudo, G. A. Murvin, and George Salata claimed some interest in a crop of cantaloupes growing on the leased premises. The complaint also prayed for the appointment of a receiver to care for, harvest, and market the cantaloupes pending the action.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Upon the filing of the complaint an order to show cause why a receiver should not be appointed was issued. The summons, complaint, and order to show cause, which was set for hearing on May 17, 1929, were duly served upon all the defendants except Watson. At the hearing on the order to show cause A. B. Monks was permitted to file a petition in intervention claiming the crop of cantaloupes by virtue of a bill of sale executed therefor by defendant Watson in March, 1929. At the same time an amended complaint was filed by plaintiffs similar in all respects to the original complaint except that Monks was joined as a defendant. Neither Monks nor Watson were served with the complaint, amended complaint, summons, or order to show cause, prior to the hearing, but Monks appeared and through his attorney vigorously contested the appointment of the receiver. After a complete hearing of the matter, the court appointed a receiver to take charge of, harvest and market the crop of cantaloupes, and, in accordance with section 567 of the Code of Civil Procedure, the receiver's bond was fixed at the sum of $10,000. Watson did not appear at the hearing, and the appointment of the receiver was, as to him, ex parte. The court failed to make an order for a bond to be executed by plaintiffs before appointing the receiver as required by section 566 of the Code of Civil Procedure where a receiver is appointed ex parte. Defendants Giraudo, Murvin, and Salata thereafter disclaimed and are not involved in these appeals.

The receiver took possession of the crop, marketed, and sold the same. Meanwhile, Watson had been served with summons and complaint by publication, and his default for failure to appear was entered on July 8, 1929. The receiver, having marketed all of the cantaloupes, filed his report containing his receipts and expenditures on July 17, 1929. On July 18, 1929, Watson filed a motion to vacate his default, and on the same day Monks filed objections to the report of the receiver, together with a petition to vacate his appointment on the grounds, among others, "that the said plaintiffs did not at any time before the making of the order appointing the said receiver execute or file an undertaking as required by law and that said application for the appointment of a receiver made by the plaintiffs was an ex parte application."

On August 21, 1929, Watson's motion to vacate his default was granted and his answer filed immediately thereafter. The report of the receiver, Monks' objection thereto and petition to vacate his appointment were heard on July 26, 1929. The receiver's account and report were approved and his expenses and attorney's fees, in the sum of $2,080, allowed. The balance of the money in his hands was ordered paid into court. This was done, and the receiver was discharged and his bondsman exonerated.

The hearing on Monks' objection to the appointment of the receiver and petition to revoke the same was continued to August 10, 1929, at which time Watson was permitted to join in the objection and petition. A written order denying the foregoing petition and objection was signed and filed by the court on November 16, 1929. From this order both defendants have appealed. This appeal will hereafter be designated as the first appeal.

The trial of the action was heard on April 28, 1930. It was stipulated at the trial that the note and the rental it represented were unpaid, that Watson had no defense to the action, and that judgment should be entered against him. The only question litigated was as to whom the money impounded in court should be paid, defendants asserting it should be paid to Monks by virtue of a bill of sale to the crop given him by Watson prior to the termination of the lease. Judgment was entered in favor of plaintiffs for the amount of the rental then due, and $2,000 damages and increased rental, under section 1174 of the Code of Civil Procedure. The judgment further declared that plaintiffs were entitled to all net proceeds of the crops realized by the receiver, but provided that, if any of the defendants should pay to the plaintiffs within five days from the entry of the judgment, the amount of the judgment rendered against Watson, or should file within said five days an authorization for the payment to the plaintiffs of the amount of the judgment from the moneys held by the court, then the leasehold interests of defendant Watson should be restored and any balance of said funds be paid to him subject to any right therein of defendant Monks. From this judgment both defendants appeal, and in this opinion it will hereafter be referred to as the second appeal. It has been stipulated that the two appeals may be considered together.

[1] We will consider first the second appeal: that is, the appeal from the judgment. In support of Monks' claim of title to the crop of cantaloupes, a bill of sale dated March 18, 1929, signed by Watson and purporting to transfer the crop to Monks, was introduced in evidence. The court found this to have been executed merely as security for the sum of $4,000 theretofore loaned Watson by Monks. Appellants claim the transaction was a completed sale. The evidence thereon is conflicting, but sufficient evidence appears in the transcript to support the finding of the court. Monks testified as follows: "Q. What conversation did you have with Watson prior to the 18th day of March that led up to his giving you a bill of sale for these cantaloupes? A. I told him I would have to have something for the money I had put in and for the money I would have to put up to go ahead and I would have to have something or I couldn't go on. I took the bill of sale as security for what I had advanced and what I might there-

after advance. It was on the 16th day of March, if I remember it right, that I had this conversation with Mr. Watson, and told him I would have to have something to secure me for the money I had advanced. He then gave me this bill of sale on the 18th day of March to secure me for money I had advanced."

[2] It is true that Monks claimed he had advanced $11,000 on the crop before it was taken over by the receiver. We deem this immaterial, since after Watson, lessee of the property and owner of the crop, held over and remained unlawfully in possession, title to the crops on the land vested in respondents as lessors subject only, perhaps, to Watson's and Monks' right to claim the same after payment of respondents' judgment in accordance with section 1174 of the Code of Civil Procedure. Agoure v. Plummer, 175 Cal. 543, 166 P. 311.

[3] Appellants insist, however, that the appointment of the receiver was void by reason of the failure to comply with the provisions of section 566 of the Code of Civil Procedure, and upon this contention the first appeal is based. Conceding their contention to be true, it is difficult to see how they are in any manner aggrieved. As above set forth, it was stipulated that the rent was unpaid, from which it necessarily follows that, after the service of the three-day notice under section 1161 of the Code of Civil Procedure, Watson was guilty of an unlawful detainer of the leased property. Right to possession of the property, together with all crops growing thereon, immediately vested in respondents. Code Civ. Proc. § 1161; Agoure v. Plummer, supra.

Can appellants now complain that a receiver was unlawfully placed in possession of property which they did not own? From the time of this appointment no act of the receiver, even if without proper legal authority, could in any manner injure appellants, since the property over which the receiver exercised dominion no longer belonged to them. We do not believe they can question the act of respondents in placing a receiver in possession of their own property even though the statutory provisions relative to the appointment of a receiver were ignored. True, section 1174 of the Code of Civil Procedure gives to appellants the right to satisfy the judgment and be restored to the prior estate. This section does not, however, purport to affect the title to crops growing upon the unlawfully detained lands prior to compliance with its provisions.

[4, 5] At the time judgment was given, it could not be known whether or not the amount thereof would be paid by appellants in accordance with section 1174 of the Code of Civil Procedure. At that time respondents were entitled to all proceeds received from the crops and could not be deprived thereof until appellants had complied with section 1174 of the Code of Civil Procedure. The court therefore properly permitted the compensation of the receiver and his attorney's fees deducted from the funds collected by him. Perhaps, if the appointment of the receiver be void, appellants, after paying the judgment pursuant to such section, might have a cause of action for the recovery of such compensation and attorney's fees as an injury to the estate to which they would be restored. A determination of this matter is not involved in this appeal, and we express no opinion thereon. We are of the opinion, however, that they are not affected in any way by the order prior to complying with section 1174 of the Code of Civil Procedure. The trial court having properly found Watson guilty of an unlawful detainer, and title to the crops and proceeds thereof having thereby vested in respondents, all matters involved in the first appeal have therefore become moot. Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018; Mendocino County v. Peters, 2 Cal. App. 34, 82 P. 1124.

[6] Appellants also attack certain findings made by the court in its order denying their petition for revocation of the appointment of the receiver. Any error in such findings is now immaterial, all questions as to the order based thereon having become moot.

[7] Additional specifications of error are assigned relative to alleged failure of the court to find upon issues made in appellants' objections to the receiver's account and report. The appointment of the receiver, even though void, having been harmless, appellants cannot at this time question the correctness of his report. A complete answer to these assignments of error lies in the fact that no appeal was taken from the order approving and confirming the account and report. The order approving the same was filed on July 26, 1929. Appellants' notice of appeal recites that it is taken from the order made on November 16, 1929, denying the objections of Monks and Watson to the appointment of the receiver and also denying their petition for the revocation of the appointment. Any error in the order confirming the account and report cannot therefore be reviewed.

The appeal from the order is dismissed. The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

SWANSON v. SIEM et al.

Civ. 4582.

District Court of Appeal, Third District, California.

June 27, 1932.

Rehearing Denied July 27, 1932.

1. Partnership ⇐258(7).

Complaint by one claiming partnership existed between himself and deceased, against deceased's administratrix to recover alleged partnership property and demanding accounting, *held* to state cause of action in replevin (Probate Code, § 571).

Such complaint alleging that plaintiff and deceased entered a partnership agreement for live stock business to devote their personal attention to the business and to share equally in the profits and losses, that deceased died, and that his wife was duly appointed administratrix, that specified live stock belonged to the partnership, but were possessed and claimed by the administratrix as part of the deceased's estate, that plaintiff had demanded possession thereof as partnership property and an accounting of the partnership transactions which were refused, and asking for return of the property, and an accounting for the partnership transactions, was proper suit in replevin under Probate Code, § 571, relating to surviving partner's settlement with deceased partner's estate; the requested accounting being merely incidental to the demand for possession.

2. Partnership ⇐258(8½).

Question of existence of partnership is one of law and fact.

3. Partnership ⇐20.

Existence of partnership must ordinarily be determined from transactions, conduct, and declarations of alleged partners, absent written partnership agreement.

4. Partnership ⇐17.

To establish existence of partnership, it is usually essential to prove it was parties' intention to engage in partnership business.

5. Partnership ⇐44.

Burden is on one asserting existence of partnership to prove it.

6. Partnership ⇐44.

Before partner may be charged as such by his declarations, prima facie showing of existence of partnership should be established (Code Civ. Proc. § 1870, subd. 5).

7. Evidence ⇐259.

After existence of partnership has been shown by prima facie evidence thereof, partner's admissions are admissible against other partners (Code Civ. Proc. § 1870, subd. 5).

8. Partnership ⇐20.

Express agreement is not essential to constitute partnership (Civ. Code, § 2395).

9. Partnership ⇐53.

In suit against estate of deceased alleged partner in live stock business, evidence *held* sufficient to establish existence of partnership without deceased's declarations (Code Civ. Proc. § 1870, subd. 5).

Evidence disclosed that plaintiff owned ten acres of land upon which he fed, in 1928 and 1929, 700 or 800 hogs which had been bought by money furnished by deceased; that such ranch was also used to store feed for hogs and cattle also bought by deceased; that plaintiff received neither rent nor wages; that sometimes stock were marketed by plaintiff and sometimes by deceased; and, among other things, that plaintiff and deceased divided the profits equally.

10. Partnership ⇐47.

In suit against estate of deceased alleged partner, evidence *held* to prima facie show partnership, rendering admissible deceased's statements regarding his partnership relation with plaintiff (Code Civ. Proc. § 1870, subd. 5).

11. Appeal and error ⇐1050(1).

Admitting partner's declarations relative to existence of partnership, before establishing existence thereof, *held* harmless.

Admitting the declarations in such order was harmless, being a mere exercise by the court of its discretion in determining the order of proof, especially where the cause was tried without jury.

12. Partnership ⇐258(3).

Surviving partner could maintain replevin for partnership property against deceased partner's administratrix without filing claim against estate, even where alternate money judgment was rendered (Probate Code, §§ 571, 716).

Surviving partner could maintain such action under Probate Code, § 571, relating to surviving partner's settlement with deceased partner's estate, without filing a claim as required by section 716, since the claims required to be filed are those for such debts against decedent as might, if due, have been enforced against him in his lifetime by personal action for the recovery of money, and upon which only a money judgment could have been rendered, and since one partner's claim against another for possession of partnership property does not exist during their lifetime, each being equally entitled to possession.

13. Executors and administrators ⇐224.

It is not necessary to present claim against estate of deceased person for cause

of action arising after his death (Probate Code, § 716).

14. Partnership ⇐258(1, 3).

In replevin by surviving partner against deceased partner's administratrix for partnership live stock, that some of live stock was sold after commencement of action by counsel's stipulation and impounded with clerk did not affect remedy nor require filing probate claim (Probate Code, §§ 571, 716).

15. Partnership ⇐258(3).

In replevin by surviving partner against deceased partner's administratrix for partnership live stock, awarding plaintiff proceeds of live stock sold at commencement of suit and impounded with clerk was not money judgment based on suit against estate of deceased partner requiring filing of probate claim as prerequisite to maintaining action thereon (Probate Code, §§ 571, 716).

16. Executors and administrators ⇐453(2).

Where deceased partner's administratrix appropriated partnership live stock, judgment was properly rendered against her personally and as administratrix, in surviving partner's replevin suit (Probate Code, § 571).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Suit in replevin by Elmer Swanson against Jessica Siem, as administratrix of the estate of Ernest Siem, deceased, and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

William N. Graybiel, of Turlock, for appellants.

G. B. Hjelm and Harold L. Hjelm, both of Turlock, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered in favor of the plaintiff in a suit in replevin, which was brought by a surviving partner against the administratrix of the estate of the deceased partner and others, to recover the possession of partnership property.

The appellant contends the findings and judgment are not supported by the evidence, that the cause was for an accounting and that the trial court was without jurisdiction to render judgment for the reason that no claim was filed against the estate of Siem under the provisions of section 1500 of the Code of Civil Procedure (section 716, Probate Code), and that the court erred in admitting evidence of declarations of the deceased partner as proof of the existence of a copartnership.

The complaint alleges that in January, 1924, the plaintiff and Ernest Siem entered into an agreement of copartnership for the purpose of engaging in the business of raising, purchasing, and marketing live stock; that they were each to furnish real property for the raising and care of the stock, devote their personal attention to the business, and participate equally in the profits and losses thereof. It was then alleged that Ernest Siem died January 11, 1930, and that upon proceedings duly had, the defendant Jessica Siem, the wife of said deceased person, was appointed and qualified as administratrix of his estate; that a specified number of cattle and hogs of the value of $8,000 and farming implements which were described and located on the "Swanson Ranch" belonged to the copartnership business, but were possessed and claimed by the defendant Jessica Siem as a part of the estate of her deceased husband; that the defendant Kee and Mendoza were indebted to the copartnership in specified sums which were also claimed as property of the estate of the deceased partner; that prior to the commencement of this action the plaintiff demanded of the defendants the possession of said partnership property and an accounting of the partnership transactions, which were refused; that the defendant Jessica Siem had sold certain cattle and threatened to continue to sell the stock belonging to the copartnership. Thereupon an injunction was asked restraining the sale of said partnership property, and a decree was demanded for the return of the personal property or payment of the market value thereof for failure to do so. The prayer of the complaint also asks for an accounting of the partnership transactions.

No demurrer to this complaint was filed. The defendants answered controverting the essential allegations of the complaint, denying the existence of the alleged copartnership, and claiming that all of said property belonged to the estate of Ernest Siem, deceased. At the trial findings were adopted favorable to the plaintiff, and a judgment awarding him the possession of the property, or compensation for its value in the event of failure to deliver the same, was rendered. From this judgment the defendants have appealed.

[1] It is apparent from the pleadings this is a proper suit in replevin on the part of the surviving partner, under the provisions of section 1585 of the Code of Civil Procedure (section 571, Probate Code), to regain and "continue in possession of the partnership, and to settle its business." Fong Sing v. O'Dell, as Adm'r, 50 Cal. App. 55, 194 P. 745; Perelli-Minetti v. Lawson, 205 Cal. 642, 651, 272 P. 573. This action is essentially one of replevin. The demand for an accounting to

determine what property actually belongs to the partnership assets does not change the nature of the proceeding. The requested accounting is merely incidental to the demand for possession of the property. There appears to be no statutory inhibition against the survivor of a copartnership maintaining an action for accounting against the representatives of a deceased partner. 20 Cal Jur. 829, § 121; Raisch v. Warren, 18 Cal. App. 655, 124 P. 95; Link v. Haire, 82 Mont. 406, 267 P. 952, 957. The most that may be said of the case of McKay v. Joy, 70 Cal. 581, 11 P. 832, upon which the appellants in this case rely, is that the court holds there is no necessity for maintaining a suit in equity because section 1585, supra, furnishes ample authority for the surviving partner to acquire possession of the partnership property. In a suit for replevin, on the part of a surviving partner, it is proper to offer any competent evidence to identify and determine what property actually belongs to the partnership business.

The findings and judgment to the effect that a copartnership existed between the plaintiff and the deceased, Ernest Siem, are sufficiently supported by the record, in spite of the existence of a sharp conflict of evidence in that regard.

[2-7] The question of the existence of a copartnership is a mingled problem of law and fact. 20 R. C. L. 849, § 55. In the absence of a written declaration of copartnership, it must ordinarily be determined from the transactions, conduct, and declarations of the alleged partners. It is usually essential to prove it was the intention of the parties to engage in a copartnership business. Section 2397, Civ. Code; 20 Cal. Jur. 686, § 7. The burden is on the one asserting the existence of a copartnership to prove it by competent evidence. Before a partner may be charged, as such, by his declarations, a prima facie showing of the existence of the copartnership should be first established. Section 1870, subd. 5, Code Civ. Proc.; 2 Jones Comm. on Evidence, 1726, § 935. After the existence of the copartnership has been shown by prima facie evidence thereof, "the admissions and conduct of the several partners in the course of the partnership business are admissible as against the others." Dennis v. Kolm, 131 Cal. 91, 63 P. 141, 143; 1 Lindley on Partnership (2d Ed.) 128, note 2.

[8-10] A "copartnership" is defined by section 2395 of the Civil Code, as the statute then existed, as "the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." An express agreement of the parties is not necessary to constitute a copartnership, but it may be assumed to have been organized from a reasonable deduction from the acts and declarations of the parties. Niroad v. Farnell, 11 Cal. App. 767, 106 P. 252. The Uniform Partnership Law of California, which was adopted in 1929, section 2401 of the Civil Code, subdivision 4, provides: "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." In the present case, a prima facie showing of the existence of a copartnership is established, independently of the evidence of declarations to that effect. It satisfactorily appears that the plaintiff owned ten acres of land near Turlock upon which he raised and fed in 1928 and in 1929 seven or eight hundred hogs. Most of these hogs were purchased with capital furnished by the deceased Ernest Siem. This ranch was also used to store grain and feed for hogs and cattle which were also purchased by the deceased. The plaintiff received neither rent for his land nor wages for his services. Both hogs and cattle were raised in this manner and marketed. Occasionally they were sold by the deceased and sometimes they were marketed by the plaintiff. The profits derived upon the sale of such stock were divided equally between the deceased and the plaintiff. The truck which was used in the business contained a sign which read "Siem & Company." Mr. Siem had no other partner. A common bank account was also maintained in the name of "Siem & Company." The proceeds from the sale of cattle and hogs were deposited in this account. The plaintiff was permitted to and frequently drew checks upon this account in payment of their business transactions, which checks were signed "Siem & Company, By Elmer Swanson." George Olson who was employed on the hog ranch as a farm hand was paid by the plaintiff with checks which were signed as above indicated. Mr. Landram, who purchased hogs on several occasions at the request of the deceased, consummated these transactions with Fred, the son of Ernest Siem, and received his pay from the plaintiff by means of a check on the Siem & Co. fund. These and other circumstances disclosed by the record furnish a sufficient prima facie showing of the existence of a copartnership in the live stock business to authorize the proof of admissions of the deceased with reference to the existence of a copartnership relation with the plaintiff. These admissions of the deceased which were related by several disinterested witnesses, taken in conjunction with other facts and circumstances disclosed by the record, furnish ample evidence to support the findings and judgment to the effect that the deceased and the plaintiff were engaged in the copartnership business of raising, buying, and selling live stock. Mr. Landram testified to a conversation which he had with the deceased in which he said with respect to the purchase of hogs: "If you buy that stock, * * * call me up, and I will either come or I will send my partner, Mr.

Swanson, and whatever he does will be all right." Mr. Olson related a conversation which he had with the deceased regarding the sign "Siem & Company," which appeared upon their truck. He asked the deceased what that sign meant. The deceased replied, "That means we are in partnership, that means we are a company." The witnesses Pedras, Johnson, and Radford testified to similar admissions of the existence of a copartnership.

These and other similar declarations were admitted in evidence over the objections of the defendants on the ground that they were incompetent until "after proof of a partnership" had first been adduced, as required by subdivision 5 of section 1870 of the Code of Civil Procedure. The plaintiff asserted this order of proof was discretionary on the part of the judge, who tried the case without a jury, and agreed to supply the evidence of the existence of the copartnership later in the course of the trial. The rulings of the court upon these objections were reserved. Inadvertently these objections were not passed upon. We must, however, assume the defendants sufficiently preserved their objections to squarely raise the question.

[11] The admission of declarations of the partner with relation to the existence of the copartnership prior to the establishment thereof, under the circumstances of the present case, is not reversible error. In view of the plaintiff's assurance that he would subsequently supply proof of the existence of the copartnership, the admission of these declarations was a mere exercise of discretion in determining the order of proof. There appears to have been no abuse of discretion on the part of the court. The cause was tried without a jury. The mere order of proof was harmless. Bates v. Tower, 103 Cal. 404, 37 P. 385; Jacobson v. Lamb, 91 Cal. App. 405, 417, 267 P. 114.

[12, 13] There is no merit in appellants' contention that this action for replevin may not be maintained without first filing a claim against the estate of the deceased partner, notwithstanding the fact that an alternate money judgment was rendered as compensation in the event the property could not be restored to the surviving partner.

In an action for replevin of personal property which is instituted against the administratrix of a deceased partner, it is unnecessary to file a claim under the provisions of section 1500 of the Code of Civil Procedure (section 716, Probate Code) as a prerequisite to maintaining the action. Claims are required to be filed for "such debts and demands against the decedent as might, if due, have been enforced against him *in his lifetime by personal actions for the recovery of money*, and upon which only a money judgment could have been rendered." 11 Cal. Jur. 651, § 371. In 11 Ruling Case Law, 190, § 210, it is said such claims are required to be filed for "debts or demands of a pecuniary nature which could have been enforced against the deceased in his lifetime, and could have been reduced to simple money judgment." 24 C. J. 322, § 943. It is apparent that a claim of one partner against another for the possession of partnership property does not exist during their lifetime. Each partner is equally entitled to the possession of partnership property. It is not necessary to present a claim against the estate of a deceased person for a cause of action which arises after his death. 24 C. J. 330, § 952. The language of the court which is used in the matter of In re Estate of Dutard, 147 Cal. 253, 256, 81 P. 519, 520, is peculiarly applicable to this case where a surviving partner seeks to recover possession of partnership property by virtue of the provisions of section 1585 of the Code of Civil Procedure (now Probate Code, § 571). The court there says: "It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate, within the meaning of the probate law. The decisions are clear and conclusive upon the proposition that, where one seeks to recover from the representatives of an estate specific property alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, is not required to present a claim as a creditor, and is not a 'creditor of the estate.' His action is not founded upon a claim or demand against the estate."

[14, 15] The fact that some of the live stock which belongs to the partnership business was sold after the commencement of this suit by stipulation of counsel, and the proceeds thereof impounded with the clerk subject to the order of the court and the determination of this action, does not alter the plaintiff's remedy; nor require the filing of a probate claim. The character of the property was transformed from live stock to cash by stipulation of the parties, and paid into court subject to the final decision of the court. This was for the mutual accommodation of the parties, and did not change the nature of the action, nor the remedy which is available. This procedure was first suggested by the court. The judge said: "Sell the hogs and impound the money waiting the decision of the court, don't go to any more expense." That was done. Some $4,000 was thus placed in the hands of the clerk. The court further said: "I suppose that money, under the stipulation, is to be subject to the judgment of the court?" Mr. Graybiel, attorney for the defendants, replied: "That is understood." Regarding this stipulation the following colloquy occurred:

"The Court: * * * They (the hogs) were sold, as I remember, by agreement?

"Mr. Hjelm: Yes.

"The Court: * * * And the money deposited?

"Mr. Hjelm: That is right."

The defendants did not contradict this assertion that the hogs had been sold by stipulation of the respective parties and the proceeds deposited with the clerk subject to the final determination of the action. This colloquy amounted to an acknowledgment on the part of the defendants that the live stock was so sold by stipulation and the proceeds of sales impounded with the clerk subject to the court's order. Since the court found that the stock belonged to the partnership business, the proceeds of the sales thereof by stipulations were properly awarded to the plaintiff. This did not constitute a money judgment based upon a suit against the estate of the deceased partner which required the filing of a probate claim as a prerequisite to the maintaining of the action.

[16] The judgment was properly rendered against Jessica Siem, personally. Her appropriation of partnership property which did not belong to the estate was an act in excess of the authority of her trust as administratrix. She is, therefore, required to account for the property, both personally and in her representative capacity.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; PARKER, Justice pro tem.

124 Cal.App. 603

HALL v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.

Civ. 786.

District Court of Appeal, Fourth District, California.

June 30, 1932.

1. Witnesses ⇐6.

Court issuing subpœna can order resident witness to appear anywhere in county, though place of appearance is more than 50 miles from witness' residence (Code Civ. Proc. § 1989).

2. Witnesses ⇐21.

Failure of resident of another county to obey subpœna constitutes contempt only if place of residence is less than 50 miles from place where subpœna ordered witness' attendance (Code Civ. Proc. § 1989).

3. Contempt ⇐40.

Proceedings in contempt are of criminal nature.

4. Contempt ⇐54(4).

No intendments or presumptions are to be indulged in aid of complaint in contempt proceeding.

5. Witnesses ⇐21.

Application and affidavit on which order to show cause why witness disobeying subpœna should not be held in contempt *held* fatally defective in not alleging witness' place of residence (Code Civ. Proc. § 1989).

6. Depositions ⇐71.

That evidence at contempt hearing tended to prove residence of witness disobeying subpœna in county *held* not to cure defect in application and affidavit not alleging witness' residence (Code Civ. Proc. § 1989).

Proceedings by Lillian Earle Hall for a writ of review to annul the judgment of the Superior Court of Riverside County, Hon. George R. Freeman, Judge, adjudging petitioner guilty of contempt.

Proceedings and judgment annulled.

Superseding original opinion in 12 P.(2d) 98.

A. Brigham Rose, of Los Angeles, for petitioner.

Neil S. McCarthy, Earl L. Banta, Howard P. Hall, and Saul Ruskin, all of Los Angeles, for respondents.

SCOVEL, Justice pro tem.

Prior to the institution of the proceeding herein sought to be reviewed, Thomas H. Lipps et al. filed an action in the Superior Court of Los Angeles county against Lillian Earle Hall, petitioner herein, and others. Thereafter Thomas H. Lipps, desiring to take the deposition of petitioner, filed in the superior court of Riverside county a verified application for subpœna to take deposition, reciting the pendency of the foregoing action, alleging that Lillian Earle Hall "now resides" in Palm Springs in Riverside county, and requesting that a subpœna issue commanding her to appear before L. B. Caldwell, a notary public in the city of Riverside, on January 18, 1932. The application was supported by an affidavit reciting "that Lillian Earle Hall has appeared in said action and said action is at issue as to her." Thereupon a subpœna was issued by the Honorable George R. Freeman, judge of the Superior Court of Riverside county, ordering that Lillian Earle Hall appear before such notary in the city of Riverside in Riverside county on January 18, 1932. The subpœna was duly served on petitioner at Palm Springs and proper notice of the taking of the deposition served upon her attorneys. Lillian Earle Hall failed to appear before

the notary on January 18, 1932, for the taking of the deposition.

Thereafter Thomas H. Lipps filed in the Superior Court of Riverside county his application, supported by an affidavit, reciting the filing of the above-named documents, service of the subpœna upon Lillian Earle Hall and notice of the taking of the deposition upon her attorney, upon which application an affidavit and order to show cause was issued directing Lillian Earle Hall to appear before said court to show cause why she should not be held in contempt by reason of her disobedience to said subpœna.

In response to the order to show cause, Lillian Earle Hall duly appeared by her attorney and filed an affidavit reciting that Palm Springs is sixty-five miles from the city of Riverside; that she had failed to obey the subpœna upon advice from her attorney; and that the court had no jurisdiction to issue the same. It was further alleged in the affidavit that she was a registered voter and resident of Los Angeles county and that her place of residence was 2302 Budlong avenue in the city of Los Angeles.

At the hearing upon the order to show cause, evidence was introduced showing that Lillian Earle Hall was served with the subpœna at the Del Tahquitz Hotel in Palm Springs; that during the past three years she had had an apartment in the hotel, kept her clothes and belongings there, and at the time of the hearing was still living in the apartment; that she then, and for three years prior thereto, had owned and operated a beauty shop in the hotel.

The court thereupon ordered that Lillian Earle Hall be adjudged guilty of contempt and that she pay a fine of $100. Thereafter Lillian Earle Hall filed her petition in this court for a writ of review praying that the foregoing judgment of the Superior Court of Riverside county be annulled.

[1, 2] Petitioner contends that the application and affidavit upon which the order to show cause was issued are fatally defective, in that neither sets forth the place of residence of Lillian Earle Hall at the time the subpœna was served upon her, or at any other time. We are of the opinion that the contention must be sustained. Section 1989 of the Code of Civil Procedure provides that "a witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial." It thus appears that a limitation upon the territorial force and effect of a subpœna issued from a court of record is made where it is sought to compel a witness to attend outside of the county wherein he resides. If, however, the witness is a resident of the county within which his attendance is sought, he may be compelled to attend anywhere within the county. The subpœna issued herein ordered Lillian Earle Hall to appear before a notary in the city of Riverside in Riverside county. If she were a resident of Riverside county, any failure on her part to obey the subpœna would constitute a contempt. If, however, she were a resident of a different county, failure to obey the subpœna would only constitute a contempt if her place of residence in such other county were less than fifty miles from the city of Riverside, where the subpœna ordered her attendance.

[3-6] It will be noted that the application and affidavit upon which the order to show cause was issued, and pursuant to which the judgment of contempt was based, wholly failed to allege any place of residence of Lillian Earle Hall. "Proceedings in contempt are of a criminal nature, and no intendments or presumptions are to be indulged in in aid of the sufficiency of a complaint." Frowley v. Superior Court, 158 Cal. 220, at page 224, 110 P. 817, 818. In the absence of any statement showing that she was either a resident of Riverside county, or that, if she were a resident of another county, the distance from her place of residence to the city of Riverside did not exceed fifty miles, it must be concluded that the application and affidavit did not state facts showing a contempt; nor did the fact that at the hearing upon the order to show cause evidence was produced tending to prove that her residence was actually in Riverside county cure the defect.

It was stated in Hutton v. Superior Court, 147 Cal. 156, 81 P. 409, 410, that: "It is well settled that, where the contempt is committed without the presence of the court, the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt, and, if it does not, the court is wanting in jurisdiction, and the order of contempt is void and will be annulled on certiorari. Overend v. Superior Court, 131 Cal. 280, 286, 63 P. 372; Rogers v. Superior Court, 145 Cal. 88, 78 P. 344. In such a case, it is immaterial what may be shown to the court upon the hearing, or specified and found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void ab initio. The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint, and, unless they, upon their face charge facts constituting a contempt, the court is without jurisdiction to proceed." See, also, Frowley v. Superior Court, supra.

Since the proceedings and judgment of contempt are void for the reason herein stated, the other points raised by petitioner need not be considered.

The proceedings and judgment of contempt against petitioner are annulled.

We concur: BARNARD, P. J.; JENNINGS, J.

124 Cal.App. 677

PEOPLE v. BUCK.

Cr. 1212.

District Court of Appeal, Third District, California.

July 11, 1932.

Criminal law ⇐1182.

Judgment of conviction of manslaughter was affirmed where no appearance was made for appellant at time case was called for hearing (Pen. Code, § 1253).

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Canby Buck was convicted of manslaughter, and he appeals.

Affirmed.

Tebbe & Tebbe and William V. Cowan, all of Yreka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Siskiyou county of a felony, to wit, manslaughter.

The transcript on appeal was filed in this court May 19, 1932. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 11, 1932. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

124 Cal.App. 497

AIMO v. MITCHELL.

Civ. 4524.

District Court of Appeal, Third District, California.

June 25, 1932.

Rehearing Denied July 25, 1932. Hearing Denied by Supreme Court Aug. 22, 1932.

1. Bills and notes ⇐383.

Statute providing that negotiable instrument may be discharged by any act which will discharge simple contract for payment of money does not apply to holder taking paper in due course without knowledge of defects (Civ. Code, § 3200, subd. 4).

2. Bills and notes ⇐451(1).

Defendant in action on checks specifically stating purpose thereof, *held* not limited to defenses of payment, parties' lack of capacity, want of consideration, etc.; any facts defeating plaintiff's recovery of money constituting valid defense (Civ. Code, §§ 1783, 3200, subd. 4).

3. Sales ⇐340.

Statute providing that detriment, caused by breach of buyer's agreement to accept and pay for personalty, title to which is vested in him, is deemed contract price, applies only where seller has not repossessed property or holds it for buyer's benefit and notifies buyer of intended resale (Civ. Code, § 3310).

4. Sales ⇐384(7).

Seller, repossessing and reselling property after buyer's default, may sue buyer only for difference between contract price and amount received on resale.

5. Sales ⇐342.

Seller feeding hay, for which check sued on was given, to cattle, could not recover purchase price.

6. Bills and notes ⇐351.

Generally, maker of note, sued on by indorsee after maturity, may prove anything in defense that denies its validity or bars action thereon, such as fraud, mistake, want of consideration, etc.

7. Sales ⇐340.

Payee of checks for price of cattle, resold by payee after refusal of payment by deceased maker's executrix, *held* not entitled to recover purchase price, but only damages suffered (Civ. Code, § 3310).

8. Appeal and error ⇐878(1).

Judgment for defendant on cross-complaint should be affirmed, in absence of appeal therefrom.

9. Executors and administrators ⇐434(7).

Judgment for defendant on counterclaim for sum received by plaintiff from sale of hogs belonging to estate of defendant's testator in action on latter's checks for price of cattle and hay cannot be considered as offset against plaintiff's claims against estate.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by Nino Aimo against Cynthia Mitchell, as executrix of the estate of James H. Mitchell, deceased. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified in part, and reversed in part.

See, also, 8 P.(2d) 501.

William M. Stafford, of San Francisco, for appellant.

H. W. McGowan, of Willows, for respondent.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of this court.

The plaintiff had judgment against the defendant upon two checks executed and delivered to the plaintiff by James H. Mitchell, now deceased. From this judgment the defendant appeals.

The record shows that on or about the 27th day of January, 1930, James H. Mitchell, signing his name as "J. H. Mitchell," made, executed, and delivered to the plaintiff two checks in the words and figures following, to-wit:

"Willows, Cal., Jan. 27th, 1930
"Bank of Willows 90–476
"Pay to Nino Aimo or order $566.40/100 Five Hundred Sixty six and 40/100 dollars, for 35.40 tons hay at 16.00 per ton.
"J. H. Mitchell"

"Willows, Cal., Jan. 27, 1930
"Bank of Willows 90–476
"Pay to Nino Aimo or order $2000.00/xx Two Thousand ——— Dollars, first payment on 53 head milch cows or heifers at $100 each to be selected.
"J. H. Mitchell."

The record further shows that James H. Mitchell died testate on or about the 30th day of January, 1930, and that the two checks herein referred to were not presented by the plaintiff to the Bank of Willows for payment, prior to the death of James H. Mitchell. After the appointment of the defendant as executrix of the estate of said deceased the checks referred to herein were presented to her for allowance and payment, and allowance and payment were refused. Within the time allowed thereafter, this action was begun.

The answer of the defendant denied the nonpayment of the respective checks, denied the allegations in respect thereto, and after setting forth the death of James H. Mitchell on the 30th day of January, 1930, and alleging the pendency of negotiations relative to the purchase of the cattle mentioned in one of the checks, set forth the following facts as a defense thereto:

"That said defendant avers that after the death of said James H. Mitchell, as aforesaid, said plaintiff took possession of said cattle, and the whole thereof, and during the months of July and October, 1930, said plaintiff sold about twenty-seven (27) head of said dairy cows and received therefor the sum of One Hundred Ten ($110.00) Dollars per head, or the sum of Twenty-Nine Hundred Seventy ($2,970.00) Dollars. That said sum of Twenty-Nine Hundred Seventy ($2,970.) Dollars so received by said plaintiff for said twenty-seven head of cows was greater than, and in excess of the amount which said plaintiff agreed to accept and was to receive from said James H. Mitchell, deceased, for said twenty-seven (27) head of cows.

"That said defendant avers that after the death of said James H. Mitchell, as aforesaid, and on or about the 8th day of October, 1930, said plaintiff sold the remainder of said dairy cows, to-wit: Twenty-six (26) head, to one Thad Wait, for a sum, which said defendant is informed and believes, and so avers the fact to be, was in excess of the sum said plaintiff agreed to accept and was to receive from said James H. Mitchell, deceased, for said twenty-six head of cows.

"That said defendant avers that said plaintiff, in selling said cattle, as aforesaid, did so as the owner thereof, and that he made, executed and delivered to the respective purchaser, a bill of sale therefor, and that the price which said plaintiff received for all of said cattle was greater than and in excess of the amount which he agreed to accept and was to be paid therefor by said James H. Mitchell, deceased. That by reason of the foregoing, said plaintiff has sustained no damage, and that there is not any sum due, owing and unpaid to said plaintiff on account of said claim set forth in said complaint on file herein."

As a further defense, and by way of cross-complaint, the defendant set up that, at the time the plaintiff sold the twenty-six head of cows mentioned in the answer, the plaintiff sold twenty-four head of hogs belonging to the estate of James H. Mitchell, deceased, and received therefor the sum of $480, for which sum judgment was prayed against the plaintiff. The answer pleads the facts which we have referred to herein by way of estoppel to the plaintiff's cause of action. The cause was submitted to the court upon an agreed statement of facts, as follows:

"It is hereby stipulated by and between H. W. McGowan, Esq., as attorney for plaintiff above named and Wm. M. Stafford, Esq., as attorney for defendant above named, that the facts hereinafter in this stipulation set forth are true and correct and may be accepted and regarded as admitted facts upon the trial of the above entitled action. 1. That on the 24th day of January, 1930, said plaintiff above named and J. H. Mitchell made and entered into a contract wherein and whereby said plaintiff agreed to sell and said J. H. Mitchell agreed to purchase certain personal property, to-wit: Fifty-three (53) head of dairy cows, and that on said 24th day of January, 1930, a bill of sale of said cattle above mentioned was made and executed by said plaintiff above named to said J. H. Mitchell, deceased. That a true and correct copy of said bill of sale is hereto annexed and marked 'Exhibit A', and made a part hereof.

"2. That on the 27th day of January, 1930, said James H. Mitchell, deceased, made, executed and delivered to said plaintiff a check which is in words and figures as follows:

" 'Willows, Cal. Jan. 27, 1930.
" 'Bank of Willows 90—476
" 'Pay to Nino Aimo or order $2000./xx Two Thousand ———— Dollars, First payment on 53 head milch cows or heifers at $100 each, to be selected.
" 'J. H. Mitchell.'

"3. That thereafter and on the 30th day of January, 1930, said James H. Mitchell, also known as J. H. Mitchell, died testate in the County of Glenn, State of California, and that on the 28th day of February, 1930, said defendant was by an order of the above entitled court made and given, appointed the executrix of the estate of said decedent, and that said defendant ever since said day last above mentioned has been and now is, the duly appointed, qualified and acting executrix of the estate of said decedent.

"4. That said defendant as the executrix of the estate of said James H. Mitchell, deceased, caused to be published as required by the provisions of section 1490 of the Code of Civil Procedure of the State of California, a notice to creditors of the estate of said decedent. That the time for the presentation of claims against the estate of said decedent, as required by said notice to creditors, expired on the 1st day of September, 1930.

"5. That thereafter and within the time required by the notice to creditors published in the estate of said decedent, said plaintiff filed in the above entitled court in the records of said estate, his verified claim in the sum of two thousand ($2,000.00) dollars, based upon said check. That thereafter and on November 1, 1930, said claim was rejected in whole by the defendant above named as executrix of the estate of said decedent.

"6 That after the death of said J. H. Mitchell, as aforesaid, said plaintiff took possession of said cattle described in said bill of sale hereto annexed and marked 'Exhibit A', and that during the month of July, 1930, said plaintiff sold twenty-seven (27) head thereof for the sum of One Hundred Ten ($110.00) Dollars per head, or the sum of Two Thousand Nine Hundred Seventy ($2,970.00) Dollars. That thereafter and on or about the 8th day of October, 1930, said plaintiff sold the remainder of said cattle to one Thad Wait. That when said plaintiff resold said cattle in the months of July and October, 1930, as aforesaid, he did so as the sole and exclusive owner thereof, and made, executed and delivered a bill of sale therefor to the purchasers thereof.

"7. That at the time of the death of said James H. Mitchell, as aforesaid, he was the owner of, and entitled to the possession of twenty-four (24) head of hogs, together with the increase thereof, which were at said time situated on the ranch of said plaintiff at Stonyford, Glenn County, California. That said hogs were of the value of four hundred eighty ($480.00) dollars, and were so appraised by the Inheritance Tax Appraiser of the estate of said decedent.

"8. That on the 8th day of October, 1930, when said plaintiff sold said dairy cows as above stipulated, he also, and at the same time sold said twenty-four (24) head of hogs, together with the increase thereof, to said Thad Wait, and that at said time said hogs were the property of, and belonged to the estate of said James H. Mitchell, deceased. That said plaintiff had never been authorized or empowered to sell said hogs, by said defendant as executrix of the estate of said decedent, or by anyone acting for and on her behalf. That said plaintiff has never made or rendered any account to said defendant as executrix of the estate of said decedent, of the proceeds of said sale, nor has he paid to said defendant, as such executrix, the money realized from the sale of said hogs.

"9. That on or about the 27th day of January, 1930, said James H. Mitchell, deceased, purchased thirty-four (34) tons of hay from said plaintiff, and which hay was at said time on the ranch of said plaintiff at Stonyford, California.

"10. That on said 27th day of January, 1930, said James H. Mitchell, deceased, made, executed and delivered to said plaintiff a check, which is in the words and figures as follows.

" 'Willows, Cal. Jan. 27th, 1930.
" 'Bank of Willows 90–476
" 'Pay to Nino Aimo, or order, 566 40/100 Five hundred sixty-six and 40/100 dollars for 35.40 tons hay at 16.00 pr. ton.
" 'J. H. Mitchell.'

"11. That thereafter, and within the time required by the notice to creditors published in the estate of said decedent, said plaintiff filed in the above entitled court in the records of said estate, his verified claim in the sum of five hundred sixty-six and 40/100 ($566.40) dollars, based upon said check. That thereafter, and on November 1, 1930, said claim was rejected in whole by the defendant above named, as executrix of the estate of said decedent.

"12. That said thirty-four (34) tons of hay were never removed from said ranch of said plaintiff at Stonyford, California, but remained thereon and were fed and given to said fifty-three head of cattle, hereinabove referred to, and which said plaintiff sold as hereinabove stipulated and agreed, as well as other cattle and livestock owned by plaintiff on said ranch.

"Dated, February, 1931.
"H. W. McGowan,
"Attorney for Plaintiff,
"Wm. M. Stafford,
"Attorney for Defendant."

In addition to the foregoing it was agreed that the checks had never been paid.

The question presented to this court for determination is whether the circumstances detailed in the agreed statement of facts constituted a discharge of the obligation evidenced by the two checks. Each check contained a statement of the purposes for which it was drawn and a reference to its being a part of the purchase price of the property involved in the negotiations between the plaintiff and James H. Mitchell.

On the part of the appellant it is contended that, under the circumstances, no action lies for the purchase price of the property referred to, and that the only cause of action would be for the difference between what the plaintiff realized on the subsequent sale, and the price agreed to be paid by James H. Mitchell. As to the hay, there was no subsequent sale, but the entire quantity thereof was consumed by the plaintiff in feeding it to the cattle involved in the transaction, and also to other cattle owned by the plaintiff.

[1, 2] On the part of the plaintiff it is contended that the checks were negotiable instruments, and the fact that the plaintiff had taken possession of the property involved and resold the same, was wholly immaterial; that it was an action for the purchase price under section 3310 of the Civil Code as it then read (which is now section 1783, Civ. Code); and that the only defense possible for the defendant would be payment, lack of capacity of the parties, lack of consideration, failure of consideration, inadequacy of consideration, illegality of consideration, fraud, or mistake. In making this contention respondent overlooks subdivision 4 of section 3200 of the Civil Code, specifying how a negotiable instrument may be discharged. After specifying that it may be discharged in three different ways, subdivision 4 reads: "By any other act which will discharge a simple contract for the payment of money." The negotiable instrument law, as found in 8 C. J. 566, relative to discharges, reads as follows: "First: By payment in due course, etc.; Second: By payment in due course by the party accommodated, etc.; Third: By the intentional cancellation thereof by the holder; Fourth: By any other act which will discharge a simple contract for the payment of money." On page 611 of the same volume we find the following, specifying how negotiable instruments may be discharged, other than by the payment of money, to wit: "Payment is not necessary to discharge a bill or a note, either as to a party secondarily liable or as to a party primarily liable. For instance, a bill or a note may be discharged by the act of the parties by novation, by accord and satisfaction, by compromise and settlement, by release, including a release of a joint-maker, by a discharge in bankruptcy, or insolvency, or in many other ways." Again, on the same page, we find the following: "Parties primarily liable on a bill or a note, such as the makers and acceptors, are discharged, and the instrument is extinguished in general by any act which will discharge any other simple contract for the payment of money, such as payment, release, or the like." The discharge provided for by any act which will discharge a simple contract for the payment of money has been held to apply only as between the maker and the original payee, or an indorsee after maturity. It does not apply to a holder who takes the paper in due course, and without knowledge, etc. To the same effect is the text found in 19 California Jurisprudence, p. 922.

It is thus apparent that under the provisions of section 3200, Civil Code, and the negotiable instruments law, the checks involved are on the same basis as though they were simple contracts for the sale and purchase of cattle and hay, as upon the face of each instrument specifically appears the purpose for which it is given, and the conclusion is unescapable that, if it were a simple contract for the payment of money, any facts and circumstances which show that the plaintiff is not entitled to the recovery of the money would constitute a valid defense.

Here, the record shows that the plaintiff repossessed himself of all of the cattle, and sold the same to other parties. A part of the cattle was sold for an advance over the price agreed to be paid by James H. Mitchell, deceased. All of the remainder of the cattle were to be sold, but for what price the record does not disclose. If any presumption could be indulged in in relation thereto, it would be that they were sold for the full price agreed to be paid therefor by the deceased, as there is no claim for damages on account of any depreciation in value.

[3, 4] Contending that the title had passed both as to the cattle and as to the hay, it is insisted by the respondent that this action is governed by section 3310, Civil Code, as it then read, which is as follows: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price." This section of the Code, however, applies only where the seller has not repossessed himself of the property which constitutes the basis of the transaction, or holds the property for the benefit of the buyer and notifies him of the intended sale. Where the property is repossessed by the seller, and by him subsequently sold, an action lies only for the difference between the amount received upon the resale and the amount agreed to be paid by the first buyer. The construction of this section, as we have stated, is very clearly set forth in the case of Phillips v. Stark, 186 Cal. 369, on page 374, 199 P. 509, 512, where we find the following: "Before dismissing the cause, however, there are two things which perhaps should be added. The first is in regard to the measure of the damages to which the plaintiff is entitled.

The measure provided by section 3310, Civil Code, in cases where title has passed to the vendee, is the full purchase price. But this measure, of course, is based upon the assumption that because the title has passed, the property has gone from the vendor, and he has nothing but his claim against the vendee without any offsets. But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that by repudiating the contract and thrusting the property back on the plaintiff the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and the market value of the property (sections 3311, 3353, Civ. Code), or upon that suggested by Bennett v. Potter [16 Cal. App. 183, 116 P. 681], that the vendee is responsible for the full purchase price under section 3310, Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property. Section 3337, Civ. Code."

In Levy v. Kahn, 59 Cal. App. 119, 210 P. 40, we find the following where the court was considering section 3310, Civil Code: "It was also held that section 3310, Civil Code, in fixing the measure of damages as the full contract price where title had vested in the vendee, did so on the assumption that because the title had passed, the vendor had nothing but his claim against the vendee without any offsets. 'But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property,'" etc.

To the same effect is the case of Hamberger-Polhemus Co. v. Lewin, 101 Cal. App. 704, 282 P. 425. See, also, Gopcevic v. California Packing Corp., 64 Cal. App. 132, 220 P. 1078.

[5] It likewise seems self-evident to us that the plaintiff, after feeding the hay for which one of the checks was given, is not entitled to recover the purchase price thereof.

[6] In view of these cases and the agreed statement of facts, we think the following quotation which we take from the case of Hunt v. Glassell, 47 Cal. App. 774, 191 P. 373, 375, applicable: "Under such conditions as these, the general rule is that—'The maker of a note sued on by an indorsee after maturity may prove anything in defense which goes to destroy or satisfy the note—anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes an admission or affirmance of the plaintiff's right of action and his title to the money he seeks to recover, but which seeks to defeat the recovery by establishing liability on his part. Within this class of defenses are fraud, mistake, want or failure of consideration, release, or anything else which goes to show that he ought never be compelled to pay the note to the person to whom it was originally given, or to any person who had held it after maturity, and before it came into the hands of the plaintiff.'"

[7-9] The facts set forth in the agreed statement of facts and under the authorities which we have cited compels the conclusion that the plaintiff is not shown to be entitled to recover for the purchase price under the provisions of section 3310, Civil Code, but is entitled to recover, if anything, only such damages as he may have suffered, which damages, not being shown, necessarily leads to a reversal of the judgment so far as it is based upon the two checks. There being no appeal from the judgment awarding the respondent the sum of $480 as the sum of money received by the plaintiff for twenty-four hogs belonging to the estate of the deceased, it follows that it should be affirmed, with the modification that it cannot be considered as an offset against any claim which the plaintiff may have against the estate of said deceased. To the extent that the judgment so provides, it is reversed, and in so far as the judgment awards the plaintiff recovery upon the two checks mentioned herein, it is also reversed.

We concur: PARKER, Justice pro tem.; R. L. THOMPSON, J.

124 Cal.App. 508

MITCHELL v. AIMO et al.

Civ. 4617.

District Court of Appeal, Third District, California.

June 25, 1932.

1. Executors and administrators ⇐156.

To place purchaser or executrix of his estate in default and establish vendors' claim to earnest money, deposited in escrow for payment to vendors on conveyance of land to purchaser, vendors must show tender of sufficient deed to purchaser or executrix.

2. Vendor and purchaser ⇐102.

Owners selling land they had agreed to sell to another for same price effected rescission of contract.

3. Vendor and purchaser ⇐308(1).

Vendors, failing to execute and deliver sufficient deed to purchaser, as required by

contract before payment of price, and selling same land to another for same price, *held* not entitled to earnest money deposited in escrow.

4. Executors and administrators ⇐453(2).

Judgment that executrix of deceased purchaser of land recover earnest money deposited in escrow *held* erroneous; proper judgment being that vendors have no interest therein.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by Cynthia Mitchell, as executrix of the estate of James H. Mitchell, deceased, against Nino Aimo, Edith Aimo, and another. Judgment for plaintiff, and defendants Aimo appeal.

Affirmed.

See, also, 8 P.(2d) 501.

H. W. McGowan and Duard F. Geis, both of Willows, for appellants.

William M. Stafford, of San Francisco, for respondent.

Mr. Acting Presiding Justice PLUMMER delivered the opinion of this court.

The plaintiff began this action to recover of and from the Glenn County Title Company the sum of $1,000 theretofore deposited with said title company by James H. Mitchell pursuant to a certain agreement or contract for the sale of real estate, and also for a judgment to the effect that the defendants Aimo have no title or claim to said $1,000.

The record shows that on or about the 7th day of October, 1929, James H. Mitchell, now deceased, entered into a contract for the purchase of a certain tract of land then owned by the defendants Aimo. This contract, so far as pertinent here, contained the following provisions:

"Purchase Price: It is mutually agreed that the purchase price of the above described real property, and the tenements, hereditaments and appurtenances thereunto belonging, including the water right hereinafter mentioned is the sum of Thirty-five Thousand and 00/100 ($35,000.00) Dollars, which said sum shall be paid as follows, to-wit: Five Thousand and 00/100 ($5000.00) Dollars in cash upon the execution and delivery by the vendors, of a good and sufficient deed of grant, bargain and sale: Thirty Thousand and 00/100 ($30,000.00) Dollars by the assumption of an existing encumbrance against said land now held by Bruce H. Sutliff, which the purchaser assumes and agrees to pay."

"Ernest Money: As an evidence of good faith, the purchaser has, at the time of the signing of this agreement, deposited with Glenn County Title Company, in escrow, the sum of One Thousand and 00/100 ($1000.00) Dollars, to be held and retained in escrow as an evidence of good faith that the purchaser will pay to the vendors the said sum of Five Thousand and 00/100 ($5000.00) Dollars as soon as the vendors are able to make a deed conveying to the purchaser the said lands with an adjudicated and established water right thereto, of at least eleven hundred (1100) acre feet. In the event said purchaser fails, neglects or refuses to pay to the vendors said sum of Five Thousand and 00/100 ($5000.00) Dollars, when, if, and as such payment become due hereunder, then and in that event the One Thousand and 00/100 ($1000.00) Dollars so escrowed shall be forfeited to the vendors, and shall be delivered to, and retained by them as stipulated and liquidated damages, etc."

The cause was tried upon an agreed statement of facts, six of which we set forth in full herein, as follows:

"1. That on the 7th day of October, 1929, J. H. Mitchell and Nino Aimo and Edith Aimo made and entered into a contract, wherein and whereby it was agreed that said Nino Aimo and Edith Aimo should sell, and said J. H. Mitchell should purchase a certain piece and parcel of land situate partly in Glenn County and partly in Colusa County, State of California, for the total price of Thirty-five Thousand ($35,000.00) Dollars, payable as follows, to-wit: Five Thousand ($5,000.00) Dollars in cash upon the execution and delivery, by the vendors, of a good and sufficient deed of grant, bargain and sale; Thirty Thousand ($30,000.00) Dollars by the assumption of an existing encumbrance against said land now held by Bruce H. Sutliff, which the purchaser assumes and agrees to pay. That a copy of said contract is hereunto annexed marked 'Exhibit A' and made a part hereof, and to which reference is hereby had for all purposes.

"2. Thereafter and pursuant to the terms of the contract above referred to, said J. H. Mitchell deposited in escrow with the Glenn County Title Company at its office in Willows, Glenn County, California, the sum of One Thousand ($1,000.00) Dollars cash. That said sum ever since has been and now is on deposit with, and held by said Glenn County Title Company.

"3. That said James H. Mitchell, also known as J. H. Mitchell, died testate in the County of Glenn, State of California, on the 30th day of January, 1930. That thereafter and on the 28th day of February, 1930, said plaintiff was by an order of the above entitled court duly made and given, appointed the Executrix of said decedent and that said plaintiff ever since said day last above mentioned has been and now is, the duly appointed, qualified and acting Executrix of the estate of said decedent.

"4. That at the time of the death of said James H. Mitchell, as aforesaid, the negotiations for the sale of said real property described in said contract hereto attached marked 'Exhibit A' and made a part hereof, had not been completed and/or consummated, and that the provisions and terms of said contract had not been fully performed by either party thereto, and that no deeds, assignments, transfers or conveyances had been made, executed and/or delivered to said decedent, or placed and deposited in escrow for his benefit by said defendants Nino Aimo and Edith Aimo, or either of them.

"5. That the terms and provisions of said contract hereinabove referred to have not been performed, and/or completed since the death of said decedent as aforesaid, either by said plaintiff as the Executrix of the estate of said decedent, or by said defendants Nino Aimo and Edith Aimo, or either of them, and that no deed, conveyance and/or other instrument in writing, conveying the title to said property has since the death of said decedent, been made, executed and/or delivered to said plaintiff as executrix of the estate of said decedent by said Nino Aimo and Edith Aimo, or either of them, or deposited in escrow therefore pursuant to and as required by the terms of said contract.

"6. That said Nino Aimo and Edith Aimo, on the 8th day of October, 1930, sold, transferred and conveyed said property described in said contract above referred to, and the whole thereof, to one Thad Wait for the sum of Thirty-five Thousand ($35,000.00) Dollars."

In addition to which the statement of facts shows that the executrix of the estate of James H. Mitchell, deceased, published notice to creditors to present their claims as required by law, and that the time for presenting claims expired on the 1st day of September, 1930, and that no claim was ever presented by the defendants Aimo, or either of them, to the executrix of said estate, for said sum of $1,000. It was further agreed that the Glenn County Title Company, a corporation, asserted no claim or interest in or to the said sum of $1,000, but was merely holding the same subject to the order of the court.

The contention of the appellants is to the effect that they are the owners of the $1,000, and that no claim for the same was required to be presented to the executrix of the estate of said deceased.

It is further set forth by the appellants that the $1,000 was a trust fund payable to them. In support of this contention appellants have cited, among others, the following authorities: Sprague v. Walton, 145 Cal. 228, 78 P. 645; Stanwood v. Sage, 22 Cal. 516; Kerns v. McKean, 65 Cal. 411, 4 P. 404; McGrath v. Carroll, 110 Cal. 79, 42 P. 466; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728. None of these cases and the others cited by appellants are pertinent to any questions involved in this cause. In Sprague v. Walton, the only question involved was whether the husband had made a gift to his wife. In Stanwood v. Sage, the issue was as to whether certain goods had been sold in a particular manner. Kerns v. McKean was an action to recover possession of real property, and involved no issue of trust.

Without further elaborating as to the additional cases cited by counsel, which we have mentioned and other cases which we have not named herein, it is sufficient to say that none of them involved issues similar to those presented here, or in anywise tend to establish that the $1,000 deposited with the Glenn County Title Company, a corporation, was impressed with a trust, or that the title thereto ever in any manner vested in the appellants. Nor do the circumstances disclosed in this case bring the transaction within any of the provisions of the Civil Code relative to the establishment of a trust.

[1] By the agreed statement of facts it appears that the appellants never tendered a deed of conveyance to either James H. Mitchell, now deceased, or to Cynthia Mitchell, as executrix of the estate of James H. Mitchell, deceased. We do not need to cite authorities to the effect that, in order to place James H. Mitchell in default, or to place the executrix of the estate of James H. Mitchell in default and establish any claim on the part of the appellants to the $1,000, it was necessary for the appellants to first show performance on their part of the contract by tendering a good and sufficient deed to James H. Mitchell, or, after his death, to Cynthia Mitchell as executrix of the estate of said James H. Mitchell, deceased.

[2] The agreed statement of facts further shows that the appellants, on the 8th day of October, 1930, sold the identical property that they had agreed to sell to James H. Mitchell, for exactly the same sum of money named as the purchase price to be paid by James H. Mitchell to the appellants therefor. By selling the property for the same price, two facts are established. First, that the appellants placed themselves in a position where they could not perform the contract on their part, and therefore affected a rescission. Second, that having sold the property for exactly the same price, they had suffered no damage.

The contract entered into, as hereinbefore stated, further provided that the $5,000 mentioned therein was to be paid upon execution and delivery by the vendors of a good and sufficient deed of grant, bargain, and sale, together with an adjudicated and established water right thereto of at least 1,100 acre-feet. No showing of any compliance

with this provision of the contract on the part of the appellants appears in the record, and as the agreed statement of facts shows that the appellants have parted with their title to the premises, no compliance with the contract on their part can now be had.

[3, 4] We deem it unnecessary to set forth herein any statement concerning the argument or authorities cited by the respondent, as what we have said, together with the agreed statement of facts, shows conclusively that the appellants are without any right or title to the $1,000, and that the judgment awarding the same to the plaintiff should be affirmed. There is one error in the judgment, however, which should be corrected. The concluding portion of the second paragraph of the judgment reads: "And that said plaintiff, as such executrix, have and recover said sum of $1,000.00 from said defendants Nino Aimo and Edith Aimo, and each of them." The record shows that the possession of said money is held by the Glenn County Title Company, against whom judgment for recovery is otherwise provided for, and therefore that the portion of the judgment which we have copied should read, and it is ordered that the above-quoted language be stricken out, and the following substituted therefor: "And that neither of said defendants, Nino Aimo nor Edith Aimo, have any right, title, interest or ownership in and to said $1,000.00."

No testimony was offered in support of the appellants' counterclaim, nor is any tenable reason assigned why consideration thereof should be given upon this appeal.

The judgment is affirmed. Costs awarded respondents.

We concur: PARKER, Justice pro tem.; R. L. THOMPSON, J.

124 Cal.App. 673

PEOPLE v. KELLER.

Cr. 2202.

District Court of Appeal, Second District, Division 1, California.

July 11, 1932.

1. Criminal law ⇐508(1).

Fact of corroboration or lack thereof has no connection with question of admissibility of accomplice's testimony.

2. Criminal law ⇐372(12).

In prosecution for forgery and conspiracy to commit forgery, testimony relating to earlier transactions *held* admissible to establish plan or design pursuant to which crimes charged were committed.

Testimony of such earlier transactions was admissible even though it also tended to prove commission of crimes other than those charged.

3. Criminal law ⇐780(2).

Failure to instruct that certain witnesses were accomplices *held* not error under evidence showing that they were feigned accomplices.

4. Criminal law ⇐1037(2).

Court having instructed on feigned accomplices, accused could not object to instruction on appeal, without request for further instructions thereon in trial court.

5. Conspiracy ⇐47.

Evidence being sufficient to establish conspiracy to commit forgery and that accused was party thereto, it was not necessary to produce evidence connecting accused directly with actual forgery.

6. Criminal law ⇐422(1).

Where evidence tends to prove existence of conspiracy, acts of any conspirator are admissible against coconspirators.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Al. S. Keller and another were convicted of forgery and of conspiracy to commit forgery, and named defendant appeals.

Affirmed.

Lester E. Hardy, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J.

Appellant, together with Fred L. De Liden and Robert Kalter, was charged by information in four counts, with crimes separately stated in the several counts. As appellant was acquitted on counts III and IV, they require no consideration here. Count I charged conspiracy to commit forgery in that the several defendants conspired together to commit the crime of forgery, and that pursuant thereto defendant De Liden did make, forge, and counterfeit a certain check and order in writing for the payment of money, and did then and there utter, publish, and pass the same, etc. Count II directly charged the defendants with the crime of forgery of the same check described in count I. The defendant De Liden pleaded guilty under count I, and the other counts were dismissed as to him. Both Keller and Kalter were convicted on counts I and II. Keller alone appeals from the judgments pronounced against him, as well as

from the order denying his motion for new trial. The further proceedings against Kalter, whatever they may have been, are not shown in the record here.

[1, 2] It is contended (Brief, p. 183) that the court erred to the prejudice of appellant in overruling his objections and admitting in evidence "the uncorroborated testimony of Fred L. De Liden to the fact that appellant cooperated with him in the commission of forgeries of other checks in February and March, 1931." The transaction covered by counts I and II, as shown by the date of the check, was August 18, 1931. The fact of corroboration, or lack thereof, has no connection with the question of admissibility of the testimony of the accomplice. One O'Dea testified concerning transactions and conversations with Keller in June, July, and August, 1931, but not concerning the checks of February and March, 1931. It is argued in behalf of appellant (Brief, p. 185) that "since the testimony of De Liden to Keller's connection with the latter crimes could not be strengthened by his own testimony to Keller's connection with the former crimes, and since O'Dea's testimony to Keller's connection with the latter crimes could not tend to connect Keller with the former crimes in order that his connection with the former crimes might tend to connect Keller with the latter crimes," there can be no foundation for permitting De Liden to testify to any connection of Keller with the former crimes. This argument clouds the issue by introducing a reference to the testimony of O'Dea, which is unrelated to the simple question of *admissibility* of evidence of earlier transactions tending to establish the existence of a plan, design, or system pursuant to which the crimes charged in this case were committed. That such evidence may be received, even though it also tends to prove the commission by defendant of some other crime, there is no doubt. It has been said that in cases of this kind, the evidence of such other offenses "must be closely related, both as to time and character." People v. Morani, 196 Cal. 154, 159, 236 P. 135, 137. Here the character of the earlier offenses is identical with those of the case at bar. The time is sufficiently near to overcome the objection of remoteness. The court did not err in admitting the evidence.

[3, 4] It is further contended by appellant (Brief, p. 121) that the court erred in failing to instruct the jury that the witnesses O'Dea and Christiansen were accomplices, although there was no request for such instruction; and that, at all events, the court should have submitted to the jury for its determination, the question as to whether or not these witnesses were accomplices. According to the testimony of these witnesses, it appears that the plan for perpetration of the forgery described in the information, and other forgeries, was first proposed by Keller to O'Dea. The plan proposed was, that O'Dea should procure the co-operation of a bank employee, to temporarily abstract from the bank files genuine checks, in order that the handwriting thereof should be examined and imitated by De Liden. O'Dea, in seeming compliance with this proposal, secured the desired checks from Christiansen, an employee of the Bank of America. The testimony of the witnesses O'Dea and Christiansen indicates that they were only feigned accomplices. Particularly it is worthy of note that promptly after the plan was proposed by Keller, O'Dea had an interview with a vice president of the bank, and that a number of O'Dea's telephone conversations with Keller were held (on O'Dea's end thereof), in an office of the Burns Detective Agency, a representative of that agency being present. It cannot rightly be said that as a matter of law the said witnesses were accomplices. The court instructed the jury on the law concerning feigned accomplices. If appellant desired any further instruction on the subject, he should have asked for it. Having failed to make any such request, he should not be given any advantage now by reason of the fact that the court did not give such additional instruction. People v. Matthew, 68 Cal. App. 95, 107, 228 P. 417.

We find no merit in the claims of appellant concerning other instructions under the heading "further errors in the instructions." Appellant's Brief, pp. 206 et seq.

[5, 6] The verdict was not contrary to the evidence. In relation to this point appellant contends (Brief, p. 193) that the evidence is insufficient to connect appellant with any act committed in furtherance of the common design, if any. This point seems to be fairly met and answered by the fact that there was evidence sufficient to prove the existence of the conspiracy to commit forgeries and to prove that appellant was a party to the conspiracy. In this condition of the case it was not necessary to produce evidence connecting appellant directly with the actual forgery of the check. Where the evidence produced at the trial reasonably tends to prove the existence of such conspiracy and the connection of appellant therewith, the acts of any one of the conspirators may properly be admitted as evidence against each member of the confederacy. People v. Eiseman, 78 Cal. App. 223, 244, 248 P. 716.

The judgments are affirmed. The order denying motion for new trial is affirmed.

We concur: HOUSER, J.; TAPPAAN, Justice pro tem.

124 Cal.App. 559

PEOPLE v. DELETORRE et al.

Civ. 889.

District Court of Appeal, Fourth District, California.

June 28, 1932.

1. Bail ⊂⊃59.

Stipulation in bail bond for summary judgment *held* not void for failure of consideration because law providing for refund to surety in reliance upon which bond was allegedly executed, was declared unconstitutional (Pen. Code, §§ 1278, 1287, and § 1306, as amended by St. 1929, p. 1872).

Stipulation was not void since consideration for a bail bond, as between the people and the surety thereon, is the release of defendant charged with crime, and such a release is a sufficient consideration for every part of the bond, the provision for summary judgment was not being inserted in bail bond solely because of St. 1929, p. 1872, but because it was required by Pen. Code, §§ 1278, 1287, and by St. 1929, p. 1872, and surety having complied with such statutes to secure release of defendant from custody, release was a sufficient consideration for the stipulation for a summary judgment, as well as for the general liability assumed.

2. Bail ⊂⊃55.

Unconstitutionality of law providing for refund to bail bond surety *held* not to void statutory bail bond (Pen. Code, §§ 1278, 1287, as amended by St. 1927, pp. 1387, 1388, and § 1306, as amended by St. 1927, p. 1385; St. 1929, p. 1872).

Unconstitutionality of St. 1929, p. 1872, amending Pen. Code, § 1306, providing for the return to the surety of the amount paid on a summary judgment at any time within one year, on certain named conditions, did not void the bond, since such statute was severable from the remaining provisions of Pen.Code, § 1306, as amended by St. 1927, p. 1385, and did not vitiate the whole of section 1306, and since the bond while statutory, was not created by, or dependent on section 1306, but was based upon sections 1278 and 1287, as amended by St.1927, pp. 1387, 1388, and other sections of the Penal Code authorizing and providing for the release of defendant on such a bond.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceedings by the People against Soledad Deletorre, Seaboard Surety Corporation of America, and another, for summary judgment in accordance with terms of a forfeited bail bond. From an order denying its motion to set aside summary judgment entered upon the bail bond, last-named defendant appeals.

Affirmed.

Arthur T. Stollmack and Samuel H. Weissberg, both of Los Angeles, for appellant.

Thomas Whelan, Dist. Atty., and E. I. Kendall, Deputy Dist. Atty., both of San Diego, for the People.

BARNARD, P. J.

This is an appeal from an order denying a motion to set aside a summary judgment entered upon a bail bond. The bond was executed by this appellant to secure the presence of a certain defendant when wanted for trial in the superior court of San Diego county. The bond contained the following paragraph:

"If the forfeiture of this bond be ordered by the court, judgment may be summarily made and entered forthwith against the said Seaboard Surety Corporation of America, a corporation, and the said defendant, if he be a party to the bond, for the amount of their respective undertakings herein, as provided by sections 1305 and 1306 of the Penal Code."

The defendant in question not appearing when the case came on for trial on September 2, 1930, the court, on motion, declared the bail bond forfeited. A motion was later filed by this appellant asking for an order setting aside the forfeiture, which motion was denied on January 5, 1931. On January 10, 1931, a summary judgment was entered, based upon the provisions of the bond and the terms of the statutes. On February 10, 1931, this appellant filed a motion to vacate and set aside this summary judgment, which motion, after a hearing, was denied on March 14, 1931. This appeal is from the order denying that motion.

It has been held that judgments of the nature of the one the appellant here seeks to set aside, being consent judgments, are not subject to appeal. People v. Hodges, 205 Cal. 476, 271 P. 897; People v. Pacific Ind. Co., 114 Cal. App. 563, 300 P. 46.

In People v. Aymar, 98 Cal. App. 1, 276 P. 595, and authorities therein cited, an exception to the above-mentioned rule is recognized in cases where the judgment is in fact not entered in accordance with the consent relied on, on the theory that in such a case a consent judgment is not involved. The appellant here claims to come within this exception. It is contended that the apparent consent to the entry of a summary judgment contained in the portion of the bond above quoted, was in fact no consent to such a judgment because it was made in reliance upon the amendment to section 1306 of the Penal Code, adopted in 1929 (St. 1929, p. 1872), providing for the return to the surety of the amount paid upon such a judgment at any time within one year

upon certain named conditions, and because this amendment to section 1306 has been declared unconstitutional. Pacific Ind. Co. v. Myers, 211 Cal. 635, 296 P. 1084, 1087. The appellant makes no attempt to show specific injury resulting from its reliance upon the amendment in question. It clearly appears that the defendant for whom this bail was furnished has never been produced, and that he can never be produced owing to the fact that he died in a foreign country, after judgment was entered. Reversal is asked solely upon the theory that the bond itself has been rendered void.

[1] Appellant's first contention is that, since it executed this bond in reliance upon the provisions of the amendment now held to be void, the stipulation for a summary judgment contained in the bond is void for failure of consideration. The consideration for a bail bond, as between the people and the surety thereon, is the release of the defendant charged with crime. People v. McReynolds, 102 Cal. 308, 36 P. 590; Los Angeles County v. Luscher, 58 Cal. App. 632, 209 P. 899. Such release is a sufficient consideration for every part of the bond. The provision for summary judgment was not inserted in such bonds as this because of the 1929 amendment to section 1306, but because the same was required by sections 1278, 1287, and by the 1929 amendment to section 1306. The appellant complied with those statutes in order to secure a release of the defendant from custody, and this release was a sufficient consideration for the stipulation referred to, as well as for the general liability assumed.

[2] The second and main contention of appellant is that, since a bail bond is a statutory bond, and since a bond founded upon an unconstitutional statute is void, this bond, having been made in conformity with section 1306, is void. This contention is based upon the claim that a part of this section having been declared unconstitutional, the whole thereof is unconstitutional, since its various portions are not severable, but all form "an interrelated scheme for handling the problem of bail."

It may first be observed that, while this is a statutory bond, it is not created by or dependent upon section 1306 of the Penal Code. It is based upon sections 1278 and 1287 and the other sections of that Code authorizing and providing for the release of a defendant upon such a bond. Section 1306 relates only to the enforcement of a forfeiture of such a bond, and the 1929 amendment thereto related only to additional relief for the judgment debtor under certain circumstances. The elimination of that amendment in no way removed the statutory authority for this bond. Nor does the fact that this amendment has been declared unconstitutional render all of section 1306 unconstitutional and void upon the principle that the respective portions thereof are not severable. That portion of section 1306 providing for the entry of a summary judgment after forfeiture of a bail bond, was adopted by an amendment in 1927 (St. 1927, p. 1385), at which time, sections 1278 and 1287, setting forth the requirements for such a bond, were correspondingly amended (St. 1927, pp. 1387, 1388). These sections referred to section 1306 as then amended, and specifically provided that such an undertaking should contain a new sentence which, in effect, is a stipulation for a consent judgment. People v. Page, 100 Cal. App. 252, 279 P. 1059. When section 1306 was amended in 1929, the provisions put into it in 1927 were not changed, and the provisions of sections 1278 and 1287 were not altered. This amendment made no change in any of the procedure provided for the giving of a bail bond, or for the enforcement thereof in case of forfeiture up to the time when judgment is entered. It applied only to possible procedure following such a judgment, and attempted to give an additional relief to the surety after judgment, upon certain conditions. In declaring these additional provisions unconstitutional in Pacific Indemnity Co. v. Myers, supra, the court said: "But the provisions of the amendment are clearly severable from the provisions of the section in force prior to the amendment and continued in force, for there is no indication in the statute or otherwise that the Legislature would not have left the section as enacted in 1927 undisturbed if its attempt to relieve some arbitrarily selected sureties from the rigors of a forfeiture had not been undertaken. We are not apprehensive, therefore, that bail bonds in pending proceedings will be jeopardized by the determination herein, as suggested by counsel for the petitioner."

The general rule as to severability of different portions of a statute in relation to their constitutionality is thus stated in 5 California Jurisprudence, at page 643: "It is a general rule supported by an unbroken line of decisions that a provision in or a part of an act may be unconstitutional and beyond the power of the legislature to enact, and still the whole act may not be void. The accepted doctrine in such case is that the constitutional portions of the statute may stand alone and remain in force if they can be separated from the portions which are void. The unconstitutional provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it, without such obnoxious provisions. However, if the unconstitutional provisions of a statute or ordinance are inseparable from the main body thereof, it follows that the whole statute or ordinance is void."

Applying this rule to the case before us, we think the provisions attempted to be added to

section 1306 by the amendments of 1929 are so plainly severable from the remaining provisions of that section, as the same was amended in 1927, that no lengthy analysis of the statutes and cases is required. In our opinion, the unconstitutional amendment of 1929 did not vitiate the whole of section 1306.

It has been held that just such an order as the one here appealed from is no more appealable than was the judgment which the order refused to set aside. People v. Pacific Indemnity Co., 114 Cal. App. 563, 300 P. 46. However, since no motion to dismiss was made in this case we have deemed it best to treat the appeal as if properly before us.

The order appealed from is affirmed.

We concur: JENNINGS, J.; SCOVEL, Justice pro tem.

124 Cal.App. 619

ZOLLARS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8478.

District Court of Appeal, First District, Division 2, California.

July 5, 1932.

Rehearing Denied Aug. 4, 1932. Hearing Denied by Supreme Court Sept. 2, 1932.

Master and servant ⇐419.

Expert testimony that varicose ulcer resulting from injury had "healed" sustained award denying further compensation for subsequent recurrences.

The evidence disclosed that if ulcer on employee's leg was started by injury sustained in course of his employment all effects thereof had long since passed away, and that original ulcer had healed, and that recurrence of ulcer at time of hearing was caused solely by varicose veins. Claimant's contention that even though undisputed evidence showed that ulcer was "healed" it was not "cured," in view of the fact that it subsequently broke out from time to time several times, could not be sustained, since in common parlance "healed" means "cured," and vice versa.

[Ed. Note.—For other definitions of "Cure," see Words and Phrases.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Ralph E. Zollars, claimant, for compensation for injuries sustained while claimant was in the employ of Red River Lumber Company. To review an order of the Industrial Accident Commission, claimant brings certiorari.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, J.

The petitioner commenced this proceeding to obtain a writ of review for the purpose of having annulled an award of the respondent commission. The record discloses that on the 15th day of July, 1928, the petitioner was employed by the Red River Lumber Company as a grader. While so employed he suffered an injury. A veneer panel fell and struck him on the right leg at a point slightly on the inside of, and a few inches above, the ankle. The bruise was about the size of a nickel. The injury was so slight that, although the skin was roughed up, nevertheless there was no bleeding. Later the petitioner went to the employer's doctor and the wound was dressed with antiseptics. At the time of the injury the petitioner was suffering from varicose veins on both legs. After the injury the petitioner continued his work until August 1, 1928, but at that time was ordered into the hospital for treatment. He was then suffering from a varicose ulcer at the point where he had been injured. The ulcer was treated until August 19, 1928, when it was sufficiently healed so he could return to work. On August 27th he again entered the hospital and was there until September 17th. He returned to work, and on October 18th he entered the hospital and was treated until January 7, 1929. At that time he was discharged "ulcer again healed." On February 8, 1929, the petitioner was again admitted to the hospital and was treated until March 9, 1929, when he was discharged "ulcer healed." On March 14th he was again admitted to the hospital and was treated until April 27th, when he was again discharged "ulcer healed." On leaving the hospital he went East and did not return to California until the early part of December, 1930. While East the ulcer again broke forth and he consulted Dr. A. S. Beatty at Preston, Iowa, and was treated by him. That was on August 11, 1930. The treatment continued until September 19, 1930, when his varicose veins were injected. The ulcer healed but soon broke down, and the petitioner was last treated by Dr. Beatty on November 16, 1930. When the petitioner returned to California, he was again admitted to Westwood Hospital and was treated until March 21, 1931, at which time the ulcer was healed and he was discharged from the hospital. Down to that date he had been paid indemnity for all lost time. Those payments aggregated $1,545.06.

Between the date of the accident and March 21, 1931, is approximately one hundred thirty-nine weeks. He was paid indemnity for eighty weeks, but for fifty-nine weeks he was at work and received no indemnity. When he was informed that the payment made on March 21, 1931, was the last payment, the petitioner commenced a proceeding before the respondent commission. After numerous hearings, on February 29, 1932, the respondent commission made and caused to be filed its award, which in part is as follows: "The disability caused by such injury did not extend beyond the period covered by said payments; and subsequent recurrent varicose ulcers were not caused or exacerbated by said injury." At this time the petitioner claims: "That the respondent Commission in its findings and award acted without and in excess of its jurisdiction and powers and that the uncontradicted evidence does not support the findings of fact by said Commission that 'the disability caused by such injury did not extend beyond the period covered by the said payments; and said recurrent varicose ulcers were not caused or exacerbated by said injury.'"

All of the experts agreed that the petitioner was suffering from a varicose ulcer and that the immediate cause of the initial breaking forth of the ulcer was the injury above mentioned. There was evidence that a varicose ulcer may be started by trauma or without trauma. There was evidence that if the ulcer on the petitioner's leg was started by the injury above mentioned all effects of that injury had long since passed away and the conditions existing at the time of the hearing were brought about by the varicose veins and not otherwise. There was also expert opinion evidence that petitioner's condition was "quite typical of varicose veins of a rather high degree in which the tissues are extremely vulnerable and in which in fact ulcer may be expected to form now and then without any external cause whatever merely by standing." But, in several places in his briefs the petitioner asserts that this case involves an injury that has never been *cured*.

The petitioner does not claim that the instant case presents an aggravation of any disease existing prior to such injury. Workmen's Compensation Insurance and Safety Act, § 3, subd. 4, as amended by St. 1919, p. 911. Furthermore, there was no evidence that the injury which the petitioner received aggravated the varicosity of petitioner's leg, therefore there could be no recovery on the aggravation theory. Radonich v. Anaconda Copper Min. Co. (Mont.) 8 P.(2d) 658, 660. The sole point presented, therefore, is that this is a case where the injury has never been *cured*. That the ulcer was *healed* was the undisputed testimony, but that the *healed* ulcer again broke forth from time to time is also undisputed. Because it did so break forth the petitioner asserts it was not *cured*. Although six doctors were examined no single one was asked whether at any time the ulcer was *cured*. No doctor testified it was not. Several doctors testified that it was *healed*. In common parlance *healed* is *cured* and vice versa. See Century Dictionary. But counsel, an attorney, says the ulcer was not *cured*. In making this statement we think counsel is assuming to express medical conclusions not supported by the record. In the absence of medical expert evidence to the contrary the record discloses many *cures*. That a healed varicose ulcer breaks forth again argues naught. That is the nature of a varicose ulcer as shown by the testimony. If the petitioner would assert that the ulcer was not *cured* he should have produced medical—not lay or legal—opinion to that effect. Houghton v. Dickson, 29 Cal. App. 321, 324, 155 P. 128.

We think there was an abundance of evidence supporting the award of the respondent commission.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

124 Cal.App. 678

PENTECOST v. GRAHAM et al.

Civ. 897.

District Court of Appeal, Fourth District, California.

July 11, 1932.

1. Appeal and error ⇐931(1).

On appeal, trial judge as trier of facts is presumed to have recognized and accounted for any inconsistencies appearing in testimony.

2. Landlord and tenant ⇐132(2).

Evidence *held* sufficient to sustain finding for plaintiff in action by tenant against landlord for injuries sustained when landlord's agents forcibly entered premises.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Sue C. Pentecost against Alda R. Graham and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Utley & Nuffer, of El Centro, for appellants.

C. L. Brown, of El Centro, for respondent.

BARNARD, P. J.

This is an appeal from a judgment for $525 for personal injuries suffered by the plaintiff, including the cost of medical attention. On September 25, 1930, the plaintiff was living in a house she was renting from the defendant Graham. On that day the other two defendants, as agents of the defendant Graham, came to this house with the intention of removing certain furniture therefrom. The plaintiff refused to admit them, and was attempting to close the door when the injuries in question were received. The court found that these two defendants, with great force and violence, pulled the door open while the plaintiff had her hand on the knob; that this caused the plaintiff to fall forward; that thereupon one of the defendants, with great force and violence, pushed her backward in such a manner that she fell with great force upon the floor; and that she was rendered unconscious and suffered various injuries.

The defendants have appealed from the judgment; the only ground of appeal being that the evidence offered in support of the plaintiff's contention is so inherently improbable and so fraught with inconsistencies and falsehoods that it is not sufficient to support the findings and judgment. The appellants point out three alleged "inconsistencies." One of these relates to the manner in which injuries were received; it being contended that the respondent in her testimony gave three versions thereof. While there are some slight discrepancies in the evidence referred to, they are trivial and unimportant, and not only are the findings supported by those portions of the evidence quoted by the appellants, but by considerable other evidence shown in the record. Two other inconsistencies are pointed out, relating only to the extent of the injuries received by the respondent. It is said that she alleged in her complaint that on a certain date she was told by her physician that one of her kidneys had been torn loose by this fall, while the physician in question, although testifying that he had told her it might be that her kidney had been torn loose, referred this conversation to a different date than that named by the respondent. Again, it is said that the respondent testified that on the day of her injury she called the attention of her physician to an injury to her thumb, while the doctor testified that, if she did so, he did not remember it. Upon such contentions as these, it is maintained that the evidence is so inherently improbable as, in effect, to constitute no evidence at all.

[1, 2] There is nothing inherently improbable or impossible of belief in the testimony in support of the complaint, as shown by the record. The claimed inconsistencies are not only unimportant, but at most could only go to the weight of the evidence. Upon an appeal, it will be presumed that the trial judge recognized, and accounted for to his own satisfaction, any inconsistencies which may be made to appear in the testimony. Henley v. Pacific Fruit Cooling & Vaporizing Co., 19 Cal. App. 728, 127 P. 800. Under any view, nothing more is here presented than a conflict in the evidence, and the necessary findings are fully supported.

The judgment is affirmed.

We concur: MARKS, J.; HARDEN, Justice pro tem.

124 Cal.App. 622

MELOY v. CITY OF SANTA MONICA.

Civ. 4552.

District Court of Appeal, Third District, California.

July 5, 1932.

1. Landlord and tenant ⇐170(1).

Landlord is not liable for conduct of tenant off leased premises unless he authorized or ratified tenant's act.

2. Landlord and tenant ⇐170(1).

To charge landlord, nuisance must necessarily result from tenant's ordinary use of premises, or from purposes for which premises were let.

3. Landlord and tenant ⇐170(1).

Tenant alone is chargeable where ill results flow from his improper use of premises.

4. Landlord and tenant ⇐170(1).

Landlord is not responsible for misconduct of tenant of estate leased for lawful purposes, where no nuisance existed upon estate at time of letting.

5. Landlord and tenant ⇐170(4).

Allegations that tenants of adjacent flying field flew airplanes at low elevation over plaintiff's residence, created dust, and caused crowds to gather on plaintiff's premises, did not state cause of action against landlord (Code Civ. Proc. § 731; Civ. Code, § 3479).

Allegations that defendant, as owner and landlord of flying field, by its agents or tenants flew airplanes at low elevation over plaintiff's residence, produced terrific noises, and by use of such field adjacent to plaintiff's premises created large clouds of dust, and caused crowds to gather on plaintiff's premises, did not state cause of action against the landlord, because it did not appear from the complaint that the aircraft could only enter and depart from the flying field over the premises of plain-

tiff, or that such condition existed at the date of the letting, and that but for the negligence of the tenants the clouds of dust and débris mentioned would have been cast upon plaintiff's premises.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Katherine Whitaker Meloy against the City of Santa Monica. From a judgment for defendant, plaintiff appeals.

Affirmed.

Black, Hammack & Black, Carey McWilliams, and John N. Hurtt, all of Los Angeles, for appellant.

Chester L. Coffin, City Atty., Orlando H. Rhodes, Asst. City Atty., and Cornelius W. McInerny, Jr., Deputy City Atty., all of Santa Monica, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

Defendant demurred to plaintiff's amended complaint, the demurrer was sustained; plaintiff refusing to further amend, judgment was rendered for defendant, from which judgment plaintiff appeals.

The amended complaint alleges that for the past twenty years appellant has been and now is the owner and in possession of lot 1, tract 6437, in the city of Los Angeles, containing about sixty acres; that for many years past she has resided in her dwelling situated near the southerly end of the westerly boundary of her said land and has for many years caused, and is now causing, her said property to be cultivated and planted to growing crops; that appellant's property, except for the things hereafter set out, is well situated for residence property, receiving as it does from the ocean constantly prevailing winds from a westerly direction, with an average velocity of ten miles per hour; that her property is located a sufficient distance from the business section of a city so that the noises, dust, and crowds incident thereto have been lacking; that on or about August 30, 1926, defendant acquired and became possessed and since then has owned and possessed the 175 acres known as the Clover Field, immediately adjacent to appellant's land on the westerly side thereof, separated therefrom only by Centinella boulevard; that since it became the owner of said land defendant has executed leases and arrangements with divers persons and associations covering various portions of said Clover Field for the sole and express purpose of furnishing said persons and associations with sites for the establishment of business pursuits pertaining to commercial aviation, which consists in a large part by such persons and association, in the flying of passengers for hire and giving instructions to students in the art of flying in the immediate neighborhood and vicinity of plaintiff's said premises; that as a direct result of the said use and employment of said property, under the said leases and arrangements, the defendant through its tenants and agents has continuously since it became the owner of the said Clover Field used it and is now using it for flying and operating airplanes and parachutes and other aircraft and has caused its airplanes and other aircraft to continually fly over plaintiff's residence at an elevation of less than one hundred feet and by means thereof has created and is creating terrific and unusual noises in the vicinity of plaintiff's dwelling which are startling in the extreme and wearing upon her nerves, all to her damage in the sum of $50,000; that as a direct result of the use by defendant as aforementioned of said Clover Field great clouds of dust of an impenetrable nature have been at all times since the said acquisition of Clover Field, from dawn to dark, stirred up by defendant upon said field, and by the operation of said aircraft and by the prevailing winds aforesaid have been cast upon the premises of plaintiff; that said dust makes impossible improvements on her property and prevents and retards the growth of foliage and other things growing thereon, and attracts great crowds of people to the vicinity of her premises who scatter refuse thereon, which refuse is by the prevailing wind carried onto plaintiff's said premises; that also as a direct result of said aviation activities and the use of said Clover Field as aforesaid, parachute jumps and forced landings are frequently made by defendant and/or its said agents upon and near plaintiff's property and in consequence have attracted large crowds of people to and upon her said property who trample crops and growing things thereon, all to her further damage in the sum of $100,000; that all of the acts and facts set forth in the complaint were done with the knowledge and connivance of defendant; that plaintiff has frequently requested defendant to abate the said nuisance, but defendant has neglected and refused so to do; that defendant threatens and intends to continue to maintain said nuisance and unless restrained therefrom will continue to so maintain it; that plaintiff has no plain, speedy, or adequate remedy at law.

Defendant demurred to the amended complaint on the grounds:

1. That it did not state facts sufficient to constitute a cause of action.

2. That it was uncertain in that it cannot be ascertained whether defendant or its tenants have flown or caused to be flown over plaintiff's premises airplanes or other aircraft, or whether defendant or its tenants created the noises alleged in the complaint, or whether defendant or its tenants created or caused the clouds of dust alleged in said

complaint; that it cannot be ascertained from said complaint what is the causal connection between the acts of defendant and the trampling of the property of plaintiff and scattering refuse thereon or the making of parachute jumps or forced landings on plaintiff's property; that it cannot be ascertained wherein plaintiff claims damages in the sum of $150,000, nor that the facts pleaded in said complaint were done with the knowledge or connivance of defendant; that it is ambiguous and uncertain for the same reasons; that there is a defect of parties defendant in that the alleged tenants have not been joined as such.

The main question for determination on this appeal is whether or not the complaint states a cause of action. Section 731 of the Code of Civil Procedure provides in part that an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance as the same is defined in section 3479 of the Civil Code. This latter section provides that anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfort and enjoyment of life or property, is a nuisance.

The first of the alleged nuisances is that defendant, through its tenants and agents, continually flew their airplanes over plaintiff's dwelling at an elevation of less than one hundred feet, thereby producing unusual and terrific noises.

[1] Respondent contends that the landlord is not liable for the acts or conduct of the tenant off of the leased premises and, therefore, if the tenant committed acts that amounted to a nuisance away from the leased premises, the landlord would not be liable for the same. We think that this contention is correct, unless the landlord authorized or ratified the acts or conduct of the tenant. Keenan v. New Hanover County Commissioners, 167 N. C. 356, 83 S. E. 556.

While there are allegations in the amended complaint that respondent has used and employed the said Clover Field for commercial aviation, it appears to have done so only through tenants or through associations under arrangements, the nature of which are not disclosed, and there is no allegation that these associations in their use of said property were acting as the agents of respondent. It therefore appears from said complaint that the alleged nuisances were created either by tenants or by associations which were not agents of respondent.

In Kalis v. Shattuck, 69 Cal. 593, 11 P. 346, 348, 58 Am. Rep. 568, the court quoted with approval the following: " 'To bring liability home to the owner of real property,' says Crompton, J., in Gandy v. Jubber, 5 B. & S. 73, 485, 'the nuisance must be one which is, in its very essence and nature, a nuisance at the time of the letting, and not something which is capable of being thereafter rendered a nuisance by the tenant.' "

It is not sufficient to render a lessor liable that premises leased by him are capable of a use which are not in themselves a nuisance. If he demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. In such a case it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such a sense as to render him liable. He will not be liable for the use of the premises in such a way as to do harm merely because it was a manifest possibility of their being used in such a way. Lucid v. Citizens' Investment Co., 49 Cal. App. 257, 193 P. 161; Shellman v. Hershey, 31 Cal. App. 641, 161 P. 132. It does not appear from said complaint that the nuisances therein alleged existed at the time of the letting, nor that the leased premises, at the time of the letting, were in a condition from which their use by the lessee would necessarily result in creating a nuisance.

[2, 3] In order to charge the landlord, the nuisance must necessarily result from the ordinary use of the premises by the tenant, or from the purposes for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the use of the premises may or may not become a nuisance, according as the tenant exercised reasonable care, or used the premises negligently, the tenant alone is chargeable for the damages arising therefrom. Baker v. Gates, 279 Mo. 630, 216 S. W. 775; Gilliland v. Chicago & A. R. Co., 19 Mo. App. 411; 2 Wood Landlord and Tenant (2d Ed.) 1283.

[4] A landlord is not responsible to other parties for the misconduct or injurious acts of his tenant to whom his estate has been leased for a lawful and proper purpose, when there is no nuisance or illegal structure upon it at the time of the letting. Gould v. Stafford, 91 Cal. 146, 27 P. 543; Kalis v. Shattuck, supra.

[5] It does not appear from said complaint that the said aircraft could only enter and depart from said Clover Field over the premises of appellant, or that this condition existed at the date of the letting, nor does it appear that but for the negligence of the tenants the clouds of dust and the débris mentioned in said complaint would have been cast upon appellant's premises.

We are of the opinion that the trial court did not err in sustaining the demurrer to the amended complaint, and therefore the judgment must be, and is, affirmed.

I concur: PLUMMER, J.

124 Cal.App. 378

ASSOCIATED INDEMNITY CORPORATION v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8226.

District Court of Appeal, Second Appellate District, Division 2, California.

June 17, 1932.

Rehearing Denied July 16, 1932.

1. Master and servant ⇨405(4).

Evidence *held* to support Industrial Accident Commission's finding that employee's silicosis was caused by injury arising out of and in course of employment.

2. Master and servant ⇨398.

"Date of injury" to employee, suffering from occupational disease, must be taken as date when disability was first incurred in determining whether compensation proceeding was commenced within statutory time (St. 1917, p. 841, § 11).

3. Master and servant ⇨373.

"Occupational disease" is one wherein cumulative effect of employee's continual absorption of small quantities of deleterious substance from environment of employment ultimately results in manifest pathology.

[Ed. Note.—For other definitions of "Occupational Disease," see Words and Phrases.]

4. Master and servant ⇨385(1).

"Disability," as used in Workmen's Compensation Law, means combination of partial or total physical incapacity and inability to work.

[Ed. Note.—For other definitions of "Disability," see Words and Phrases.]

5. Master and servant ⇨372.

"Compensable injury" is injury for which compensation is payable, and date thereof is not time of accident or occurrence causing injury, but time when right to compensation accrues.

6. Master and servant ⇨385(1).

Provision of Workmen's Compensation Act, permitting employee suffering injury not yet disabling to apply for and obtain nominal award of compensation, is inapplicable to case of occupational disease (St. 1917, p. 850, § 20 (c).

7. Master and servant ⇨398.

Claim for compensation by employee, compelled by occupational disease to leave work about five months before filing application, *held* not barred because of failure to apply within six months after symptoms of disease first appeared (St. 1917, p. 841, § 11).

8. Master and servant ⇨391.

Compensation allowed employee suffering from occupational disease should be apportioned between successive insurance carriers during period of gradual increase in disability.

Proceeding for compensation under the Workmen's Compensation Act by Louallen R. Harvey, employee, opposed by the American Encaustic Tiling Company, employer, and the Associated Indemnity Corporation, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation, the insurance carrier brings certiorari.

Affirmed in part, and remanded in part, with directions.

John J. Taheny, of San Francisco, Syril S. Tipton and Elmer E. Sawyer, both of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Harold E. Sackin, of Los Angeles, for respondent Harvey.

WORKS, P. J.

Harvey was an employee of a tiling concern, and suffered disability arising out of and in the course of his employment. In working about the tile which his employer manufactured, his lungs became affected by the dust which constantly arose from the product while he was working over it. The symptoms of his disability began strikingly to exhibit themselves about three years before he finally made claim for compensation to the Industrial Accident Commission, and he was incapacitated because of the gradual increase of the disaffection, being thereby forced to cease the employment, five months before the claim was made. Petitioner, the insurance carrier, contends that the claim was barred by the six-month period of limitation provided by the Workmen's Compensation Act. The act formerly provided that claims must be filed not more than six months after an "accident," but it was long ago amended so as to provide for the running of the same period from the "injury" suffered by the claimant.

[1] When the present matter was before respondent Industrial Accident Commission, that body rendered the following written opinion denying a rehearing after the adjustment of compensation which was allowed Harvey:

"The applicant, Louallen R. Harvey, is now suffering a respiratory disability which the medical evidence satisfactorily shows to be a silicosis, or a form of disease of the lungs due to the presence of silicious material inhaled over a period of time from atmosphere charged with dust thrown into the air incidentally to industrial operations

in rock and dry earths. The applicant at the time of the hearing in this case had worked for the defendant American Encaustic Tiling Company for fourteen years, during the last three or four of which he cleaned rock-grinding machines with blower and waste, and was exposed to rock and dust daily. Prior to the said three or four-year period he ran a pump for a year, not exposed to dust, but previously did mixing for a year and a half when the air was so thick with rock and clay dust that ne could hardly see through it, according to his testimony. This and other evidence is adequate foundation for an award finding that the silicosis from which the applicant is suffering was caused by injury arising out of and in the course of said employment.

[2-5] "Prior to March 26, 1928, the employer was insured against its liability for compensation with the State Compensation Insurance Fund; and from the said date to the date of hearing, December 10, 1930, the employer was insured with the Associated Indemnity Corporation. The latter insurer has pleaded that applicant's claim is barred, on the ground that the filing of his application on November 13, 1930, took place more than six months from the 'date of injury.' It is provided by section 11 of the Workmen's Compensation Act (St. 1917, p. 841, § 11) that proceedings for the collection of disability compensation must be commenced 'within six months from the date of injury,' except that there are certain extensions which are not material here. The problem before this Commission, therefore, is to determine whether or not the provisions of the Workmen's Compensation Act may be fairly interpreted to permit the maintenance of this proceeding as not being barred by limitation of time, under the following state of facts elicited by the testimony taken before the Commission.

"About three years before the date of hearing the applicant first noticed his breath getting short. This condition gradually progressed so that ultimately he could hardly handle a fifty-pound ladder. In the summer of 1928 he noticed pains in his chest and his condition required him to sit down and rest quite often. From then on he got gradually worse, the symptoms continuing the same but more marked, except that in addition he noticed a dry hacking cough setting in. He first had to leave work on June 22, 1930, which was about five months prior to the filing of application. On June 13, 1930, he was sent by the employer's superintendent to Dr. Frees, who examined him but gave no treatment, and the applicant has had no treatment since then, although several medical examinations have taken place from time to time. The applicant testified that he never informed the responsible officials of the employer prior to June 10, 1930, that he thought he had incurred an industrial injury or disease; but he did admit on cross-examination that he told the foreman, Mr. Horner, that he thought the condition was due to his occupation, this statement being made to Horner a year and a half before he quit work. He also admitted speaking to two other foremen to the same effect at that time and subsequently.

"This Commission considers that within the meaning and intent of the Workmen's Compensation Act the 'date of injury' in connection with occupational disease shall be properly taken to be the date when disability is first incurred. An occupational disease, such as that which is before us in the present proceeding, is one in which the cumulative effect of the continual absorption of small quantities of deleterious substance from the environment of the employment ultimately results in manifest pathology; any one exposure to the deleterious substance is inconsequential in itself, but the accumulation of repeated absorptions is the factor which brings about the disease. If follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves, and this would be when the employee becomes disabled and entitled to compensation, that is, when under the well-established meaning of the term 'disability,' as used in compensation law, there is a combination of partial or total physical incapacity and of inability to work. In the case at bar disability accrued for the first time when the applicant had to quit work by reason of his physical incapacity, namely, June 22, 1930, approximately five months prior to filing his application with the Commission. Such a conclusion is based on the proposition that a compensable injury is an injury for which compensation is payable, and the date of the injury is not the time of the accident or occurrence causing injury, but the time when the right to compensation accrues.

"We have ample authority for the foregoing interpretation of the law in such decisions as that of Johnson's Case, 217 Mass. 388, 104 N. E. 735; Bergeron's Case, 243 Mass. 366, 137 N. E. 739; Esposito v. Marlin-Rockwell Corporation, 96 Conn. 414, 114 A. 92; Hustus' Case, 123 Me. 428, 123 A. 514; McKenna's Case, 117 Me. 179, 103 A. 69; Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N. W. 511; Acme Body Works v. Koepsel, 204 Wis. 493, 234 N. W. 756, 236 N. W. 378; Martin-Laskin Co. v. Ind. Com., 172 Wis. 548, 179 N. W. 740; Zurich, etc., Co. v. Ind. Com.,

203 Wis. 135, 233 N. W. 772; Hornbrook-Price Co. v. Stewart, 66 Ind. App. 400, 118 N. E. 315.

"The latest decision brought to our notice is that in the case of Textileather Corp. v. Great American Indemnity Co., 156 A. 840, wherein the New Jersey Court of Errors and Appeals held on October 30, 1931, 'it is disability after exposure in the employer's business that creates the obligation to compensation,' and the carrier at the time of disability to be liable.

[6] "It is true that the First District Appellate Court of this state in the case of Blanchard v. Ind. Acc. Com., 68 Cal. App. 65, 228 P. 359, 11 I. A. C. 245, held that in the case of an occupational injury the limitations of time would commence to run from the date when the injured employee had knowledge of the disease which eventually incapacitated him: but in view of the above-cited authorities the Commission, on reflection, respectfully submits that such a ruling should be reconsidered and that the accrual of disability rather than knowledge of the disease should be the criterion for adopting the date when limitations should commence to run. The Commission also admits that statements of the First District Appellate Court in the case of Kauffman v. Ind. Acc. Com., 37 Cal. App. 500, 174 P. 690, 5 I. A. C. 132. lay down certain principles contrary to these upon which the instant case is being decided by this Commission. In the Kauffman Case neither did disability accrue nor were the effects of injury recognized until more than six months after a specific accident whereby a particle of steel lodged in the interior of the employee's eye; but the court nevertheless held that the case was barred, since the application was not filed until more than six months after the accident. The Commission believes that the instant case can be distinguished from the Kauffman Case in view of the fact that we are at present dealing with an 'occupational disease' which by its cumulative character is not at all analogous to the case of a single accidental specific injury. The Commission, moreover, is of the opinion that section 20 (c) of the Workmen's Compensation Act (St. 1917, p. 850, § 20 (c), which permits an employee who has suffered an injury which is not yet disabling to file an application and obtain a nominal award, is for the same reasons not applicable to a case of occupational disease, inasmuch as the circumstances surrounding the incurring of such a disease do not permit the afflicted employee to recognize the injurious consequences of his occupational environment until he has actually become disabled.

"There is the further consideration that even though the afflicted employee may have symptoms while still able to work, nevertheless he still continues to absorb the deleterious substances thereafter. These later absorptions are just as much a factor in finally disabling him as were the materials absorbed prior to the appearance of symptoms. It would therefore be unfair and arbitrary to select out one set of absorptions as constitutive of the 'injury,' when in fact the entire cumulative process was responsible for the ultimate disability. Hence it would be inequitable to bar the employee on the ground that more than six months have gone by after the first appearance of symptoms, when, as a matter of fact, he was being subjected to a series of new and independent injuries which reached a climax within six months before filing the application.

"It is, of course, a commonplace that the adoption of the word 'injury' in place of the word 'accident' early in the history of workmen's compensation in California was for the express purpose of rendering occupational diseases subject to full compensation. This Commission is of the opinion that if a case of occupational disease is to be considered barred by limitations of time in the event that the employee waits to file his application more than six months after the mere appearance of symptoms of the disease, rather than the incurring of disability from the disease, it will become practically impossible to award compensation for that class of injuries, since in practice an employee, owing to the insidious character of this form of incapacity, will ordinarily not recognize his impaired physical condition as being chargeable to his occupation until long after the initial symptoms appear. The Commission believes that an artificial obstacle to compensating this form of injury, resulting from the application of a rule of limitations designed to meet conditions of a totally different sort, is out of harmony with the spirit and purposes of the compensation system, and in particular would ordinarily be destructive of the right to compensation in a field which was the special subject of legislative concern.

[7] "In consonance with the foregoing views. the Commission in making its award found that the claim of the applicant is not barred by limitations of time and that he is entitled to disability indemnity in accordance with the medical findings, payable by the insurer whose policy was effective at the time of incurring disability. Upon considering the petition for rehearing, we find no reason for modifying this conclusion."

We are satisfied with this opinion of the commission, and decline to follow Blanchard v. Industrial Accident Commission and Kauffman v. Industrial Accident Commission, referred to in the opinion, in so far as they may be said to apply to the question of limitation discussed by the commission.

[8] Harvey's employer had two insurance carriers, successively, during the gradual in-

crease of his disability, of which petitioner was the second. No award was made by the commission against the first carrier. Petitioner contends that the compensation allowed Harvey should have been apportioned between the two. Despite the position taken by respondent Industrial Accident Commission upon this question in the opinion above quoted, we are disposed to follow Blanchard v. Industrial Accident Commission, supra, in so far as the opinion in that case deals with it. That case, indeed, is concerned with successive employers, but we think the rule stated in it has an equal application to successive insurance carriers. There may be some difficulty in making the apportionment called for here, but, if so, the difficulty is properly to be solved by the commission. We do not suggest a solution, but shall leave it to the commission to settle the problem.

The award is affirmed so far as the amount thereof is concerned, but the matter initiated before the Industrial Accident Commission by the petition for adjustment filed by Harvey is remanded to the commission, with directions to make proper apportionment of the award between the two insurance carriers.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

124 Cal.App. 548

PEOPLE v. WHITE.

Cr. 2145.

District Court of Appeal, Second District, Division 2, California.

June 28, 1932.

Rehearing Denied July 13, 1932.

Hearing Denied by Supreme Court July 28, 1932.

1. Larceny ⇐62(1).

Convictions under counts charging grand theft *held* sustained by evidence showing defendant guilty of larceny by trick and device.

2. Larceny ⇐14(2).

Where one obtains money by falsely representing that property, when received, will be applied to described purpose, when there exists no such purpose, and owner, through fraud, parts with property, and person receiving property receives it with intention of using it as if it were his own, crime of "larceny by trick and device," included in crime of theft, has been committed (Pen. Code, § 484).

[Ed. Note.—For other definitions of "Larceny By Trick," see Words and Phrases.]

3. Licenses ⇐40.

Term "investment contract" within statute prohibiting selling securities without license includes certificates issued to purchasers who paid money in expectation of profit from investment (St. 1917, p. 673, § 2, subd. 7, as renumbered by St. 1925, p. 963, and amended by St. 1929, p. 1252).

[Ed. Note.—For other definitions of "Investment Contract," see Words and Phrases.]

4. Statutes ⇐241(1).

Penal statutes must be construed according to fair import of their terms and with view to effect object of statute and promote justice (Pen. Code, § 4; Pol. Code, § 4; Civ. Code, § 4).

5. Licenses ⇐18½.

Instrument providing that sum of money had been paid to defendant to be used for purpose of investment, and that defendant agreed to pay specified sum on specified date as principal and earnings, *held* "investment contract," for sale of which license was required (St. 1917, p. 673, § 2, subd. 7, as renumbered by St. 1925, p. 963, and amended by St. 1929, p. 1252).

6. Witnesses ⇐306.

Witness must claim privilege of not giving testimony against himself before he is entitled to immunity (St. 1917, p. 681, § 17, as amended by St. 1925, p. 971).

7. Criminal law ⇐419, 420(1).

Absent proof that defendant was compelled to give testimony before commissioner of corporations, what he said there was inadmissible in prosecution for violating Corporate Securities Act under rule excluding hearsay testimony (St. 1917, p. 681, § 17, as amended by St. 1925, p. 971).

8. Criminal law ⇐868.

Under showing made, court properly refused to complete investigation on whether one juror had, during progress of trial, expressed opinion on merits.

During trial, defense counsel informed court that he had just been informed that one of jurors had made statement to person then in courtroom to effect that defendant need not expect that he was going to get off so easy, and witness, when called to stand, testified that she had heard from another person that some one had made statement that one of jurors had made statement to effect that defendant was not going to get off so easy, but that person making statement to witness did not know which juror had made statement, and did not say from whom she had heard rumor. The person making statement was then in hospital, and investigator was sent to interview her, and she stated that she had heard no statement

to effect that juror had declared in effect that defendant would be convicted. Defendant offered no further proof in the matter.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Fred G. White was convicted of grand theft and of violating the Corporate Securities Act, and he appeals.

Affirmed.

H. A. I. Wolch, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Defendant was charged by information under counts I, III, V, VII, IX, XI, and XIII with the crime of grand theft, it being alleged as to the first four of these counts that the money in question was obtained from one Evalena Michael, as to the next two of said counts that the money was obtained from one Lillian Leonard, and as to the last of said counts that the money was obtained from one Bonnie Lloyd. The acts constituting the theft charges were also made the basis of seven counts, bearing even numbers, charging the selling of securities without a permit from the commissioner of corporations, in violation of the Corporate Securities Act (St. 1917, p. 673, as amended). He was found guilty by the verdict of the jury of all of the offenses charged except that contained in count VIII.

The evidence discloses that appellant was doing business under the fictitious name of Pacific Loan & Investment Company, and that he induced the complaining witnesses and others to invest money with him by representations that his business was producing a tremendous profit through the buying of trust deeds, bankrupt stocks, and foreclosures at a sacrifice and disposing of them to a few big stores and business men in Los Angeles; the stores and men named being among the most prominent of that city. He also represented that he obtained large returns by financing and loaning money to the leading merchants of Los Angeles; the names of these merchants being given in the representations. The agreement given by appellant to the investors was in the form of that delivered to the complainant Evalena Michael, which reads: "This agreement made and entered into this 30th day of October, A. D. 1929, by and between Evalena Michael, 1626 North Harvard, City of Los Angeles, State of California, hereinafter known as party of the first part, and the Pacific Loan & Investment Company, 761 Roosevelt Building, City of Los Angeles and State of California, hereinafter known as party of the second part, as follows, witnesseth: That said party of the first part has this day delivered to party of second part the sum of $5000 in cash, which is to be used by party of the second part for investment only until the 30th day of October, A. D. 1930. Party of the second part agrees to pay party of the first part the sum of $7,500 on the 30th day of October, 1930, as principal and earnings for the above stated period of time. Witness the hands of the parties hereto in duplicate the day and year first above written."

Appellant attacks the convictions under the counts charging grand theft upon the ground that, the theft charged being in the nature of the obtaining of money by false pretenses, the evidence fails to show that the complaining witnesses parted with their money by reason of appellant's representations, and that none of appellant's material representations were shown to be false.

Appellant has failed to sustain the latter of these contentions by his brief, and there is ample evidence in the record to show not only the falsity but the materiality of appellant's representations. Not only did the representations relate to past and then existing facts, but there were also coupled therewith statements that the moneys were to be used for specific purposes, shown by the evidence to be nonexistent. The evidence tended to support, not only the theory that the money was obtained by false pretenses, but also the theory that the theft was of the variety commonly known as larceny by trick and device. While it is true, as contended, that in a prosecution for the obtaining of property by false pretenses the evidence must show that the complaining witness parted with his property because he relied upon material misrepresentations as to past or present facts, this rule is not the same in cases of larceny by trick and device. In the latter class of theft the owner of property is induced by the trickery, deceit, and misrepresentation of the defendant to transfer the possession of his property to the defendant with the intent on the part of the complainant that the property shall be used for a specific purpose or in a particular manner, and without any intent that the title to the property shall ever vest in the defendant; while the defendant, on the other hand, though declaring it to be his intent and object to use the property for a specific purpose, in fact has no such intent or object; his true intent being to make and use the property as his own as soon as it comes into his possession. This intent of the accused is frequently shown, as it was in the case at bar, by proof that the purported object and purpose, to which the money obtained was intended to go by the complainant, had no existence in fact, and that the declarations of the accused that such an object and purpose did exist were knowingly false. In the case at bar, the money which furnishes the basis of counts I, III and V was paid by

the complainant for the purpose of building and selling houses on what are referred to as the Brentwood Green lots, and count VII is based upon an alleged investment pool which defendant claimed he was creating. As to counts IX and XI, it appears that the complaining witness Lillian Leonard had had seven similar transactions within less than eight months prior to those charged, in which she received a profit of 10 per cent., and one in which she received a profit of 20 per cent. within 90 days, a total profit of $550; that these investments were the result of statements made by Evalena Michael (the complaining witness in the first eight counts and who was employed by appellant to sell these instruments upon a 10 per cent. commission) in which Mrs. Michael repeated to Mrs. Leonard, under appellant's instructions, the representations as to the character of the investments which appellant had made to her; that all of the transactions were with appellant personally; and that a part of her reliance upon appellant was due to what he himself told her, combined with the prior experience of herself and other investors with appellant. Appellant's representations to Mrs. Bonnie Lloyd, the complainant in the last two counts in the information, were among other things to the effect that one of his best customers was one H. C. (name given in full in transcript), and the record amply sustains the conclusion that appellant never had any business transactions with the person named, who is one of Los Angeles' most prominent citizens. Appellant in his testimony claims that he did not refer to this particular individual, but had reference to another man by the same name. Taking the context into consideration, the jury was fully warranted in the conclusion that appellant's testimony upon this subject was not true, and that the representation made to Mrs. Lloyd was false and deceitful.

It also appears that appellant employed salesmen to secure investors, and that he told them that he was making commercial loans to the largest department stores in Los Angeles, such as Bullock's, the May Company, Walker's and Robinson's, and that he was backed by eight prominent men of Los Angeles (the names of these men appearing in the record); that these salesmen had authority to and did repeat these statements to prospective investors, and that the statements were false.

[1, 2] Concretely, the record shows that the appellant represented as an existing fact that he was doing an investment business which in fact did not exist, and that he was not making loans to the named department stores nor did he have the backing of the men named. In this light, when appellant received the moneys of the investors, including the complaining witnesses, he received it for a purpose which did not exist and which he knew had no existence. Complainants intended that their moneys should go to the making of investments by a business organization such as was described in the representations, and which organization was backed by the prominent business men named in the representations. There is ample evidence to sustain the conclusion that, while they intended to invest their money, they did not intend to pass title to such money to the defendant. The record conclusively shows that appellant, when he received the moneys, could have had no intention of investing them through the medium of an organization such as was described in his representations, for none such existed, but intended to appropriate the moneys to his own use to do with as he personally chose. The convictions under the counts charging grand theft are sustained by evidence showing the appellant guilty of that form of theft known as larceny by trick and device. Where a person obtains the money or other property of another by trick or device, as by falsely and fraudulently representing that such property when received is to be applied to a described purpose or object when in fact there exists no purpose or object corresponding to that described, and the owner, through such fraud, parts with the possession of his property without intent to part with the title thereto to the defendant or that it shall go toward any object or purpose other than the described purpose, and the person receiving the property receives it with the intent not of applying it to the purpose or object such as he has described, but of using it as he chooses, as if it were his own, the crime of larceny by trick and device, now included in the crime of theft under section 484 of the Penal Code, has been committed. People v. Edwards, 72 Cal. App. 102, 236 P. 944; People v. Robertson, 26 Cal. App. 507, 147 P. 468; People v. Frederick Grant White, 66 Cal. App. 703, 226 P. 962; People v. Arnold, 20 Cal. App. 35, 38, 127 P. 1060; In re Clark, 34 Cal. App. 440, 167 P. 1143; People v. Sichofsky, 58 Cal. App. 257, 208 P. 340; People v. Solomon, 75 Cal. App. 9, 241 P. 931; People v. Hennessey, 201 Cal. 568, 258 P. 49; People v. Meadows, 108 Cal. App. 67, 291 P. 226.

Appellant contends that the evidence is insufficient to sustain the convictions under the theft counts because the complaining witness did not rely upon the false representations. The contention is based upon the theory that the prosecution was necessarily for that form of theft described as the obtaining of property by false pretenses and the fact that certain answers were made by the complainants which, standing alone, tend to show that the witnesses did not rely upon the false representations in parting with their money. As to the latter argument it is sufficient to say that, taking the testimony of each of the witnesses as a whole, the evidence amply sustains the conclusion that they would not have

parted with their money had they not placed reliance upon the false representations of the appellant.

[3-5] As to the counts under which appellant was convicted of selling securities without a license and in violation of the Corporate Securities Act, it is contended that the contracts received by the complaining witnesses upon the payment of the various sums of money are not "securities" as defined by that act. The act, St. 1917, p. 673 (section 2, subd. 7, renumbered by St. 1925, p. 963, and amended by St. 1929, p. 1252) in declaring what shall be included in the term "security" mentions "investment contract," a term which aptly describes the contract here in question. The term "investment contract" has been judicially defined. In State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937, followed in State v. Evans, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165, it is held that certificates issued to purchasers who paid their money in expectation of a profit from the investment might properly be regarded as investment contracts. Appellant here contends that it is the rule that criminal statutes are subject to the rule of strict construction, and that under a strict construction the contracts in question do not come within the provisions of the Corporate Securities Act. Whatever may be the rule elsewhere, in this state the common-law rule that penal statutes are to be strictly construed has no application, and statutes of this state are to be construed according to the fair import of their terms and with a view to effect the object of the statute as well as to promote justice. Pen. Code, § 4; Pol. Code, § 4; Civ. Code, § 4. That the contract before us is an investment contract is hardly open to question. Appellant's statement that "the contract does not, within itself, contain any obligation on the part of the promisor to employ the funds in any particular fashion" is contradicted by the phraseology of the document itself, and is as unfounded as his statement that the document is merely in the nature of a receipt or the further suggestion that it may have created the relationship of principal and agent. There is no ambiguity or mystery about the writing. It plainly provides that a certain sum of money has been paid to the party of the second part, that this money is to be used only for the purpose of investment, and the second party agrees to pay a specified sum on a specified date as principal and earnings for the stated period of time upon the investment.

[6, 7] Appellant next contends that the prosecution was barred by the immunity provision of section 17, as amended by St. 1925, p. 971 (now section 23 [St. 1931, p. 952]), of the Corporate Securities Act. In brief this section provides that the commissioner of corporations shall have power to administer oaths, examine books and papers and business "of any company, broker, or agent * * * permitted or authorized by him to sell securities," and "in any examination, audit, or investigation made or hearing conducted by him, he shall have the power to take the testimony of any witness and to issue subpœnas." The section further provides that no person shall be excused from testifying or producing evidence upon the ground that by so doing he might tend to incriminate himself or subject himself to punishment for a felony or to a penalty or forfeiture; "but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which he shall have been *so compelled* to testify under oath" or to produce such documentary or other evidence. (Italics ours.) Like authority to conduct examinations and hearings and to take testimony under oath may, under the section, be delegated by the commissioner to a deputy or examiner appointed by him for such purpose, but such appointment must be in writing, signed by the commissioner under his official seal.

At the trial appellant testified that he appeared before a person whom he "understood at that time was the commissioner," by whom and another person whose official capacity is not stated he was examined. The court sustained objections to the questions which followed, which were as to the subject-matter of the examination, and whether it concerned the matters upon which appellant was being prosecuted; the objections being properly sustained upon the ground that they called for incompetent testimony and the conclusion of the witness. Appellant's counsel then offered to prove that appellant had testified before the state corporation department with regard to the matters involved in the prosecution, nothing being said in the offer about appellant having been under oath or that he had testified under compulsion, declaring that he desired to make "the same offer of proof," to which offer the prosecutor made the same objection, which the court sustained. It should be noted that there was no competent proof prior to what has been recited that appellant had appeared before either the commissioner of corporations or a person appointed by such commissioner in writing as required by the section, and at no place does it appear that appellant was "compelled" to give any testimony or produce any evidence. At one point in his preliminary testimony appellant did say that he "was subpœnaed by the Corporation Commissioner of Corporations," but this later appears to have been merely a conclusion, for appellant under his own counsel's questioning testified as to the matter of subpœna that he found a subpœna (signed by some one named "Ellis") in his office one morning, and that this occasioned his pres-

ence at the corporation department. In other words, appellant was never subpœnaed, but appeared at the department voluntarily.

Before any evidence of taking of appellant's testimony at the corporation department could become admissible, it was necessary that it be made to appear that the giving of such testimony was under the conditions in consequence of which alone an immunity could arise. Appellant testified that the subpœna which he found in his office was "signed as I recall it by Ellis." As there appears no evidence that "Ellis" was authorized either in the manner required by the act or in any other manner to issue the subpœna, or that he was connected officially with the department of corporations, it appears not only that appellant was not subpœnaed, but there is no evidence of the existence of any legal subpœna. As appellant was not under compulsion of a subpœna, but appeared voluntarily, the case of People v. Schwarz, 78 Cal. App. 561, 248 P. 999, relied upon by appellant, is readily distinguished from the one before us, since in that proceeding the witnesses Frankfort and Goldner were compelled to attend through service of a proper subpœna, and gave their testimony over strenuous objections. It is to be noted, however, that the court in the Schwarz Case, page 568 of 78 Cal. App., 248 P. 990, 992, also held that, since the witness Weist testified voluntarily, his claim that he was compelled to give evidence was without foundation, leaving the defendant Weist without the protection of the immunity claimed by him. In the case at bar there was neither testimony nor offer of proof to the effect that appellant, when at the department of corporations, claimed the privilege of not giving evidence against himself. "It is apparent, we think, that the law contemplates that the witness claim the privilege of not giving testimony or of not furnishing evidence against himself before he is entitled to the immunity provided for by the statute." People v. Eiseman, 78 Cal. App. 223, 248 P. 716, 727; People v. Doble (Cal. App.) 257 P. 81.

In the absence of a preliminary showing that appellant was compelled to testify or produce evidence before the commissioner of corporations or his legally delegated examiner or deputy, evidence of the substance or nature of such evidence was neither competent or relevant to the issues. The rulings of the trial court excluding evidence of the nature and subject-matter of appellant's testimony before the commissioner of corporations were not erroneous. In the absence of proof that appellant was "compelled" to give such testimony, what he said there was inadmissible in the criminal case under the rule excluding hearsay testimony.

[8] Appellant's final assignment of error is that the trial court failed and refused to complete an investigation as to whether one of the jurors had, during the progress of the trial, expressed an opinion on the merits. During the course of the trial, defense counsel informed the court, in the absence of the jury, that he had just been informed that one of the jurors in the cause on trial had made a statement to a person then in the courtroom to the effect that the defendant need not expect that he was "going to get off so easy." The court requested counsel to call the witness, whereupon one Reba F. Alexander was called to the stand and testified, not as counsel had declared, but that she had heard from one Helen Holzworth that some one had made the statement that one of the jurors had made the statement to the effect that Mr. White was not going to get off so easy, but that Mrs. Holzworth did not know which juror had made the statement, and did not say from whom she had heard the rumor. No further or other proof was submitted by appellant's counsel, who now contends that it was the duty of the court to pursue the inquiry to a conclusion. It appears that Mrs. Holzworth was, at the time the matter was called to the court's attention, confined in a hospital at Santa Monica, Cal. The court declined to follow the suggestion of appellant's counsel that it proceed to the hospital to question Mrs. Holzworth, but did in turn suggest that either side might see her at that place, and that the process of the court was open to either side for that purpose. The court further offered to permit counsel to question the jurors on the subject, but appellant's counsel at no time availed himself thereof; neither does it appear that any one representing the appellant called upon Mrs. Holzworth at the hospital to get her version of the incident. It does appear, however, that the district attorney sent an investigator and a stenographer, who interviewed Mrs. Holzworth and took shorthand notes of the questions propounded and her answers thereto. The stenographer was sworn as a witness, and testified that Mrs. Holzworth had stated that she knew none of the jurors and had not met or talked with any of them, and did not even know who the jurors were; that she had heard no statement to the effect that a juror had declared in effect that the defendant would be convicted, and that all that she had heard was that her doctor had told her, prior to the beginning of the trial, that he did not think that the jury would let the defendant off after what he had done. The appellant at no time offered any further proof in the matter. It cannot but have been obvious to the court that the rumor of alleged misconduct of a juror was without foundation, and the court, in view of the circumstances, was under no obligation to go further into the matter. Appellant's counsel quite evidently concurred in this view, for, when the taking of testimony on this incidental question was concluded, the court inquired whether either side had anything further to offer in the mat-

ter, and counsel for both sides replied that there was nothing. The point is wholly without merit.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

124 Cal.App. 662

NELSON v. BOWEN et al.

Civ. 4430.

District Court of Appeal, Third District, California.

July 9, 1932.

Rehearing Denied Aug. 8, 1932.

1. Chattel mortgages ⇐157(2).

Evidence established that grantee under trust deed took possession with grantor's consent as "mortgagee in possession."

[Ed. Note.—For other definitions of "Mortgagee in Possession," see Words and Phrases.]

2. Mortgages ⇐199(3).

Mortgagor's consent that mortgagee go into possession need not be express, but may be implied from surrounding circumstances.

3. Mortgages ⇐199(3).

Mortgagee entering possession, cultivating, caring for, and harvesting crop on mortgaged premises with mortgagor's consent, may deduct from rents and profits received all necessary expenses incurred.

4. Mortgages ⇐199(3).

Mortgagee in possession must account for all rents and profits received and apply net profits toward payment of indebtedness.

Where mortgagee is in possession, profits derived from such possession become additional security for indebtedness, and must be applied in discharge thereof.

5. Mortgages ⇐187.

Mortgagee may retain possession peaceably obtained until debt is paid.

6. Mortgages ⇐197.

Right of mortgagee in possession to gather growing crops and apply net proceeds toward discharge of indebtedness is superior to rights of subsequent creditors and mortgagees.

7. Mortgages ⇐197.

Grantee under trust deed having gone into possession with grantor's consent, its right to harvest crops was not limited by fact that trust deed did not itself confer lien on crops or right to possession.

8. Mortgages ⇐197.

Grantee under trust deed going into possession with grantor's consent was not trespasser, and was liable to account only for profits from crop harvested.

In the instant case, since expenses exceeded receipts, grantee under trust deed in possession was not liable to subsequent crop mortgagee for any part of proceeds of crop.

Appeal from Superior Court, Shasta County; James W. Bartlett, Judge.

Action by C. N. Nelson against C. A. Bowen and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Edwin T. McMurray, of San Francisco (Sidney Rhein, of San Francisco, of counsel), for appellant.

Francis V. Keesling and C. A. S. Frost, both of San Francisco, and Chenoweth & Leininger, of Redding, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Judgment went for the defendants in an action prosecuted by the plaintiff to recover damages for and on account of an alleged conversion of a crop of prunes. From this judgment the plaintiff appeals.

On the 27th day of October, 1926, the Shasta Orchard & Farm Company, Inc., hereinafter referred to as the orchard company, was the owner of a certain farm in the county of Shasta, comprising about 600 acres. The orchard company was a corporation owned by the family of Harry S. Bates. Harry S. Bates was the president and managing agent. His son, Merrill Bates, was the secretary. His wife, Gladys Bates, was the third member of the corporation.

On or about the date mentioned, the orchard company effected a loan with the Lincoln National Life Insurance Company, hereinafter referred to as the insurance company, by which the insurance company advanced to the orchard company the sum of $70,000. A note and trust deed were executed by the orchard company to secure the repayment of said sum, together with interest thereon at the rate of 7 per cent. per annum.

It appears that the indebtedness of the orchard company was somewhere in the neighborhood of $132,000, that the Northern National Bank of Redding had, prior to the dates mentioned, financed the raising of crops on the orchard company's property, but that in the spring of 1927, the Redding bank declined to advance any more money to the orchard company to defray the expenses of caring for, harvesting, and marketing the

crops to be grown upon the 600 acres of land for the year 1927. The record indicates that the orchard company was without funds. Under date of March 28, 1927, President Bates of the orchard company wrote to R. A. Thorne, manager of the mortgage department of the insurance company at Ft. Wayne, Ind. In this letter Bates informed the insurance company that the Redding bank would not advance any more money; that he had taken the matter up with four large real estate offices in San Francisco, with the idea of selling the premises for the debts thereon so that the company could "quit clean"; that he had made arrangements for starting plowing on April 1st, but under the circumstances he had been compelled to cancel such arrangements; thereafter, on April 8, 1927, A. A. Semsen, California loan officer of the insurance company, went to the ranch to make investigation as to existing conditions. In an interview with Bates, Semsen was informed by him that the company was unable to make arrangements with the Redding bank, and that he could not go ahead with the work. The trust deed given to secure the promissory note thereinbefore referred to empowered the company to do necessary work in caring for the crops that should be raised upon the premises in the event that the orchard company failed in such particulars. The purpose of Semsen's visit to the orchard company's property was to serve a notice upon the orchard company of the requirements of the trust deed. At the interview to which we have referred, it was suggested to Semsen as to whom he could employ to do the plowing. Thereafter, on April 19th, Semsen employed the defendant C. A. Bowen, who at that time was living at Cottonwood, a town not far from the premises involved in this action. Semsen took Bowen to the ranch on the 20th of April, and advised Bates that Bowen had come to plow the ranch. Bowen thereupon moved his family and household effects and equipment to the ranch, and at first lived in what is known as the "lower ranch house." Bates thereafter commenced packing his personal belongings, household effects, etc., and on May 26, 1927, moved with his family from the ranch to San Francisco. The Bates family did not thereafter return to the ranch, nor did any one for or on behalf of the orchard company ever have anything further to do with the cultivation, care, harvesting, and marketing of the crops grown upon the premises. At the time the Bates family left the ranch, Mr. Bates told Bowen that he expected to move to San Francisco and there go into business. It appears that everything belonging to the Bates family, excepting a safe, was moved from the ranch to San Francisco. The record shows that even the electric light fixtures were taken out of the residence formerly occupied by the Bates family, and sold to a secondhand dealer. During the year 1927 Bowen plowed the orchard and vineyard on the ranch, sulphured the trees, cleaned the dead wood out of the orchard, picked the grapes, peaches, and pears, and harvested, dried, and shipped the prunes. In connection with the drying of the crops, the dehydrator on the premises was repaired, and its operation superintended by Bowen. Additional labor was employed when required, and from time to time Semsen visited the ranch and superintended its operations. Accounts of the expenses incurred as well as receipts received were transmitted to the home office of the insurance company in Ft. Wayne.

After the Bates family left the ranch, Bowen moved his family into the main ranch house on or about June 13, 1927. Bates' family took an apartment in San Francisco. On July 12, 1927, Bates sold all of the stock of the orchard company to one W. L. Wolf, a real estate dealer. The sale took place in San Francisco. In the transaction C. N. Nelson, who had previously been a partner of Wolf, transferred a house in Redwood City to the orchard company. This property was transferred to Bates for his equity in the ranch. Bates took the Redwood City property subject to the $20,000 mortgage. Wolf gave the orchard company a note for $20,000, and the orchard company gave Nelson a note for $20,000 secured by chattel mortgage on the 1927 prune crop then being and growing on the premises involved in this action, covered by the trust deed first referred to herein. On July 15, 1927, Wolf and Nelson visited the ranch in Shasta county. Wolf introduced himself to Bowen, and told Bowen that he had purchased the stock of the orchard company from Bates. Wolf and Nelson accompanied by Bowen, went over a portion of the ranch. Nelson stated he had not before seen the ranch. During the conversation, Bowen stated that he was working for the insurance company and not for Bates. This conversation was in the presence of Nelson. On July 16, 1927, Wolf and Nelson went to the recorder's office in Redding and recorded Nelson's crop mortgage. On the previous day, July 15th, the insurance company had recorded a notice of default and intention to foreclose its deed of trust. This record was examined by Wolf and Nelson, as shown by the fact that Wolf stated he had seen, while in Redding, that the insurance company had recorded a notice of default. Neither Wolf or Nelson ever called to see or communicated with Semsen about the ranch. Nelson never again visited the ranch. Bowen harvested the prune crop; the insurance company paying all the expenses. The prune crop, which was by reason of "red spider" somewhat light, sold for the sum of $5,276.88. The sale was made on October 14, 1927. The prunes were shipped from Cottonwood on October 23, 1927. On October 20, 1927, an attorney by the name of Edward T. Sullivan, representing Nelson,

went to the ranch, read a notice to Bowen that Nelson, as mortgagee, took possession of the prunes. This notice was tacked up on the warehouse. This was the only action ever taken by Nelson after taking his chattel mortgage on July 12, 1927, relative to the prune crop. The expenses of cultivating, caring for, pruning, sulphuring, and harvesting the prune crop amounted to the sum of $5,893.89. The net loss on the prune crop for 1927 was $617.01. The total profit on the operation of the ranch for the year 1927 was the sum of $947.68, which sum was credited on the indebtedness of the orchard company when the trust deed was foreclosed on November 21, 1927. The profit came from sales of peaches, grapes, and rent of the dehydrator. The peaches, grapes, and dehydrator were not covered by the chattel mortgage.

The foregoing facts present for our consideration, first, a question as to whether the insurance company was a mortgagee in possession and had entered with the consent of the mortgagor, or rather, with the consent of the grantor named in the trust deed; second, did the insurance company, as a mortgagee in possession, have a right to sell the prune crop and apply the proceeds to the indebtedness? and, finally, if the insurance company was not technically a mortgagee in possession, was it not, nevertheless, entitled to reimbursement for the expense of caring for and harvesting the crop of prunes?

The statement of facts shows that the orchard company was without funds; that it was upon the request, and therefore upon the consent, of the orchard company that the insurance company placed a man upon the premises to do the necessary work, advanced the necessary funds and superintended all the work in managing the farm, caring for, harvesting, and marketing the crops grown thereon. The facts show that the Bates family left the ranch early in the spring, paid no further attention to the crops, did nothing in relation thereto further than to execute the chattel mortgage in July, 1927. The chattel mortgage referred to was executed in San Francisco before either Wolf or Nelson had visited the ranch. Upon visiting the ranch, the plaintiff found a representative of the insurance company with his family living in the Bates house and caring for the property. Nothing was said by Wolf or Nelson relative to the harvesting of the prunes; no attention was paid thereto, save and except as we have hereinbefore stated. Upon visiting the recorder's office at Redding, the plaintiff and Wolf saw the notices of default to which we have referred, and also were advised of the existence of the trust deeds upon the premises.

The trial court found the failure of the orchard company to plow, sulphur, or otherwise care for the orchards and vineyards growing on the real property covered by a deed of trust, and that on or about the 19th day of April, 1927, the insurance company peaceably and lawfully took possession of the real property and all the appurtenances, including as well the growing crops thereon, and that upon said date the orchard company peaceably surrendered possession thereof to respondent insurance company; that the insurance company thereafter plowed, cultivated, sulphured, cared for, and harvested and marketed all the crops growing on said premises, and paid all the expenses thereof; that the occupancy of the insurance company was open, notorious, etc.; that on and after the 19th day of April, 1927, the orchard company exercised no control whatever over said property, or of the growing crops thereon, and did not in any manner care for, harvest, or market any of the growing crops; that on the 26th day of May, 1927, the orchard company, its agents, officers, and employees, removed from said real property and wholly abandoned the same, and thereafter, and at all times mentioned herein, abandoned said property and surrendered the possession thereof to the insurance company; that thereafter the insurance company at all times continued to hold the possession of said property, and of the crops growing thereon; that the crops on said property consisted of prunes, peaches, grapes, and other fruits; that the cost and expense of cultivating, caring for, and marketing the crops growing on said property for the year 1927 amounted to $7,629.15; that the total receipts for all the crops grown on said premises amounted to the sum of $8,576.83, leaving a net balance of $947.68, which was credited upon the indebtedness of the orchard company to the insurance company; that the total receipts from the sale of the crop of prunes was the sum of $5,276.88; that the costs of plowing, cultivating, sulphuring, pruning, harvesting, drying, and marketing the prune crop amounted to the sum of $5,893.89, leaving a net loss on the prune crop of $617.01.

The court further found the execution of the instruments which we have hereinbefore mentioned, and the filing of the chattel mortgage by the plaintiff, according to the statements of facts which we have hereinbefore set forth, and also a knowledge by the plaintiff of the possession by the insurance company, and also the fact that none of the parties involved in this action offered to take care of said crop or expended any fund necessary for the care, cultivation, and harvesting of the crops on said premises.

[1] Under the circumstances which we have hereinbefore recited, it seems clear to us that the finding of the court of the abandonment of the premises by the orchard company is clearly sustained by the testimony. It is likewise well established that the possession of the premises was peaceably turned over to the insurance company, and that the intent

and understanding of the orchard company and the insurance company was that the insurance company should continue in possession, cultivate the premises, care for and market the crops, pay the expenses thereof, and deduct the expenses from the amounts received for the sale of any harvested crops. The fact that Bates, after leaving the premises, endeavored to make sale of the same in order to clean up his indebtedness, does not militate against a single finding of the trial court. The title to the premises still remained in the orchard company, and whatever Bates might do, or whatever the orchard company might do in relation to the title in an endeavor to make sale of the premises had no bearing upon the possession vested in the insurance company. It does not appear from the record that the effort of the orchard company or of Bates to make sale in any manner interfered with the possession of the insurance company, or contemplated any such interference. The chattel mortgage executed and delivered to the plaintiff covered only the prune crop, and whatever inference may be drawn relative to the intent of the orchard company, bearing upon the question of possession as to the prune crop by the execution of the chattel mortgage, is rebutted by the fact that the peach, grape, and other fruit crops on the premises were not included therein, and were left entirely to the care of the insurance company. Thus, if the intent of continued possession is manifested in one instance, the intent of abandonment is just as clearly shown in the other.

[2] Following the letter by the orchard company advising the insurance company of the inability of the orchard company to finance and care for the crop during the year 1927, the removal from the premises by the orchard company of those who had formerly cared for the crops growing upon the mortgaged land and the testimony which we have summarized herein, it seems indisputable that the insurance company, on and after the 19th day of April, 1927, occupied the position of a mortgagee in possession, as that term is defined in 41 C. J. p. 612, where it is said: "The term 'mortgagee in possession,' is applied to one who has lawfully acquired actual possession of the premises mortgaged to him, standing upon his rights as mortgagee, and not claiming under another title, for the purpose of enforcing his security upon such property or making its income help to pay his debt; but the mere fact that the mortgagee receives the rents and profits does not constitute him a mortgagee in possession unless he takes the rent in such a way as to take out of the hands of the mortgagor the management and control of the estate. In some jurisdictions it is essential that the possession of the mortgagee be acquired with the consent of the mortgagor at least before foreclosure proceedings, while in others his consent is not necessary if the possession is acquired in a peaceable and lawful manner." The possession here was acquired in a peaceable and lawful manner, and from the facts disclosed in the testimony it is evident that the possession of the insurance company was taken by and with the consent of the orchard company. The letter addressed by the orchard company to the insurance company disclosing the financial embarrassment of the orchard company strongly evidences the intent to turn over the possession and permit the insurance company to cultivate, care for, and harvest the crop. Again, it is not necessary that the consent be in express words for the mortgagee to go into possession, but it may be implied from all the circumstances surrounding the transaction. 17 Cal. Jur. p. 1019.

[3] As to what constitutes a mortgagee in possession further appears in 17 California Jurisprudence, p. 1016, and need not be further elaborated upon herein. The mortgagee who enters and takes possession of the mortgaged premises, cultivates, cares for, and harvests the crops thereon, and markets the same with the consent of the mortgagor, entitles the mortgagee to deduct from the rents and profits received, all the expenses necessarily incurred in the cultivation, caring for, and harvesting the crops.

[4, 5] This summary of the law is supported by the language found in 17 California Jurisprudence, p. 1026, § 298 et seq. The duty of the mortgagee under such circumstances is to account for all the rents and profits received and to apply the net profits toward the payment or discharge of the indebtedness. Where the possession has been turned over to the mortgagee, whatever profits there may be derived from the possession of the premises becomes an additional security for the indebtedness, and is to be applied in the discharge thereof. Spect v. Spect, 88 Cal. 437, see pages 442 and 443, 26 P. 203, 205, 13 L. R. A. 137, 22 Am. St. Rep. 314, where a number of authorities are cited. Having obtained peaceable possession, the mortgagee is entitled to retain the possession until the debt is paid. Spect v. Spect, supra; Cameron v. Ah Quong, 175 Cal. 377, 165 P. 961.

[6] That the right of a mortgagee in possession to gather the crops growing upon the premises and apply the net proceeds thereof towards the discharge of the indebtedness is superior to the rights of subsequent creditors and mortgagees, appears from Jones on Evidence (8th Ed.) § 1436, vol. 2. To the same effect is the case of Lavensohn v. Ward, 1 Cal. Unrep. Cas. 764.

The record shows that the plaintiff had notice of the possession of the insurance company and of the records to which we have referred. Having this notice, the plaintiff was put upon inquiry as to the rights of the insurance company. Follette v. Pacific L. & P.

Corp., 189 Cal. 193, 208 P. 295, 23 A. L. R. 965; Pell v. McElroy, 36 Cal. 268; Scheerer v. Cuddy, 85 Cal. 270, 27 P. 713. Other cases might be cited, but the case of Follette v. Pacific L. & P. Corp., supra, is sufficient.

What we have said herein is set forth as the law in the case of Craig v. Burns, 65 Mont. 550, 212 P. 856, where the Supreme Court of Montana had before it a question as to the rights of a mortgagee in possession to the rents, issues, profits, and crops growing upon the mortgaged lands, and holding that under such possession the mortgagee, while required to account, was entitled to apply the net proceeds in discharge of the indebtedness due the mortgagee.

The cases cited by the appellant to the effect that an ordinary real estate mortgage gives to the mortgagee no right to the possession of the land, and creates no lien upon, or right to the crops growing and unsevered thereon, correctly state the law as we understand it, but those cases are readily distinguishable from the principles which we hold to apply to the instant case.

[7] In Freeman v. Campbell, 109 Cal. 360, 42 P. 35, one of the cases relied upon by the appellant, the distinction was drawn between a mortgagee in possession and one not in possession. The mortgagee in possession as defined in that case is one who has gone into possession with the consent of the mortgagor. This, as shown by the authorities which we have cited, may be either express or implied, and, as the testimony in the instant case is sufficient to support a finding that the insurance company went into possession with the consent of the orchard company, the right of the insurance company to harvest the crops was not limited by the fact that the trust deed in and of itself conferred no lien upon the crops and conferred no right to the possession of the premises.

[8] There is another principle involved in this action which we think supports the judgment of the trial court. The insurance company was not a trespasser. It was in possession of the premises covered by the trust deed, with the consent of the orchard company, and after a statement by the orchard company that it could not finance the cultivation, caring for, and harvesting the crops. Under such circumstances the ruling applied in the case of Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093, would be applicable if the insurance company had no other basis upon which to claim the proceeds of the crops. In the Lightner Case, supra, it was held that, as there was no willful trespass, an accounting should be had and only the profits awarded the plaintiff after deducting the expenses of extracting the ore involved, by the defendant. In the instant case we have the finding of the court showing that the receipts from the prune crop did not equal the expenses incurred in cultivating, caring for, pruning, harvesting, and marketing that crop.

Irrespective of the manner in which the insurance company charged the expenses of cultivating, caring for, harvesting, and marketing the prune crop, the orchard company would only be entitled to the surplus of the proceeds after deducting the expenses, and the plaintiff in this action would not be entitled to any greater sum, and, as the expenses exceeded the receipts, he is not entitled to any judgment. The circumstances disclosed in the record show that the prune crop was very light. There is no pretense, however, that this was due to any fault on the part of the insurance company, or that the insurance company did not properly care for the crop, or did not receive the full market price therefor.

In support of what we have said, we cite the following cases: Williams v. Gray, 62 Mont. 1, 203 P. 524; Stewart v. Halvorson, 50 S. D. 590, 211 N. W. 457; Reynolds v. McMan Oil & Gas Co. (Tex. Com. App.) 11 S.W. (2d) 778; White v. Yawkey, 108 Ala. 270, 19 So. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; Locke v. Klunker, 123 Cal. 231, 55 P. 993; 17 Cal. Jur., p. 1026, § 298.

Being of the opinion that the testimony sufficiently supports the findings of the trial court, and that the conclusions of law were correctly drawn, it follows that the judgment should be affirmed. And it is so ordered.

I concur: PRESTON, P. J.

124 Cal.App. 541

LLOYD et al. v. CITY OF REDONDO BEACH et al.

Civ. 8282.

District Court of Appeal, First District, Division 1, California.

June 28, 1932.

1. Injunction ⇐118(1).

Allegation in injunction suit that city lacked jurisdicton to order pier improvement *held* conclusion of law precluding proof that improvement was in waters under federal jurisdiction, and that city was without requisite federal permit (33 USCA § 401; St. 1911, p. 730, as amended).

2. Injunction ⇐121.

Amendment to allegation in injunction suit that city lacked jurisdiction to order pier improvement should have been allowed to specify that such lack consisted of absence

of federal permit, if amendment raised jurisdictional defect (33 USCA § 401).

Such amendment should have been allowed in view of the fact that the complaint had never been amended; that the allegation in question had not been objected to as a conclusion of law; that defendants were not taken by surprise; that no delay in trial would have been occasioned; that no new issue was added; and that, with the amendment, the case would have been tried on its merits.

3. Navigable waters ⇐19.

Public utility cannot exercise right of eminent domain in furthering enterprise interfering with navigable waters without approval of federal authorities (33 USCA § 401).

4. Navigable waters ⇐22(1).

Consent of federal authorities must be secured for city's extension of municipal pier in navigable waters (33 USCA § 401).

5. Navigable waters ⇐36(1).

State holds title to tide lands in trust for people's benefit and subject to public rights of navigation and fishing.

6. Navigable waters ⇐37(8).

Legislature was authorized to grant tide lands to city which succeeded to state's title subject to same trust in which state held lands (St. 1915, p. 62).

7. Navigable waters ⇐22(1).

Municipal pier improvement on submerged lands owned by city *held* "necessary or convenient for commerce and navigation" under statute, hence city obtained title to location of pier sufficient to order improvement (St. 1911, p. 732, § 2, as amended by St. 1927, p. 602, § 2; St. 1915, p. 62).

St. 1915, p. 62, granted to the city all the rights held by the state in certain tide and submerged lands to be held in trust on the condition that the lands should be used solely for the construction, maintenance, and operation of wharves, docks, and piers necessary or convenient for the promotion of commerce and navigation, and by St. 1911, p. 732, § 2, as amended by St. 1927, p. 602, § 2, city was authorized to order any portion of the tide lands or submerged lands to be improved by constructing thereon wharves or piers necessary or convenient for the promotion of commerce and navigation.

8. Municipal corporations ⇐438.

To justify local assessments on benefit theory proposed improvement must be public and must confer an especial local benefit on property to be assessed.

9. Municipal corporations ⇐484(2).

If lots assessed are susceptible to some benefits from improvement, extent of such benefits, in absence of fraud or demonstrable mistake, rests in city council's determination, and will not be interfered with by courts.

10. Municipal corporations ⇐439.

Wharf 268 feet long with boat landing, comfort station, rest houses, and lighting system would benefit adjacent private property, justifying local assessment for benefits.

11. Municipal corporations ⇐484(2).

Objection that particular property could not be benefited by wharf construction must be made to city council whose decision is final.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Maude Lloyd and others against City of Redondo Beach and others. From a judgment of nonsuit, plaintiffs appeal.

Reversed with directions.

George W. Crouch and Lewis E. Whitehead, both of Los Angeles, for appellants.

Harry Polglase, City Atty., of Redondo Beach, and Arthur M. Ellis, of Los Angeles, for respondents City of Redondo Beach and City Counsel.

Wm. M. Brown, of Los Angeles, for respondent W. M. Ledbetter & Co.

GRAY, Justice pro tem.

Certain property owners within an assessment district, who sued to enjoin respondents from executing a contract awarded pursuant to proceedings had under the "improvement Act of 1911" (St. 1911, p. 730, as amended) for the extension of the municipal pier, appeal from a judgment of nonsuit.

[1, 2] Their first point is that they should have been allowed to prove that no permit for such extension had ever been obtained from the federal authorities as required by an Act of Congress of March 3, 1899, § 9 (U. S. Code, Ann., title 33, § 401, p. 377), and that, upon such proof, they were entitled to the injunction, as, in the absence of such permit, the contract and its award were invalid. In support of their general allegation that the city never had jurisdiction to order the work, appellants offered to prove that the proposed improvement was located in navigable waters of the Pacific Ocean, and that the city had never obtained the requisite permit. Upon respondents' objection to its relevancy, the court properly rejected this offer because the allegation was a mere conclusion of law (Spaulding v. Wesson, 84 Cal. 141, 24 P. 377), which tendered no issue (21 Cal. Jur. 26), and therefore was insufficient to support the introduction of evidence relative thereto (Germo Mfg. Co. v. McClellan, 107 Cal. App. 532, 290 P. 534). Thereupon appellants asked

leave to amend their general allegation as to the city's lack of jurisdiction so as to specify that such lack consisted of the absence of such permit. The court, being of the expressed opinion that such absence of the permit was not a jurisdictional objection, denied the request. In view of the fact that the complaint had never been amended; that respondents had never by demurrer or motion to strike objected to the allegation as a conclusion of law; that they were not taken by surprise; that no delay in the trial would have been occasioned; that no new issue was added; and that, with the amendment, the case would have been tried on its merits, the trial court should have allowed the proposed amendment (Burns v. Scooffy, 98 Cal. 271, 33 P. 86; Crosby v. Clark, 132 Cal. 1, 63 P. 1022), if such proposed amendment raised a jurisdictional defect in the proceedings. Respondents, by arguing merely that the absence of such permit did not establish the city's want of jurisdiction, practically concede the propriety of such amendment if it tendered a material issue.

[3, 4] While there seems to have been no previous determination of this express question by the appellate courts of this state, yet the reasoning upon an analogous question in Southlands Co. v. City of San Diego, 211 Cal. 646, 297 P. 521, 524, appears applicable and decisive of the question. In deciding "whether the Acquisition and Improvement Act of 1925, or any other statute, confers authority upon municipalities to build bridges over navigable intrastate water, when such a bridge becomes reasonably necessary in the construction and improvement of a highway," the Supreme Court held in that part that: (1) "Inasmuch as the United States possesses jurisdiction over such waters for the purpose of controlling navigation and commerce, it is obvious that the consent of the United States authorities must be secured for the construction of such a bridge;" (2) "that the source of the authority to build a bridge over intrastate navigable waters is the state, and not the United States" and "no approval other than that of the Secretary of War and Chief of Engineers to the location and plans of the bridge need be secured from the United States;" (3) that the neglect to get the state's consent is a jurisdictional defect which is not waived by failure to object on that ground before the local legislative body; and (4) that any contract entered into by the city for the erection of such bridge without the state's consent is void. While it is true that, as the federal permit had been granted in that case, no question as to its necessity arose, yet, since the opinion places the federal approval upon an equal basis of importance with the state's consent, it follows that what was held as the effect upon the contract of the absence of the state's consent is equally true as to the effect of the lack of federal approval. In a court proceeding to confirm an assessment for the widening of Chicago river, the property owners' objection that the city was not authorized to assess until it had first obtained federal approval of the project was sustained in the City of Chicago v. Law, 144 Ill. 569, 33 N. E. 855. This last case was followed in Department of Public Works and Buildings v. Engel, 315 Ill. 577, 146 N. E. 521, where it was held that an action to condemn land to be used for erecting obstructions in a navigable stream could not be maintained without first obtaining federal consent. A public utility cannot exercise the right of eminent domain in furtherance of an enterprise involving an interference with navigable waters without having first procured approval of its plans by federal authorities. Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105. We are satisfied, therefore, that the lack of a federal permit is a jurisdictional defect which appellants should have been allowed to prove under an appropriate amendment to their complaint.

[5-7] The next question presented is whether the improvement is upon submerged lands owned by the City of Redondo Beach as such ownership is contemplated by the provisions of the "Improvement Act of 1911." Statutes 1915, p. 62, granted to the city "all the right, title and interest of the State of California, held by said state by virtue of its sovereignty in and to all the *tide lands* and *submerged lands*, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific Ocean, to be forever held by said city, * * * in trust for the uses and purposes, and upon the express conditions following, to wit: (a) Said lands shall be used by said city * * * solely * * * *for the construction, maintenance and operation thereon of wharves, docks, piers, * * * necessary or convenient for the promotion or accommodation of commerce and navigation.* * * *" (Italics ours.)

The state held title to these tide lands in trust and for the benefit of the people, and such title was subservient to the public rights of navigation and fishing. Santa Cruz v. Southern Pac. R. R. Co., 163 Cal. 538, 126 P. 362; People v. California Fish Co., 166 Cal. 576, 138 P. 79. The Legislature was authorized to grant such tide lands to the city, and thereupon the city succeeded to the state's title subject to the same trusts. Cimpher v. City of Oakland, 162 Cal. 87, 121 P. 374; Los Angeles v. Pacific Coast S. S. Co., 45 Cal. App. 15, 187 P. 739. By section 2 of the "Improvement Act of 1911," as amended in 1927 (Stats. 1927, p. 602, § 2), the city was "authorized and empowered to order * * * any portion * * * of * * * *tidelands or submerged lands* owned by" it "to be improved

by or have constructed therein, over or thereon * * * *the building* * * * of *wharves, piers* * * * *necessary* or *convenient for the promotion or accommodation of commerce, navigation* * * * and for aiding and securing access to the waters of said lands to the people * * * in the exercise of their rights to fish, or for the extension of public streets or places." (Italics ours.) Since the same words are used to describe the property conveyed and the location of the work—i. e., tide lands and submerged lands—in both statutes, it is apparent the Legislature had in mind the same thing on each occasion, and therefore considered its conveyance a sufficient title to permit the ordering of the work. A comparison of the italicized portions of the two statutes shows that the authority to construct was in harmony with the trust created in the grant. Since the city succeeded to all the state's title, and the state by statutes has consented to the pier's construction (Southlands Co. v. City of San Diego, supra), and the proposed pier carries out the terms of the trust, it must be held that the city's title to the location of the pier is sufficient to authorize it to order the work.

[8, 9] Appellants next contend that the nature of the proposed improvement prevents it from conferring special benefit on the property assessed, and therefore such assessment violates state and federal constitutional prohibitions against taking property without due process of law and without payment of just compensation. The work is described in the resolution of intention as the building of a wooden extension, approximately 268 feet long, to the existing municipal pier, with a boat landing, public comfort station, six rest houses for the purpose of harboring benches or seats, and a lighting system. In order to justify a local assessment based on a theory of benefits, the proposed improvement must be public and must confer an especial and local benefit upon the property to be assessed. If, from the nature of the improvements, it can be seen that the lots to be assessed are susceptible of some substantial benefit from it, the question of the extent of the benefit received is one which, in the absence of fraud, gross injustice, or demonstrable mistake, rests peculiarly in the determination of the city council, and its action will not be interfered with by the courts. Federal Construction Co. v. Ensign, 59 Cal. App. 200, 210 P. 536. "The test of the right to create a public improvement by special assessment does not resolve itself upon the point as to whether there exists some general public benefit, because every assessment proceeding contains an element of public benefit. The test is: Does there exist with relation to the work a special and peculiar benefit to the property to be assessed?" Mills v. City of Elsinore, 93 Cal. App. 753, 769, 270 P. 224, 231; see, also, Irish v. Hahn, 208 Cal. 339, 281 P. 385, 66 A. L. R. 1382.

[10, 11] In the present case appellants do not make the narrow contention that their property is not benefited, but broadly assert that no private property could possibly be specially benefited by a public wharf. The wharf would, from its very nature, attract pleasure seekers, desirous of boating, fishing, sightseeing, walking, etc. Such persons, in the pursuance of such pleasures, must necessarily spend money in satisfying their desires, and would become potential customers of stores in the immediate vicinity of the wharf. The increased accessibility of the water, made possible by the improvement, would increase the uses to which adjacent property might be adapted. In short, business in the immediate vicinity would be stimulated by the influx of people, and property values would be created thereby. "There is no fairer test of special benefit received than that which determines the existence and amount of such benefit by the effect of the improvement upon the market value of the property to be assessed." Federal Construction Co. v. Ensign, supra, 59 Cal. App. 212, 210 P. 536, 541. The growth of civilization and increase of population has greatly increased municipal functions, and in recognition of that fact the Legislature from time to time has added to the purposes for which a city may levy local assessments. See numerous instances cited in Irish v. Hahn, supra. The express question here involved was decided adversely to appellants' contention in Solomon v. Wharf Improvement Dist. No. 1, 145 Ark. 126, 223 S. W. 385, where an injunction against an assessment for the construction of a wharf was denied. In Page and Jones on Taxation, § 360, there may be found a collection of cases upholding local assessments for the improvement of waterways, including construction of piers and wharves, for the same reasons which justify assessments for streets. Indeed, the assessment may also be upheld upon the theory, expressed in the resolution of intention, that the municipal pier being an extension of Pier avenue, a public street, the proposed extension is also a further extension of such street. Southlands Co. v. City of San Diego, supra. If appellants' objection is the narrower one, that their particular property cannot be benefited, such objection must be made to the city council, whose decision would be final and conclusive. Irish v. Hahn, supra.

The judgment is reversed, with instructions to allow the requested amendment to the complaint.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

124 Cal.App. 528

PASCOE v. PAYNE et al.

Civ. 396.

District Court of Appeal, Fourth District, California.

June 27, 1932.

1. Infants ⇐115.

Automobile owner could not complain of failure to appoint guardian ad litem to represent son in suit against owner for son's negligent operation of automobile, where owner could have had guardian appointed (Civ. Code § 1714¼).

2. Automobiles ⇐195(1).

Minor son's negligence in operating father's automobile *held* imputed to father signing son's operator's license application and permitting son to operate automobile (St. 1923, p. 532, § 62, as amended by St. 1929, p. 522).

3. Automobiles ⇐195(1).

Father signing minor son's operator's license application *held* liable for collision from son's negligence, notwithstanding failure to appoint guardian ad litem for son (St. 1923, p. 532, § 62, as amended by St. 1929, p. 522).

4. Automobiles ⇐245(90).

Whether plaintiff drove automobile into obstructed intersection at excessive speed and struck defendant's automobile, thereby contributing to cause of collision, *held* for jury.

5. Evidence ⇐589.

Where evidence is conflicting, jury is not bound by testimony of either party.

6. Automobiles ⇐245(14, 90).

Whether defendant motorist entered intersection first, and whether plaintiff thereafter persisted in his course and proximately caused collision, *held* for jury (St. 1923, p. 560, § 131, as amended by St. 1929, p. 541).

7. Appeal and error ⇐926(2).

Appellate court must assume that map not part of record, and used by witnesses, was used by jury in determining responsibility for collision.

8. Appeal and error ⇐1001(1).

Where evidence is sufficient to support findings, appellate court will not disturb judgment.

9. Appeal and error ⇐989.

That evidence of party against whom verdict was had would have supported verdict in his favor is immaterial on appeal, where evidence supported verdict rendered.

10. Negligence ⇐136(8, 10).

Where evidence is conflicting or reasonable men might differ respecting inferences from undisputed evidence, negligence or contributory negligence is question of fact.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Lester Pascoe against J. Bruce Payne and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Brittan & Brittan, of Bakersfield, for appellants.

Aldrich & Mack and Rowen Irwin, all of Bakersfield, for respondent.

THOMSON, Justice pro tem.

This is an appeal from the judgment following verdict for plaintiff, in the sum of $3,750, in an action for damages for personal injuries arising out of a collision which occurred July 11, 1930, at the intersection of N and Eighth streets, in the city of Bakersfield. The complaint is in the usual form, and the answer denies negligence on the part of defendants, and alleges affirmatively contributory negligence on the part of plaintiff.

The defendants are father and son. Plaintiff sought to hold the elder Payne for imputed negligence. The complaint alleges, and the answer admits, that, at the time of the collision, the son was a minor, 20 years old, and the father had signed the application for the operator's license which was issued to the son; and the son, at the time of the collision, was driving his father's automobile with his father's permission. At no time was a guardian ad litem appointed for the defendant, J. Bruce Payne, Jr., and no proceedings were taken for the purpose of having such guardian ad litem appointed.

The defendants and appellants rely on the following specifications of error: (1) The judgment is void as to the defendant J. Bruce Payne (Sr.), because it may be disaffirmed by his codefendant J. Bruce Payne, Jr.; (2) the evidence shows as a matter of law that the contributory negligence of the plaintiff in entering an obstructed intersection of highways at a speed in excess of fifteen miles per hour was the proximate cause of the collision and the resulting injuries; (3) the evidence shows as a matter of law that the contributory negligence of the plaintiff in persisting in his course after the defendant driver had entered the intersection of highways first proximately caused the collision and the resulting injuries.

Under their first specification of error, appellants cite section 1714¼ of the Civil Code, which provides in part: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle * * * by any person using or operating the same with the permission, express or implied, of such owner * * * in any action against an owner on

account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant * * * and, upon recovery of judgment, recourse shall first be had against the property of said operator * * * and provided, further, that in the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner shall be subrogated to all the rights of the person injured * * * and may recover from such operator the total amount of any judgment and costs recovered against such owner."

[1-3] Appellant J. Bruce Payne, Sr., argues that said section creates a new liability, making the owner and the operator jointly and severally liable, but restricts this liability by providing that, in cases where no agency exists, the primary liability shall rest upon the operator, and it gives to the owner the right of subrogation against the negligent operator. Said appellant further contends that, in a case like the instant case, where the negligent driver is a minor, and he has not been represented in the action by a guardian ad litem, the nonnegligent owner is deprived of the benefit of the above restrictions on such liability. However, the right to have a guardian ad litem appointed was available to said appellant, as well as to the respondent, and, upon application by said appellant to the trial court, such a guardian, no doubt, would have been appointed. Code Civ. Proc. § 373, subd. 2. Said appellant should not, therefore, be heard to complain on appeal because a guardian ad litem was not appointed. Said appellant's contention, however, overlooks the fact that the liability of the father of the minor in this case is also based upon the fact that the father, prior to the collision, had signed the minor's application for an operator's license, which license was issued to said minor by the motor vehicle department, and the minor, at the time of the collision, was operating said automobile with the permission of his father. The pleadings admit, and the evidence shows, these facts. Under such circumstances, the negligence of said minor is imputed to his father under the provisions of section 62 of the California Vehicle Act (as amended by St. 1929, p. 522). Buelke v. Levenstadt, 190 Cal. 684, 685, 214 P. 42; Bosse v. Marye, 80 Cal. App. 109, 116, 250 P. 693. Said section 62, which relates to the negligent use of motor vehicles by minors, does not contain the restrictions above mentioned which are included in section 1714¼ of the Civil Code. In the case of Bosse v. Marye, supra, the jury returned a verdict against the father of the negligent minor driver, and failed to find the minor liable. The appellate court, however, held, under a statute similar to section 62 of the California Vehicle Act of 1929, p. 522, that the liability of the minor and the person who signed his application for an operator's license was joint and several, and the minor was not even a necessary party to the action. It follows, therefore, that appellant J. Bruce Payne, Sr., is liable to respondent regardless of the failure to appoint a guardian ad litem for appellant J. Bruce Payne, Jr.

[4, 5] Appellants' second and third specifications of error may be condensed into the one argument that the evidence shows that respondent was guilty of contributory negligence which was the proximate cause of the injury, as a matter of law. In support of their second specification of error, appellants recite that it was stipulated that the intersection involved in the case is an obstructed or "blind" intersection; that J. Bruce Payne, Jr., who was driving his father's Cadillac automobile which was involved in the collision, and three boys who were following him in an automobile, testified that respondent's Hudson automobile which was involved in the collision approached and entered the intersection in which the collision occurred at a speed in excess of twenty-five miles per hour, and Mrs. Pascoe, wife of respondent, who was seated in the front seat of respondent's car, testified that prior to reaching the intersection respondent's car was traveling fifteen or twenty miles per hour; and appellants argue from such evidence that respondent's car must have been exceeding the speed limit at the time it entered the intersection. But there was other evidence at the trial from which the jurors might well have concluded that respondent's car entered the intersection at a lawful rate of speed. Mrs. Ione Francis, a witness for the plaintiff, testified that she was sitting on the porch of a residence about half a block north of the intersection, when plaintiff's car passed, and that it was then traveling fifteen or twenty miles per hour. Plaintiff's wife testified that, just before entering the intersection, her husband, who was driving the Hudson car, removed his foot from the accelerator and slackened the speed of the car so that he might look up and down Eighth street. This created a conflict of evidence, and the jurors were not bound to believe the testimony of defendants' witnesses, but, from the evidence produced by the plaintiff, they could have concluded reasonably that plaintiff's car entered the intersection at a lawful rate of speed.

Appellants argue that "the evidence further shows that his (respondent's) Hudson struck the right front part of the defendant's Cadillac, and that, therefore, his negligent speed proximately caused the collision." There is nothing conclusive about the fact that the Hudson may have struck the Cadillac. But plaintiff produced evidence to prove that appellant's car was approaching the intersection at a high rate of speed and swerved over to the left or south side of Eighth street before entering the intersection, and continued to swerve in that direction up to the point of

impact, which was a few feet south of the center of the intersection, and that the Cadillac struck the Hudson a glancing blow, turning the Hudson over on its side and causing it to face in the opposite direction. With such a conflict of evidence, the jurors were justified in believing that appellant's car struck respondent's car while the former was traveling at an excessive speed, and that respondent was free from any negligence that proximately contributed to the collision.

[6] Appellants' last contention is that "the evidence shows as matter of law that the contributory negligence of the plaintiff in persisting in his course after the defendant driver had entered the intersection of highways first proximately caused the collision and the resulting injuries." In support thereof appellants cite section 131 of the California Vehicle Act of 1929, p. 541 (in effect at the time of the collision), which provides that "the driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. * * *" Appellants then review evidence favorable to their contention that their car entered the intersection before respondent's car. In reply respondent points out evidence produced by him at the trial which indicates, and from which the jurors might reasonably have inferred, that respondent's car entered the intersection first.

[7] It should also be stated that the record on appeal shows that at the trial a map or diagram prepared by an engineer and drawn to scale was produced and used extensively by witnesses to illustrate their testimony. This diagram is not a part of the record on appeal, and in such case the appellate court must assume that the jury was aided by the use of the diagram in connection with other evidence in arriving at its conclusions as to the responsibility for the collision. Packer v. Wagner, 109 Cal. App. 26, 29, 292 P. 523, 524; Truitner v. Knight, 83 Cal. App. 655, 662, 257 P. 447.

[8-10] Upon the entire record on appeal it is apparent that a substantial conflict of evidence exists as to the elements of proof necessary to reach a verdict. The evidence introduced by respondent, including the physical facts connected with the collision, is sufficient to support the verdict. In this condition of the evidence an appellate court will not disturb the judgment. It is immaterial on appeal that appellants' evidence, if accepted by the jury, would likewise have supported a verdict in their favor. Waxman v. Jennings, 72 Cal. App. 671, 674, 238 P. 98. As stated by this court in the case of Packer v. Wagner, supra: "When the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact. * * * A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support it." See, also, Taylor v. United States Fidelity & Guaranty Co., 86 Cal. App. 382, 386, 260 P. 898; Rasic v. Schultheiss (Cal. App.) 9 P. (2d) 550.

Under the facts and circumstances of the instant case, the issues of contributory negligence and proximate cause were matters for the jury to determine, and its verdict against the defendants is conclusive upon this court.

The judgment is affirmed.

We concur: BARNARD, P. J.; and JENNINGS, J.

125 Cal.App.(Supp.) 787

PEOPLE v. PERELES.

Cr. 790.

Appellate Department, Superior Court, Los Angeles County, California.

June 29, 1932.

1. Druggists ⇐5.

Provision prohibiting dispensing of drugs by one not registered pharmacist should be construed, in view of remainder of act, as excepting compounding or sale of drugs in presence or under supervision of registered pharmacist (Deering's Gen. Laws 1923, Act 5886, § 13).

2. Statutes ⇐188.

Words and clauses of statute may be enlarged or restricted to effectuate intention or harmonize provisions.

3. Druggists ⇐12.

In prosecution for unlawfully selling drugs, refusal to permit proof of custom of unregistered employees to make sales under direct supervision of registered pharmacists *held* prejudicial error (Deering's Gen. Laws 1923, Act 5886, § 13; Code Civ. Proc. § 1963, subd. 20).

Defendant was entitled to show the ordinary course of business in respect to sales of poison by unregistered employees, since the offense complained of occurred several months before the trial, making it difficult to remember precisely what was done in regard to a particular sale, and since Code Civ. Proc. § 1963, subd. 20, creates presumption that ordinary course of business has been followed.

4. Criminal law ⇐670.

Offer of proof is unnecessary, where question addressed to party's own witness shows its purpose and materiality of evidence.

5. Criminal law ⇐808½.

Court's reading entire section of statute without further defining offense charged under particular clause thereof, prohibiting sale of drugs by one not registered pharmacist, *held* erroneous (Deering's Gen. Laws 1923, Act 5886, § 13).

6. Criminal law ⇐1216(2).

Statute authorizing consecutive sentences is inapplicable to alternative fine or jail sentence (Pen. Code, § 669).

Appeal from Municipal Court of Los Angeles; Arthur Crum, Judge.

Abe Pereles was convicted of unlawfully selling drugs, and he appeals.

Reversed and remanded for new trial.

E. O. Leake and J. J. Leake, both of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, John L. Bland, and Joe W. Matherly, Deputy City Prosecutor, all of Los Angeles, for the People.

McLUCAS, P. J.

The defendant was charged in two counts with violations of section 13, State Pharmacy Act (Stats. 1905, p. 535, as amended Act 5886, Deering's General Laws 1923, § 13) and was adjudged guilty on both counts. In count I it was charged that the defendant "did wilfully and unlawfully sell, retail and dispense drugs, medicines and poisons, to-wit: Lysol, the said Abe Pereles not being then and there a registered pharmacist licensed to practice in the State of California, nor under the direct, immediate and personal supervision of a registered pharmacist licensed to practice in the State of California." In count II the defendant was similarly charged with sales of aspirin and tincture of iodine. Defendant was found guilty, and appeals from the judgment.

Appellant urges that section 13 of the State Pharmacy Act is void for uncertainty. It defines four classes of offenses, and reads as follows, the numbers in parentheses being no part of the statute but interpolated by us for convenience of reference: "(1) Any proprietor of a pharmacy, who shall fail, or neglect to place in charge of such pharmacy a registered pharmacist, or (2) any proprietor, who shall by himself, or any other person, permit the compounding of prescriptions, or the vending of drugs, medicines, or poisons, in his or her store, or place of business, except by or in the presence and under the direct, immediate and personal supervision of a registered pharmacist, or (3) any person, not being a registered pharmacist, who shall take charge of, or act as manager of any pharmacy, or store, or (4) who, not being a registered pharmacist, retails, compounds, or dispenses drugs, medicines, or poisons, shall be guilty of a misdemeanor, and upon conviction thereof shall be liable to a fine of not less than twenty ($20) dollars and not more than one hundred dollars, or by imprisonment for a term of not exceeding fifty days, or by both such fine and imprisonment."

[1, 2] Appellant's contention is that the clauses which we have numbered (2) and (4) are conflicting. We find no such conflict. Clause (2) is directed at the proprietor who permits certain things to be done, and clause (4) punishes the person who does them. If there were any inconsistency between them in the description of the acts prohibited, the two clauses would not conflict, but would merely provide different regulations for the two classes of persons involved. However, we conclude, on a consideration of the whole act, that there is no such difference. In construing a statute it must be considered as a whole, and words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. In re Haines, 195 Cal. 605, 613, 234 P. 883; In re Washer, 200 Cal. 598, 604, 254 P. 951; Ex parte Hedley, 31 Cal. 108, 114; People v. Strickler, 25 Cal. App. 60, 66, 142 P. 1121. In section 1 of this statute (Deering's Gen. Laws Supp. 1927, Act 5886, § 1), we find the declaration that "it shall be unlawful for any person to manufacture, compound, sell, or dispense any drug, poison, medicine or chemical, * * * unless such person be a registered pharmacist or a registered assistant pharmacist within the meaning of this act, except as hereinafter provided." This exception leads us to expect some further provision permitting such sales, etc., by persons not registered pharmacists or assistants; an expectation which is disappointed if clause (4) of section 13 is read without exception. Section 12 contains a provision covering practically the same subject as clause (4) of section 13, as follows: "Any person not registered who shall retail medicine, poisons or chemicals, except in a pharmacy under the direct, immediate and personal supervision of a registered pharmacist, unless the same is expressly permitted by law, * * * shall be deemed guilty of a misdemeanor." Deering's Gen. Laws Supp. 1929, Act 5886, § 12. And finally clause (2) of section 13 punishes the proprietor for permitting unregistered persons to vend drugs, etc., "except * * * in the presence and under the direct, immediate and personal supervision of a registered pharmacist." All of these provisions may be harmonized by reading the words last quoted into clause (4) of section 13. This may be done

under the rules of construction above mentioned, and by doing it we reach what we regard as the proper construction of that clause.

Section 13 has been considered and upheld as a proper exercise of the police power in the following cases: It was held in the case of In re Gray, 206 Cal. 497, 274 P. 974, that section 13 was constitutional and valid and did not grant special privileges or deny the equal protection of the laws in a manner not reasonably intended to protect the public health. See, also, In re Potter, 164 Cal. 735, 130 P. 721; In re Potter, 26 Cal. App. 45, 146 P. 62.

[3, 4] Appellant complains of the rulings of the trial court in excluding certain evidence. The people had offered the testimony of witnesses that the defendant was manager of the R & B Cut Rate Store in San Pedro; that defendant, not being a registered pharmacist, sold tincture of iodine, aspirin, and lysol not in the presence nor under the direct, immediate, and personal supervision of a registered pharmacist. The defendant inquired from certain witnesses what was the practice of the employees of the store with reference to the selling of poisons. It is apparent from the context of the record that the defendant was endeavoring to elicit testimony tending to prove that it was the invariable custom for all unregistered employees to make sales of poison in the presence of and under the direct, immediate, and personal supervision of a registered pharmacist. Both sections 12 and 13 of the act permit the sale of poison in this manner by one who is not a registered pharmacist. The people had charged the defendant with a failure to comply with the provisions of section 13, and had offered evidence in support of the charge. This evidence excluded was material and relevant to the issue. It was perhaps the only manner in which the charge could be refuted; there being many hundred sales made on each day. The complaint was filed on January 27, alleging an offense on January 12, and the trial was held on March 25. It would be exceedingly difficult for any salesman to remember precisely what was done by him in regard to a particular sale of poison made over two months before the trial. There is a presumption that the ordinary course of business has been followed. Code Civ. Proc. § 1963, subd. 20. The defendant was entitled to show what was the ordinary course of business in order that the defendant might have the benefit of such presumption before the jury in its deliberations. The respondent objects that no offer of proof of custom was made. This objection is without merit. Where a question addressed to a party's own witness shows its purpose and the materiality of the evidence sought to be elicited, an offer to prove is not necessary. 38 Cyc. p. 1330. If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it is error to exclude it. Buckstaff v. Russell & Co., 151 U. S. 626, 637, 14 S. Ct. 448, 38 L. Ed. 292. The following cases recognize the rule that it is unnecessary to make a formal offer of proof where the question itself or the statement of counsel disclose the materiality of the evidence: Marshall v. Hancock, 80 Cal. 82, 22 P. 61; Houghton v. Clarke, 80 Cal. 417, 22 P. 288; Snowball v. Snowball, 164 Cal. 476, 129 P. 784; Pedrow v. Federoff, 77 Cal. App. 164, 178, 247 P. 212; Merz v. Poole, 82 Cal. App. 12, 254 P. 914. We believe the exclusion of this evidence was prejudicial to defendant, although one witness had been permitted to testify without objection that sales of poison by persons not registered were always brought to the attention of the registered pharmacist by showing it to him. We cannot say that the exclusion of this evidence may not have resulted in a miscarriage of justice.

[5] Appellant complains of instruction No. 3, which reads as follows: "You are instructed that the law under which the defendant is being prosecuted in Case No. 29611 provides as follows: (Reading) 'Any proprietor of a pharmacy who shall fail or neglect to place in charge of such pharmacy a registered pharmacist, or any proprietor who shall by himself or any other person permit the compounding of prescriptions or the vending of drugs, medicines or poisons in his or her place of business except by or in the presence of or under the direct immediate and personal supervision of a registered pharmacist; or any person not being a registered pharmacist who shall take charge of or act as manager of such pharmacy or store, or who not being a registered pharmacist retails, compounds or dispenses drugs, medicines or poisons shall be guilty of a misdemeanor, and it is incumbent upon the prosecution to prove beyond a reasonable doubt violation of the provisions of such law and in the absence of such proof the defendant is entitled to an acquittal on the charge contained in complaint No. 29611.'" No other instruction defining the offense charged was given. The defendant was being prosecuted under clause (4) of section 13. As we have already seen from the foregoing discussion, all the provisions of the act should be harmonized by reading into clause (4) of section 13, the following words, "except in the presence and under the immediate direction of a registered pharmacist," which words appear in clause (2). The mere reading of section 13 to the jury without any further definition of the offense charged was misleading to the jury, for the reason that clause (4) of section 13 appears to make the retailing, compounding, or dispensing of drugs, medicines, or poisons, by one who is not a registered pharmacist, a misdemeanor, though other provisions of the act permit such sales by one who is not a registered pharmacist, provided the sale is made in the presence and under

the direct, immediate, and personal supervision of a registered pharmacist. In fact the complaint itself charges the defendant with the sale of drugs; the defendant not being a registered pharmacist, nor under the direct, immediate, and personal supervision of a registered pharmacist. It thus appears that the defendant was not charged with a violation of the first three clauses of section 13; yet all of these clauses were read to the jury. The instruction was calculated to confuse the jury, and it must have been extremely difficult, if not impossible, for them to determine from it what was the correct definition of the crime with which the defendant was charged. People v. Monahan, 59 Cal. 389. In our opinion it was prejudicial error to give such an instruction without further definition of the offense charged.

[6] The defendant was given an alternative fine or a jail sentence on both counts, to run consecutively with each other and consecutively with the sentence in a companion case. Section 669, Pen. Code, authorizing consecutive sentences relates to sentences of imprisonment only, and not to alternative sentences. In re Selowsky, 44 Cal. App. 421, 186 P. 608; In re Cohen, 198 Cal. 221, 228, 244 P. 359.

The judgment is reversed, and the cause is remanded for a new trial.

SHAW and BISHOP, JJ., concur.

125 Cal.App.(Supp.) 794

PEOPLE v. FROST.

Cr. 806.

Appellate Department, Superior Court, Los Angeles County, California.

July 6, 1932.

1. Weapons ⇐10.

Statute regulating carrying of firearms *held* not to prohibit carrying of firearm in vehicle unless firearm be concealed (St. 1923, pp. 697, 698, §§ 5, 7, 8).

St. 1923, p. 697, § 5, regulating carrying of firearms, does not prohibit carrying of firearm in vehicle unless it be concealed, since section 5 refers to section 8, and the latter provides that certain peace officers may issue license to carry concealed a pistol, or other firearm, and such provision is only one in act providing for a license to carry firearms, so that if section 5 is to be construed as requiring license to carry unconcealed firearm in vehicle, no mode of procuring such license was provided.

2. Statutes ⇐205.

Statute must be construed as a whole to determine true legislative intent, reading each provision in light of others.

3. Criminal law ⇐1186(4).
Weapons ⇐17(1).

Complaint charging defendant carried pistol in automobile, but failing to allege pistol was concealed, *held* defective and was not cured, even if evidence showed existence of omitted fact (St. 1923, p. 697, § 5; Const. art. 6, § 4½).

Appeal from Municipal Court of Los Angeles; Frank M. Smith, Judge.

Frank Frost was convicted of violating statute regulating carrying of firearms, and he appeals.

Reversed and remanded, with directions.

Clifford Thoms and Paul W. Shenck, both of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, and J. W. Matherly and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for respondent.

SHAW, J.

[1] This case requires a construction of section 5 of the act of 1923 (Stats. 1923, pp. 695, 697) relating to the sale, possession, and use of firearms and other dangerous weapons. The part thereof to be construed reads as follows: "Except as otherwise provided in this act, it shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm as hereinafter provided in section eight hereof. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony." The question for solution is: "Does the word "concealed," where it first appears, apply only to the words, "upon his person," immediately following, or does the limitation imposed by it extend to the next ensuing words, "or within any vehicle"? Or to put it differently, does one who, without a permit, carries within his vehicle a firearm of the described class, without concealment, violate this section? We are of the opinion that he does not.

[2] A statute must be construed as a whole, in order to determine the true legislative intent, reading each provision in the light of the others. 23 Cal. Jur. 760, 761. Section 5 refers to section 8 (St. 1923, p. 698), and the latter provides that certain peace officers

may, on proof of good cause and of an applicant's good moral character, "issue to such person a license to carry concealed a pistol, revolver or other firearm for a period of one year from the date of such license." This is the only provision in the act for a license to carry firearms, so that if section 5 is to be construed as requiring a license to carry a firearm unconcealed in a vehicle, no mode of procuring such license is provided, and the forward reference to section 8 is nugatory. There appears in section 7 of the act (St. 1923, p. 698) this provision, which is clearly in pari materia with section 5: "The unlawful concealed carrying upon the person or within the vehicle of the carrier of any dirk, dagger, pistol, revolver, or other firearm capable of being concealed upon the person, is a nuisance." Following this are provisions for the confiscation and destruction of the weapons so carried. The word "concealed" is so placed in this last quotation as to leave no doubt that it applies to carrying either upon the person or within the vehicle. We find no reason for imputing any different meaning to section 5. The two sections plainly are intended to provide two different remedies for the same evil, section 5 bringing the power of the law to bear upon the carrier, and section 7 operating directly upon the weapon carried.

The title of the act also gives some support to our construction of section 5. While in the first few lines it contains general language probably adequate to cover the whole act, it then starts in to catalogue the contents; and although such a catalogue is unnecessary, it reveals to us in this case the legislative view of section 5, for the only part of the title peculiarly applicable to that section reads, "to prohibit the carrying of concealed firearms except by lawfully authorized persons."

Because exceptions in a statute sometimes afford a clew to the intended scope of its provisions, we have examined the last paragraph of section 5. It is in the nature of an exception to the part which we have already quoted, and declares that "this section shall not be construed to prohibit" any person of a described class "from owning, possessing or keeping within his place of residence or place of business any pistol, revolver or other firearm capable of being concealed upon the person," that no permit or license shall be required therefor, and that firearms or knives which are "carried openly" in a certain manner "shall not be deemed to be concealed." By no possible liberality of construction could we hold that any of the acts mentioned in this exception are denounced by the prohibitive parts of the section. See In re Bergen, 61 Cal. App. 226, 214 P. 521. Hence, we conclude that the Legislature, when framing this exception, was merely making "assurance doubly sure," and that the exception cannot be used to extend the scope of the prohibition.

On a view of the whole act we find the conclusion clear and inescapable that it does not prohibit the carrying of a firearm in a vehicle unless it be concealed. While many reasons may be suggested why legislation prohibiting such carrying, regardless of concealment, is desirable, in the interest of the public peace and safety, they must be addressed to the Legislature. We cannot go beyond the legislative intent disclosed by the statute.

[3] On this construction of the act, the complaint states no violation of it. The charging part alleges that defendant carried a pistol in an automobile, but wholly fails to allege that it was concealed. This is an entire failure to state one of the constituent elements of the offense, and it is not cured by section 4½ of article 6 of the Constitution (People v. Ball, 204 Cal. 241, 244, 267 P. 701; People v. Burns, 75 Cal. App. 84, 87, 241 P. 935; People v. Schiaffino, 73 Cal. App. 357, 360, 238 P. 725; People v. Salisbury, 59 Cal. App. 299, 301, 210 P. 642), even if the evidence shows the existence of the omitted fact. People v. Burns, supra; People v. Salisbury, supra. Hence, we need not express an opinion as to the sufficiency of the evidence in the present case.

The judgment and the order denying the motion for a new trial are reversed, and the cause is remanded to the municipal court with directions to dismiss the complaint.

We concur: McLUCAS, P. J.; BISHOP, J.



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